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# THE INDIANA DIGEST

## A DIGEST

OF THE

## DECISIONS OF THE COURTS OF INDIANA

REPORTED IN

VOLS. 1-8, BLACKFORD'S REPORTS

SMITH'S REPORTS

WILSON'S SUPERIOR COURT REPORTS

VOLS. 1-\*172, INDIANA REPORTS

VOLS. 1-\*43, INDIANA APPELLATE COURT REPORTS

VOLS. 1-91, NORTHEASTERN REPORTER; VOL. 92, PP. 1-480

\*And parts of volumes not yet published, but reported in the Northeastern Reporter

COMPILED UNDER THE AMERICAN DIGEST CLASSIFICATION

## VOLUME 5

EXEMPTIONS—INTERCOURSE

ST. PAUL  
WEST PUBLISHING CO.  
1911

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# EXPLANATORY NOTE

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**THIS DIGEST is compiled on the KEY-NUMBER SYSTEM**

**This means that**

**Topics and section numbers of this Digest are identical with those in**

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**Illustration:** A legal proposition found in this Digest under Carriers, section 93, Liability for Misdelivery, will also be found under

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# DIGEST

OF THE

## REPORTED DECISIONS OF ALL THE COURTS OF INDIANA

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### VOLUME 5

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#### EXEMPTIONS.

##### *Scope-Note.*

[INCLUDES exemption from liability to seizure and sale, under legal process for payment of debts, of property of debtors, more particularly of personal property; constitutional and statutory provisions for such exemption; nature, grounds, and extent thereof in general; who are entitled to benefit of such exemptions; what articles, amount, or value, are exempt; against what liabilities exemption is allowed; waiver or loss of right to exemption; and protection and enforcement of the right.

[EXCLUDES exemption from forced sale of real property as homestead (see *Homestead*); exemption of property of decedents from administration, and allowances therefrom to widow or family of decedent (see *Executors and Administrators*); and exemption from taxation (see *Taxation*). For complete list of matters excluded, see cross-references, post.]

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**I. NATURE AND EXTENT.****(A) NATURE, CREATION, DURATION, AND EFFECT IN GENERAL.****§ 1. Nature of right.**

[a] (*Sup.* 1879)

Exemption of property from execution is a mere personal privilege, to which the execution defendant must make some claim before it will be conceded, and to which only a limited class of debtors known as householders are entitled, and under 2 Rev. St. 1876, p. 352, it is only on judgments founded on contracts that an execution defendant is entitled to exemption.—*Terrell v. State*, 66 Ind. 570.

[b] (*App.* 1899)

The right of exemption is a personal privilege, purely statutory, and the judgment debtor is only entitled thereto upon a compliance with the statute.—*Kahn v. Hayes*, 53 N. E. 430, 22 Ind. App. 182.

[c] (*App.* 1906)

The right of exemption is purely statutory.—*Hobbs v. Town of Eaton*, 38 Ind. App. 628, 78 N. E. 333.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 1.

See, also, 18 Cyc. p. 1374.

## § 2. What law governs.

[a] (Sup. 1888)

A new promise to pay a debt discharged by bankruptcy revives the old debt as of the date of the new promise, which will be governed by the exemption law in force at the time it is made.—Willis v. Cushman, 115 Ind. 100, 17 N. E. 168.

[b] (Sup. 1903)

Exemption laws have no extraterritorial force or effect.—Baltimore & O. S. W. R. Co. v. Hollenbeck, 60 N. E. 136, 161 Ind. 452.

### FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. Exemp. § 2.

See, also, 18 Cyc. pp. 1376-1378; note, 1 L. R. A. (N. S.) 195; notes, 2 Am. St. Rep. 240, 19 Am. St. Rep. 145, 122 Am. St. Rep. 451.

## § 3. Constitutional and statutory provisions.

Time of taking effect, see STATUTES, § 250.

[a] (Sup. 1898)

Acts 1897, p. 234, amending Code Civ. Proc. § 243 (Burns' Supp. 1897, § 971; Horner's Rev. St. 1897, § 959), providing that the wages of a householder in excess of \$25 shall not be exempt against garnishment, and that no exemption shall be allowed except as therein provided, applies only to nonresident householders, as it does not repeal by implication Burns' Rev. St. 1894, §§ 715, 730 (Horner's Rev. St. 1897, §§ 703, 718), permitting a resident householder to claim \$600 in wages due him, as exempt.—Pomeroy v. Beach, 49 N. E. 370, 149 Ind. 511.

[b] (Sup. 1898)

The repeal by Burns' Rev. St. 1894, § 7779 (Horner's Rev. St. 1897, § 767), of former statutes allowing the purchaser at foreclosure sale to collect rents and profits during the year for redemption, does not enlarge the exemption law as to the owner, since the right of possession during such year is appraised as part of his property in determining his exemptions.—World Building Loan & Investment Co. v. Marlin, 52 N. E. 198, 151 Ind. 630.

### FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. Exemp. §§ 2, 3.

See, also, 18 Cyc. pp. 1380-1382; note, 45 Am. Dec. 251.

## § 4. Construction of exemption laws in general.

Time of taking effect, see STATUTES, § 250.

[a] (Sup. 1876)

Statutes to carry into effect the provision of the constitution that "the privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property," etc., and proceedings in carrying such statutes out practically should be liberally construed.—Gregory v. Latchem, 53 Ind. 449.

[b] Exemption statutes are to be liberally construed to effect their intent and purpose.—(Sup. 1882) Puett v. Beard, 86 Ind. 172, 44 Am. Rep. 280; (1883) Astley v. Capron, 89 Ind. 167; (1885) Butner v. Bowser, 104 Ind. 255, 3 N. E. 889; (App. 1891) Pickrell v. Jerould, 27 N. E. 433, 1 Ind. App. 10, 50 Am. St. Rep. 192; (1891) Coppage v. Gregg, 27 N. E. 570, 1 Ind. App. 112; (1907) Miller v. Swhier, 40 Ind. App. 465.

[c] (App. 1891)

The court will apply the exemption statute to cases that fall, not only within the strict letter of the law, but all such as come within the equity and spirit of the act.—Coppage v. Gregg, 27 N. E. 570, 1 Ind. App. 112.

[d] The constitutional provision relating to exemptions and statutes founded thereon were designed as a protection to poor and destitute families. They are based upon considerations of public policy and humanity, and are not alone for the benefit of the debtor, but for his family as well. Such statutes should be liberally construed.—(App. 1893) Eisenhauser v. Dill, 33 N. E. 220, 6 Ind. App. 188; (1897) Kolb v. Raisor, 47 N. E. 177, 17 Ind. App. 551.

[e] (App. 1897)

Statutes relating to exemptions must be applied and carried into effect in the liberal spirit, which gives rise to such laws. They are intended, not for the benefit of the debtor himself alone, else their provisions would be extended to persons who are not householders; but the purpose of such enactments is to secure provision for the wants of indigent families.—Green v. Simon, 46 N. E. 603, 17 Ind. App. 360.

[f] (Sup. 1898)

The constitutional provisions relating to exemptions and the statutes passed pursuant to the requirements thereof are to be liberally construed.—Pomeroy v. Beach, 49 N. E. 370, 149 Ind. 511.

### FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. Exemp. § 4.

See, also, 18 Cyc. pp. 1380, 1390.

## § 5. Retroactive operation.

### FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. Exemp. §§ 5-7.

See, also, 18 Cyc. pp. 1378; note, 45 Am. Dec. 252.

## § 6. — Liabilities and liens existing before exemption law.

[a] (Sup. 1879)

The right to an exemption must be determined by the law which was in force when the debt was contracted, and not by that which is in force when the exemption is claimed.—O'Neill v. Beck, 69 Ind. 239.

### FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. Exemp. § 6.

### § 7. — Liabilities existing before acquisition of right of exemption.

[a] (Sup. 1889)

Under the statute allowing to every bona fide resident householder of the state \$600 worth of personal property exempt from execution, an execution debtor who marries after levy, but before sale, thus becoming a bona fide householder, is entitled to the exemption.—*Robinson v. Hughes*, 117 Ind. 298, 20 N. E. 220, 10 Am. St. Rep. 45, 3 L. R. A. 383.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 7.

### (B) PERSONS ENTITLED.

#### § 17. Householdors.

Absence or removal as affecting character as resident householder, see post, § 29.

[a] (Sup. 1862)

An unmarried white man, over 21 years of age, living with his sister, each owning personal property, and each by labor contributing to the household expenses, he directing and controlling, is a householder, and entitled, as such, to hold a horse as exempt from execution under the \$300 act.—*Graham v. Crockett*, 18 Ind. 119.

[b] (Super. 1873)

The declared intention of not again living with his family does not absolve a married man from the legal or moral obligation of providing for them, and, although living separate and apart from them, he is still amenable to the law for their support, and is, therefore, a resident householder within the meaning of the act of exemption, and as such is entitled to claim the privilege of exemption of his property from sale on execution.—*Roney v. Wood*, Wils. 378.

[c] (Super. 1874)

One occupying rooms in a hotel with his family, though paying no board, is a householder within the meaning of the act exempting the furniture of the householder from execution.—*Sullivan v. Canan*, Wils. 532.

[d] (Sup. 1881)

The wife of judgment debtor having died, he employed a family to keep house for him and his adopted daughter, who was dependent on him for support. While she was on a visit to her natural mother, an execution was levied on the debtor's property, which he claimed to be exempt. *Held*, that he was a householder, within the meaning of the statute, and entitled to the exemption.—*Bunnell v. Hay*, 73 Ind. 452.

[e] (Sup. 1881)

A bachelor, who occupies a house and maintains a household of hired servants, is a householder, within the meaning of the law exempting a certain amount of a resident house-

holder's property.—*Kelley v. McFadden*, 80 Ind. 536.

[f] (Sup. 1882)

A man who, being a widower, lives in another man's house, but pays the board of his three children and supports them, is a householder, within the meaning of the exemption laws.—*Lowry v. McAlister*, 86 Ind. 543.

[g] (Sup. 1883)

A "householder," within the meaning of that term as used in the exemption acts, need not necessarily be a housekeeper. It is enough if he is the head of a family to whose support he contributes.—*Astley v. Capron*, 89 Ind. 167.

[h] (Sup. 1886)

A widower who has no one necessarily dependent on him for support, but who lives in a house belonging to a married daughter, in which he lived at the time of his wife's death, and on which he pays the taxes and keeps up improvements, without paying other rent, and who contributes to the living expenses of the daughter, who acts as his housekeeper, her husband, and himself, is a householder, within the meaning of the exemption law.—*Bipus v. Deer*, 106 Ind. 135, 5 N. E. 894.

[i] (Sup. 1896)

Burns' Supplement 1897, § 971, providing that no exemption shall be allowed as against garnishment except as in that section provided, only means that no exemption shall be allowed as against garnishment to the class of householders named in that section, to wit, householders other than resident householders, except as provided in the section.—*Pomeroy v. Beach*, 49 N. E. 370, 149 Ind. 511.

[j] (App. 1901)

Where a judgment debtor residing in G. county had two sons, living apart from him and supporting themselves, and a daughter and two small boys, whom he visited once a year, and who lived with and were supported by their grandmother from the time of their mother's death, five years before, except for small sums and presents which their father sent occasionally, the evidence supported a finding that such debtor was not a resident householder, within a statute exempting a resident householder's property, not exceeding \$600, from liability under a judgment on contract.—*Gregg v. Brickley*, 59 N. E. 1072, 27 Ind. App. 154.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 20.

See, also, 18 Cyc. p. 1404.

### § 19. Married women.

[a] (Sup. 1870)

Under the constitution, which declares that "the privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale, for debt," and

the act in pursuance thereof (2 Gav. & H. St. p. 367), exempting property, not exceeding a certain amount, owned by any resident householder, from sale on execution, etc., where the husband and wife are living together, and the property of the husband does not reach the limit fixed by law, and the wife is the owner of the property levied upon and yet claimed as exempt, and is herself the real debtor in the judgment and execution, her claim to exemption is valid to the extent necessary to make, with her husband's property, the amount protected by statute.—*Crane v. Waggoner*, 33 Ind. 83.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. §§ 21, 22.

See, also, 18 Cyc. p. 1403.

### § 26. Residence.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. §§ 30-33.

See, also, 18 Cyc. pp. 1406, 1407.

### § 27. — Domicile in general.

[a] (Sup. 1856)

Exemption laws of the state protect the property of residents only.—*Hoagland v. Roe*, 8 Ind. 275.

[b] (Sup. 1860)

Every resident householder of the state, without regard to the particular locality of his residence, is entitled to the benefit of the exemption law, as well when in transit with his family and property from one residence to another as when permanently settled.—*Mark v. State ex rel. Bowless*, 15 Ind. 98.

[c] (Sup. 1873)

When an execution defendant ceases to be a resident householder of the state, his right to exempt any of his property from execution ceases.—*Finley v. Sly*, 44 Ind. 206.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 30.

See, also, 18 Cyc. p. 1406.

### § 29. — Absence or removal.

[a] (Sup. 1861)

Execution was levied on the property of an execution debtor, which was within the value protected by statute from levy. He was at the time keeping himself hidden to avoid a criminal prosecution, but was occasionally seen in the county. His family were staying temporarily with his brother, on account of the sickness of his wife, whom, however, he occasionally met at their regular place of residence. *Held*, that these facts did not show that he had changed or lost his residence, or ceased to be a householder, in such sense as to deprive him of the privileges of the statute exempting such property from levy.—*Norman v. Bellman*, 16 Ind. 156.

[b] (Sup. 1895)

One who, with his family and part of his household goods, leaves the state for government service in one of the territories, with the intention of returning when such service shall terminate, is not a "resident householder," within the meaning of Rev. St. 1881, § 703, exempting certain property of "resident householders" from execution sale.—*Ross v. Banta*, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732.

[c] (App. 1897)

Where a guardian who was a resident householder entitled to an exemption under Rev. St. 1894, § 715 (*Horner's Rev. St. 1897*, § 703), embezzled funds of the ward, and judgment was obtained against him therefor, but no prosecution was instituted, and he absconded and his whereabouts were unknown, he did not lose his domicile, and his wife, therefore, might claim an exemption in his behalf, under Rev. St. 1894, § 727 (*Horner's Rev. St. 1897*, § 715).—*Green v. Simon*, 46 N. E. 693, 17 Ind. App. 360.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 33.

See, also, 18 Cyc. p. 1407.

### § 30. Surviving husband, wife, children, or next of kin.

[a] (Sup. 1892)

Where in some parts of the record of probate proceedings, setting apart to the widow property claimed as exempt from decedent's creditor, a widow is named "Tobetha," and in others "Delilah Parker," but in all cases she is mentioned as the widow of James Parker, it sufficiently appears that the name "Tobetha" was a clerical mistake, and that the person named was the widow of James Parker.—*Threlkeld v. Allen*, 32 N. E. 576, 133 Ind. 429.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 34.

See, also, 18 Cyc. p. 1400.

## (C) PROPERTY AND RIGHTS EXEMPT.

### § 31. General exemptions of personal property.

[a] (Sup. 1884)

Though a debtor may allow property exempt from execution to be levied on and sold, the property which may be taken on execution not by permission of the debtor, but in spite of him and by force of law, is alone subject to execution.—*Simpkins v. Smith*, 94 Ind. 470.

### § 32. Property within general exemption.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. §§ 35-38, 74.

See, also, 18 Cyc. pp. 1410, 1445.

**§ 33. — Nature in general.**

[a] (App. 1891)

There is no rule of law which prescribes to a debtor what kind of property he shall or shall not claim as exempt.—*Coppage v. Gregg*, 27 N. E. 570, 1 Ind. App. 112.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 35.

**§ 36. Amount of exemption and value of property.**

[a] (Sup. 1861)

Where a debtor has not \$300 worth of property, and all he has is personalty, it does not become subject to the lien of the execution.—*Godman v. Smith*, 17 Ind. 152.

[b] (Sup. 1870)

Where husband and wife are living together, and the property of the husband is not of the value of \$300, and the wife is the owner of the property levied on under an execution, and is the real debtor in the judgment and execution, she may, under Act 1852 (2 Gav. & H. St. p. 367), providing for an exemption of property to the value of \$300 to a resident householder, claim her individual property to the extent necessary to make, with the husband's, the amount of \$300.—*Crane v. Waggoner*, 33 Ind. 83.

[c] (Sup. 1897)

The mere fact that a debtor has less than \$600 worth of property does not withdraw it from the lien of a judgment or execution in the hands of an officer.—*Moss v. Jenkins*, 146 Ind. 589, 45 N. E. 789.

[d] (Sup. 1897)

Under Horner's Rev. St. 1897, § 734, providing that, in ascertaining the value of exempt property, the sheriff shall "appraise the property according to its cash value at the time, deducting liens and incumbrances," the value of the land for the purpose of exemptions is its value over and above the incumbrances.—*Citizens' State Bank of Noblesville v. Harris*, 48 N. E. 856, 149 Ind. 208.

[e] (Sup. 1898)

Code Civ. Proc. § 243, as amended by Acts 1897, p. 234 (Horner's Rev. St. 1897, § 959), limiting the exemption of the wages of householders against garnishment to \$25, and providing that no exemption as against garnishment shall be allowed save as therein provided, does not apply to resident householders, who are entitled under Burns' Rev. St. 1894, § 715 (Horner's Rev. St. 1897, § 703), to an exemption of \$600.—*Hart v. O'Rourke*, 51 N. E. 330, 151 Ind. 205.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 39.

See, also, 18 Cyc. p. 1386.

**§ 50. Life insurance.**

[a] (Sup. 1886)

Rev. St. 1881, § 3848, providing for the exemption from the claims of creditors of benefits in certain mutual benefit associations, applies only to corporations organized under the laws of Indiana.—*Presbyterian Mut. Assur. Fund v. Allen*, 106 Ind. 593, 7 N. E. 317.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 75.

See, also, 18 Cyc. p. 1436.

**§ 53. Proceeds of exempt property.**

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. §§ 76-80.

See, also, 18 Cyc. pp. 1443, 1444; note, 19 L. R. A. 33; note, 66 Am. St. Rep. 381.

**§ 58. — Property purchased with exempt money.**

[a] (Sup. 1882)

Property purchased by a pensioner with pension money is not exempt.—*Cavanaugh v. Smith*, 84 Ind. 380.

[b] (Sup. 1886)

Pension money from the United States stands upon the same footing, after it is received by the pensioner, as other money; and property purchased therewith is as liable to execution as any other property.—*Faurote v. Carr*, 9 N. E. 350, 108 Ind. 123.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 80.

**§ 59. Ownership or possession of property in general.**

[a] (Sup. 1882)

One who has in good faith sold property claimed as exempt, and subsequently rescinded the sale and regained possession, may still claim such property as exempt.—*Boesker v. Pickett*, 81 Ind. 554.

[b] (Sup. 1899)

When a conveyance is set aside as fraudulent at the suit of vendor's creditors, the title does not revert in the vendor so as to give him a right to exemptions therein, under Burns' Rev. St. § 715 (Rev. St. 1881, § 703; Horner's Rev. St. § 703), providing that property not exceeding \$600, owned by resident householders, "shall not be liable to sale on execution or any other final process from a court for any debt growing out of or founded upon a contract."—*McNally v. White*, 54 N. E. 794, 56 N. E. 214, 154 Ind. 163.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 81.

See, also, 18 Cyc. pp. 1382-1386; note, 32 Am. Dec. 242.

**§ 61. Partnership property.**

[a] (Sup. 1880)

One partner cannot claim as exempt partnership property mortgaged by the partnership to secure a partnership debt.—*Love v. Blair*, 72 Ind. 281.

[b] Partnership property cannot be claimed and held by a member of the firm as exempt from execution.—(Sup. 1881) *Smith v. Harris*, 76 Ind. 104; (1884) *State ex rel. Talbatt v. Emmons*, 99 Ind. 452.

[c] (Sup. 1885)

Partners who have made an assignment for the benefit of creditors cannot claim that any part of the partnership property be set apart to them as exempt from execution.—*Ex parte Hopkins*, 104 Ind. 157, 2 N. E. 587.

[d] (Sup. 1889)

Where the joint interest in the partnership property is severed by the sale of one of the partners to the other of his interest in the remaining property, it is no longer firm property, and the debtor has the right to an exemption.—*Goudy v. Werbe*, 19 N. E. 764, 117 Ind. 154, 3 L. R. A. 114.

Where, before creditors of an insolvent firm acquire a lien on its property, the firm is dissolved in good faith, one of the members purchasing all the firm property, and assuming all the liabilities of the partnership, such member may claim his exemptions out of the property, though he had no such right before the dissolution, and the firm creditors cannot object to the conveyance as fraudulent.—*Id.*

[e] (App. 1891)

Execution on a judgment against a partnership was issued and placed in the hands of an officer prior to a dissolution of the partnership and division of the property thereof between the two partners. After such dissolution and division the execution was levied on the share of the property allotted to one of the partners. *Held*, that such partner was not entitled to claim the same as exempt from levy under the execution in question.—*State ex rel. Miller v. Day*, 3 Ind. App. 155, 29 N. E. 436.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Exemp. §§ 83-87; 28 CENT. DIG. Insolv. § 223.

See, also, 18 Cyc. pp. 1383-1385; note, 27 Am. Rep. 247; note, 1 Am. St. Rep. 593.

**(D) LIABILITIES ENFORCEABLE AGAINST EXEMPT PROPERTY.****§ 62. Exceptions from exemptions in general.**

[a] (Sup. 1858)

Acts 1843, p. 52, § 2, provides that whenever the state bank shall discount any bill prepared to be discounted in said bank, and judgment shall be recovered thereon, no appraisement or valuation shall be required or allowed

before the sale of the property, which may, on being duly advertised, be sold to the highest bidder. *Held* that, as the intention of the legislature was to sell without appraisement only upon such paper as was prepared for the purpose and intended by the parties to be discounted in the bank, where a bill was not drawn to be discounted at the state bank or its branches, but generally to raise money wherever it could be done, but was discounted at the state bank, the case was not within the provision of the statute.—*State Bank of Indiana v. Holland*, 11 Ind. 150.

[b] (Sup. 1903)

Under *Burns' Rev. St.* 1901, § 715 (*Rev. St.* 1881, § 703; *Horner's Rev. St.* 1901, § 703), a resident householder can claim an exemption of his property from sale on execution or other final process from a court only when such execution or other process is issued on a judgment for a debt growing out of or founded on contract, express or implied. *Burns' Rev. St.* 1901, § 6676 (*Rev. St.* 1881, § 4951; *Horner's Rev. St.* 1901, § 4951), provides that any person betting on any game and losing may recover the amount lost by action at any time within six months thereafter. Section 6678 (4953) provides that if the losing party shall not, within the time fixed in section 6676 (4951), sue for the money lost, it shall be the duty of the prosecuting attorney, on information filed with him, to sue for and recover the same in the name of the state, with costs of suit, from the winner, for the benefit of the wife or minor children, if either be living, of the loser, and, in case there shall be no such wife or minor children, then for the benefit of the common schools. *Held*, that the state's right to recover depends on the statute alone, and that one winning at gambling is not entitled to the benefit of the exemption law as against an execution issued on a judgment against him in its favor.—*State ex rel. Kelly v. Morgan*, 67 N. E. 186, 160 Ind. 474.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Exemp. § 88.

**§ 63. Statutory provisions.**

[a] (Sup. 1864)

Under 2 Gav. & H. St. p. 220, a judgment rendered in a suit on a guardian's bond is collectible without the benefit of the valuation or appraisement laws; and said statute applies to bonds executed before, as well as after, its passage.—*Potter v. State ex rel. Thompson*, 23 Ind. 607.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Exemp. § 89.

**§ 64. Exception of pre-existing liabilities and liens.**

[a] (Sup. 1886)

A devisee of land upon which a judgment in favor of a creditor of the devisor has been

declared to be a lien cannot claim it as exempt from execution.—*Graves v. Graves*, 106 Ind. 118, 5 N. E. 879.

[b] (App. 1908)

A mortgagor after the sale of property under foreclosure proceedings is not entitled to claim his exemption as a resident householder out of the remainder of the proceeds derived from the sale before the entire decree has been satisfied.—*Broeker v. Morris*, 42 Ind. App. 417, 85 N. E. 982.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 90.

See, also, 18 Cyc. p. 1395.

§ 72. Liabilities incurred in fiduciary capacity.

Retroactive effect of statutory provisions, see ante, § 63.

[a] In a suit on the bond of a guardian, the court may add 10 per cent. damages to the amount found against the latter, and order it to be collected without relief from valuation laws.—(Sup. 1864) *Potter v. State ex rel. Thompson*, 23 Ind. 550, 607; (1878) *Bescher v. State ex rel. Hammann*, 63 Ind. 302.

[b] (App. 1897)

Rev. St. 1894, § 2691 (Horner's Rev. St. 1897, § 2527), declares that a suit on a guardian's bond is governed by the law regulating suits on bonds of executors and administrators (sections 2614, 2615, Rev. St. 1894; sections 2459, 2460, Horner's Rev. St. 1897), which provides that the measure of damages in such suits is the value of the property converted by the representative, with interest, such exemplary damages as the jury may be willing to give, and 10 per cent. of the whole amount assessed, but contains nothing as to whether the representative may claim exemptions. *Held*, that a suit on a guardian's bond, which was set out with the complaint for money concealed by the guardian and converted to his own use, was in contract, within Rev. St. 1894, § 715 (Horner's Rev. St. 1897, § 703), providing for an exemption as against debts which grew out of or are founded on a contract, and hence the guardian was entitled to an exemption as against the judgment in said suit.—*Green v. Simon*, 17 Ind. App. 360, 46 N. E. 693.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 96.

§ 74. Liabilities for torts.

[a] (Sup. 1857)

Under Const. art. 1, § 22, providing that a reasonable amount of property shall be exempt from seizure or sale for the payment of any debt or liability hereafter contracted, and Act Feb. 17, 1852 (2 Rev. St. p. 337), providing that property not exceeding \$300 in value, owned by a resident householder, is not liable to sale on execution or any other process from a court on any debt growing out of or founded

on a contract, express or implied, property is exempt to a debtor only in actions on contract.—*State ex rel. Haven v. Melogue*, 9 Ind. 196.

[b] (Sup. 1879)

A judgment for alimony is not a debt founded on contract, and therefore a debtor cannot claim exemption of any property from execution on such a judgment.—*Menzie v. Anderson*, 65 Ind. 239.

[c] (Sup. 1881)

Under the statute providing that an amount of property, not exceeding \$300 in value, owned by any resident householder, shall not be liable to any sale on execution for any debt growing out of or founded on a contract, express or implied, a debtor cannot claim exemption, where judgment recovered was for a penalty for running by a toll gate to avoid paying toll, since such judgment is not founded on a contract, within the statute.—*Keller v. McMahan*, 77 Ind. 62.

[d] (Sup. 1881)

An action to recover real property and a compensation for its use is an action sounding in tort; and therefore no property is exempt from an execution issued on a judgment in such case, under 2 Rev. St. 1876, p. 353, and Acts 1877, p. 127, relating to exemptions, and applying only to debts growing out of or founded on contract.—*Dorrell v. Hannah*, 80 Ind. 497.

[e] (Sup. 1882)

Where the form of an action is tort, and the damages found are therefore such as result from the tort, the defendant cannot show, for the purpose of showing a right to an exemption, so as to defeat plaintiff's right to sell under the execution, that the judgment was in fact taken upon a claim lying in contract, instead of in tort.—*Smith v. Wood*, 83 Ind. 522.

The damages recovered in an action of ejectment wherein plaintiff alleges that defendant held possession without right arise from tort, and not from contract; and hence no exemption can be allowed against execution upon a judgment for such damages.—*Id.*

[f] (Sup. 1883)

Where a widow, by concealing an antenuptial contract whereby she relinquished all interest in her husband's estate, obtained from his administrator personal property in her right as widow, and the administrator obtained judgment therefor, the judgment was for tort; and no property was, under Rev. St. 1881, § 703, exempt from the execution issued upon it.—*Nowling v. McIntosh*, 89 Ind. 593.

[g] (Sup. 1890)

A complaint alleged that, plaintiff's shoulder having been dislocated, defendant, being a practicing physician, "undertook faithfully, skillfully, and diligently to treat and set, and endeavor to cure," the shoulder, but conducted himself so negligently that it was permitted to remain out of place, until it became impossible

properly to set and cure it. *Held*, that the complaint is for the tort, and defendant is not entitled to any exemption on an execution issued on a judgment rendered therein.—*De Hart v. Haun*, 126 Ind. 378, 26 N. E. 61.

[h] (Sup. 1891)

In an action to set aside a sheriff's sale of land, it appeared that plaintiff recovered a judgment upon a complaint uniting two causes of action in tort with one on contract. *Held*, that defendant is entitled to treat the judgment as one rendered upon contract, and to claim his exemption.—*Ries v. McClatchey*, 128 Ind. 125, 27 N. E. 349.

[i] (Sup. 1893)

A sale of land under execution will not be enjoined on the ground that it is within the exemption from liability for debts founded on contract, (Rev. St. 1888, § 703,) unless it is alleged by plaintiff or found by the court that the judgment on which the execution issued was founded on contract.—*Goldthait v. Walker*, 134 Ind. 527, 34 N. E. 378.

[j] (App. 1897)

Where property claimed as exempt was seized on execution, and claimant replevied same, evidence was not admissible that the suit in which the execution issued was in tort, where the complaint therein was unequivocal as to the character of the cause of action, since in such a case the nature of the cause must be determined by the pleadings.—*Green v. Simon*, 46 N. E. 693, 17 Ind. App. 360.

[k] (App. 1897)

An action by a landlord to recover possession of premises from a tenant holding over after the termination of his lease, and for damages for the detention, brought under Burns' Rev. St. 1894, § 1706 (Rev. St. 1881, § 5225), sounds in tort, and there are no exemptions as against the judgment for damages, though the lease, which is merely evidence in the action, is improperly set out in the complaint.—*Thomas v. Walmer*, 46 N. E. 695, 18 Ind. App. 112.

FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. Exemp. § 91; 22 CENT. DIG. Ex. & Ad. § 698.

See, also, 18 Cyc. p. 1387.

§ 75. Liabilities as surety.

[a] (Sup. 1882)

A resident householder who becomes replevin bail on a judgment obtained against a defendant in a prosecution for bastardy is entitled to the benefit of the exemption law. The undertaking is a contract, and possesses all the essential requisites thereof.—*Maloney v. Newton*, 85 Ind. 565, 44 Am. Rep. 46.

[b] (Sup. 1883)

The sureties on a guardian's bond are not entitled to the benefit of the appraisement laws.—*Williams v. State ex rel. Roberts*, 89 Ind. 570.

FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. Exemp. § 102.

See, also, 18 Cyc. p. 1389.

§ 76. Judgments.

[a] (Sup. 1881)

Where a judgment for a gross amount includes a debt as against which the debtor's property is exempt, and also an obligation to which the exemption laws do not extend, an officer holding an execution on the judgment may sell property of the judgment debtor to an amount sufficient to satisfy that part of the judgment as to which the property is not exempt.—*Keller v. McMahan*, 77 Ind. 62.

[b] The costs recovered in an action of tort are part of the judgment for damages, and are not subject to exemption rights.—(Sup. 1883) *Church v. Hay*, 93 Ind. 323; (1886) *Russell v. Cleary*, 105 Ind. 502, 5 N. E. 414.

[c] A judgment for the costs of the opposite party is not a debt growing out of a contract, express or implied, and as against such costs the Indiana statute does not allow exemptions.—(Sup. 1884) *State ex rel. Wingler v. McIntosh*, 100 Ind. 439; (App. 1891) *Donaldson v. Banta*, 5 Ind. App. 71, 29 N. E. 362; (Sup. 1893) *Ross v. Same*, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732.

[d] (Sup. 1889)

A judgment creditor does not obtain any enforceable claim upon property which the law declares shall be exempt from seizure.—*Ray v. Yarnell*, 20 N. E. 705, 118 Ind. 112.

[e] (Sup. 1895)

No exemption is allowable on an execution for costs.—*Ross v. Banta*, 34 N. E. 865, 39 N. E. 732, 140 Ind. 120.

[f] (App. 1906)

Burns' Ann. St. 1901, § 6825, providing that no benefit of exemption shall be allowed on a commutation money judgment, controls such a debtor's right of exemption, as against section 715, declaring that property of the value of \$600 shall be exempt, and authorizes a judgment creditor in a commutation judgment to have any property in the possession of a third person belonging to the debtor applied to the payment of the judgment.—*Hobbs v. Town of Eaton*, 78 N. E. 333, 38 Ind. App. 628.

FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. Exemp. §§ 100, 101.

II. TRANSFER OR INCUMBRANCE OF EXEMPT PROPERTY.

Validity as to creditors or subsequent purchasers, see FRAUDULENT CONVEYANCES, § 51.

§ 79. Power to transfer or incumber in general.

[a] (Sup. 1884)

Under 2 Rev. St. 1876, p. 353, providing that "an amount of property not exceeding in

value \$300, owned by any resident householder, shall not be liable to sale on execution," the exemption applied to property owned by the judgment debtor at the time the judgment lien attached, whether afterwards conveyed or not.—*Berry v. Nichols*, 96 Ind. 287.

[b] (Sup. 1897)

Where a bona fide resident householder is possessed of less than \$600 worth of property over and above incumbrances, he may, before sale on a judgment founded on contract, convey his equity in the land freed from the lien of the judgment or execution.—*Citizens' State Bank of Noblesville v. Harris*, 48 N. E. 856, 149 Ind. 208.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 105.

See, also, 18 Cyc. p. 1446.

§ 81. Sale or exchange.

[a] (Sup. 1861)

After \$300 worth of property has been actually set off to an execution debtor, he may sell it discharged of the lien of the execution.—*Godman v. Smith*, 17 Ind. 152.

[b] (Sup. 1887)

Property exempt from execution is unaffected by execution liens, and may be sold or exchanged, even while writs of execution are in the hands of the proper officer.—*Barnard v. Brown*, 112 Ind. 53, 13 N. E. 401.

[c] (Sup. 1888)

Under Rev. St. 1881, § 608, providing that a judgment is a lien on real estate and chattels real, subject to execution, where the property of a resident householder at the time of rendition of a judgment is less than allowed by law as exempt from execution, and so continues, her grantee takes it exempt from any lien of the judgment or execution.—*Dumbould v. Rowley*, 113 Ind. 353, 15 N. E. 463.

[d] (Sup. 1889)

Where land has been duly set apart to a judgment debtor as exempt, he may thereafter convey it as he chooses, free from any lien of the judgment or right of the judgment creditor.—*Ray v. Yarnell*, 118 Ind. 112, 20 N. E. 705.

[e] (Sup. 1907)

After property has been set off by the sheriff under the exemption law as exempt from sale on execution, it may be sold by the judgment debtor free from the lien of the execution and judgment.—*Moss v. Jenkins*, 45 N. E. 789, 146 Ind. 589.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 107.

See, also, 18 Cyc. p. 1446.

§ 84. Mortgage.

Pending execution, see EXECUTION, § 115.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 109.

See, also, 18 Cyc. p. 1447.

§ 88. Rights of purchasers as to exemption.

[a] (Sup. 1858)

Where a debtor's whole property is less than \$300, the execution creditor and officer having notice of the debtor's intention to claim the statute exemption, and having delayed the levy four months, the exemption will be enforced, without a formal claim, in favor of an intermediate vendee.—*Vandibur v. Love*, 10 Ind. 54.

[b] (Sup. 1885)

Where a mortgagor, at the time of executing the mortgage, had no property subject to execution, the mortgagee could hold the property against an execution issued against the mortgagor.—*Durbin v. Haines*, 99 Ind. 463.

[c] (Sup. 1886)

Property exempt from execution may be sold or given away, and still remain exempt, in the hands of the vendee or donee, from seizure and sale for the debts of the former owner.—*Burdge v. Bolin*, 106 Ind. 175, 6 N. E. 140, 55 Am. Rep. 724.

[d] (Sup. 1889)

Where land has been set apart to a judgment debtor as exempt, and is afterwards conveyed by him, his grantee is protected by the deed, and is not bound to oppose an issue of execution against the land, or to procure additional schedules to be filed by his grantor.—*Ray v. Yarnell*, 118 Ind. 112, 20 N. E. 705.

[e] (App. 1891)

A note which is exempt in the hands of a husband, as against a judgment recovered against him, will not be rendered subject to such judgment by an assignment to his wife.—*Pickrell v. Jerauld*, 1 Ind. App. 10, 27 N. E. 433, 50 Am. St. Rep. 192.

[f] (Sup. 1897)

The purchaser of real estate which the vendor could have claimed as exempt from sale on execution may maintain an action to quiet his title, if brought before the execution sale, but he cannot bring such action after the execution sale.—*Moss v. Jenkins*, 146 Ind. 589, 45 N. E. 789.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 111.

See, also, 18 Cyc. p. 1448.

III. WAIVER OR FORFEITURE.

§ 89. Power to waive.

[a] (Sup. 1857)

The exemption of property from execution is a personal right which the debtor may waive or claim at his election.—*State ex rel. Haven v. Melogue*, 9 Ind. 196.

[b] (Sup. 1882)

Where the right of exemption exists, it cannot be waived by contract prior to the is-

suing of an execution on the judgment.—*Maloney v. Newton*, 85 Ind. 565; 44 Am. Rep. 46.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 112.

See, also, 18 Cyc. p. 1449.

§ 93. Acts or omissions constituting waiver in general.

[a] (Sup. 1860)

A written waiver of "appraisement laws" is also a waiver of the valuation laws.—*Vesey v. Reynolds*, 14 Ind. 444.

[b] (Sup. 1860)

The giving of a delivery bond by an execution debtor does not prevent him from afterwards claiming the property seized as exempt.—*Eltzroth v. Webster*, 15 Ind. 21, 77 Am. Dec. 78.

[c] (Sup. 1889)

Rev. St. § 2670, provides that, where a voluntary assignment for the benefit of creditors is made, it shall be the duty of the appraisers to set off to the assignor such articles of personal property, or so much of the real estate mentioned in the inventory, as he may select, so that the same shall not exceed a certain amount, and to specify what articles of personal property and the value thereof, or what part of the real estate and its value, they have set apart to the assignor. *Held*, that the failure of the assignor to claim his exemptions at the time and manner prescribed by the statute constitutes a waiver thereof.—*Graves v. Hinkle*, 120 Ind. 157, 21 N. E. 328.

[cc] (App. 1891)

Where a note is exempt in the hands of a husband as against a judgment recovered against him, and is assigned to his wife, the fact that the exemption is not claimed until after the suit is brought on the note and the judgment is pleaded as a set-off does not divest the right to an exemption.—*Pickrell v. Jerauld*, 1 Ind. App. 10, 27 N. E. 433, 50 Am. St. Rep. 192.

[d] (App. 1891)

Rev. St. § 2670, as amended by Act March 29, 1879, provides that, if an assignor for the benefit of creditors be a resident householder, the appraisers shall set off to him such property mentioned in the inventory as he may select, not exceeding in value \$600. *Held*, that where an assignor, a few days before the appraisement, asked his assignee to set off certain property, which the latter promised to do, the assignor's failure, by reason of sickness, to be present at the appraisement, will not constitute a waiver of his right to such set-off.—*Doherty v. Ramsey*, 1 Ind. App. 530, 27 N. E. 879, 50 Am. St. Rep. 223.

[e] (App. 1895)

The rule that, upon an assignment for the benefit of creditors, the right of exemption is waived unless, at the time of the appraisement,

the assignor selects such property as he desires to have set off to him under Rev. St. 1894, § 2907 (Rev. St. 1881, § 2670), does not apply where the assignor foregoes the right of selecting specific articles out of a retail stock of merchandise, in pursuance of an agreement with the assignee that, in lieu of such property, he shall have the proceeds thereof to that amount in money when the stock is sold. *Graves v. Hinkle* (1889) 21 N. E. 328, 120 Ind. 157, distinguished.—*Faulkner v. Jones*, 13 Ind. App. 381, 41 N. E. 830.

[f] (App. 1895)

Failure to assert a right of exemption at the time and in the manner prescribed by the statute which confers such right is a waiver of the privilege.—*Wagner v. Barden*, 13 Ind. App. 571, 41 N. E. 1067.

[g] (Sup. 1897)

Under Rev. St. 1894, § 715, which provides that property not exceeding in value \$600, owned by any resident householder, shall be exempt; and section 725, which provides that, to receive the benefit of the exemption, a debtor must deliver to the officer holding the execution a schedule of all his property, as now provided by law in case an exemption on execution is claimed,—the exemption is a personal privilege, which is waived by a failure to claim it before a sale, and the officer cannot set apart property as exempt unless he has received such an inventory.—*Moss v. Jenkins*, 45 N. E. 789, 146 Ind. 589.

[h] (App. 1907)

Where an execution defendant, who is a householder, fails to claim his statutory exemption until after the property is sold on execution, he waives his right to such exemption.—*Miller v. Swbier*, 40 Ind. App. 465, 79 N. E. 1092.

[i] (App. 1908)

A householder must claim his statutory exemption before a sale is made and the fact that he did not know whether the property would sell for more than enough to satisfy the liens thereon is not a sufficient excuse.—*Broeker v. Morris*, 42 Ind. App. 417, 85 N. E. 982.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. §§ 116, 117.

See, also, 18 Cyc. pp. 1452-1454.

§ 94. Mortgage or pledge as waiver.

[a] (Sup. 1858)

Semble, that a man cannot mortgage land to one of his creditors who is willing to give him time—his wife not joining in the mortgage—and let his other creditors sell his other property to pay their claims, and then select the mortgaged property as exempt from execution, as against the mortgagee, when he shall seek to foreclose, as well as against the other creditors; nor can the right to select a portion out of many articles of property render any

article actually exempt till the selection has been made.—*Slaughter v. Detiney*, 10 Ind. 103.

[b] (App. 1895)

Where plaintiff in an action to recover the possession of certain property, being a resident householder and entitled to the benefit of the exemption laws after the levy and before sale, presented to the sheriff a schedule of all his property of every description whatever, and demanded that the property be set off to him as exempt from execution, and it was appraised as required by law, but the sheriff refused to set it off to him, the plaintiff was entitled to have the property set off to him as exempt from execution, and the fact that it was mortgaged did not deprive him of the right, and the defendants were in the wrong in retaining the possession of the property, and could not shield themselves behind a condition broken of the mortgage, for that was a privilege personal to the mortgagee alone.—*Adams v. Hessian*, 39 N. E. 530, 11 Ind. App. 598.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 118.

See, also, 18 Cyc. p. 1452.

§ 95. Consent to levy and sale.

[a] (Sup. 1860)

The giving up of property to an officer on execution is not a waiver of the right of defendant afterwards to claim it as exempt.—*Eltzroth v. Webster*, 15 Ind. 21, 77 Am. Dec. 78.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 119.

See, also, 18 Cyc. p. 1452.

§ 97. Operation and effect of waiver.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. §§ 121-124.

See, also, 18 Cyc. pp. 1459, 1460.

§ 98. — In general.

[a] (Sup. 1861)

Where a note contains a waiver of appraisalment and benefit of exemption, it is not necessary, when judgment is obtained thereon, to render a separate judgment for costs, since the waiver of appraisalment relates to both judgment on the debt and for the costs.—*Martindale v. Tibbetts*, 16 Ind. 200.

[b] (Sup. 1878)

A bond was given conditioned to hold the maker of a note harmless thereon, and provided that, on breach of its condition, the obligee should recover judgment without relief from valuation or appraisalment laws. *Held*, that the payee of the note, in an action to enforce the bond, was entitled to a judgment without relief.—*South Side Planing Mill Ass'n v. Cutler & Savidge Lumber Co.*, 64 Ind. 560.

[c] (Sup. 1893)

It is uper to render a personal judgment against a mortgagor for the recovery of the

debt due without relief from valuation or appraisalment laws; where no such stipulation is contained either in the mortgage or in the notes which it is given to secure.—*Duckwall v. Kisner*, 136 Ind. 99, 35 N. E. 607.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. §§ 121, 124.

See, also, 18 Cyc. p. 1459.

§ 101. Forfeiture.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. §§ 126-128.

See, also, 18 Cyc. pp. 1458, 1459.

§ 104. — Fraudulent conveyance or concealment.

[a] (Sup. 1848)

If, between the rendition of judgment and the issuing of execution, defendant fraudulently conveys all his property to a third person, and it is afterwards levied on to satisfy the execution, he is not entitled to hold \$125 worth of the property exempt from execution.—*Mandlove v. Burton*, 1 Ind. 39, Smith, 3.

[b] (App. 1891)

An attempt by the assignor to commit fraud by assigning \$10,200 to another for his own use, a few days prior to his assignment, will not effect his right to exemption, particularly when, subsequent to the assignment, he gave his assignee an order on such person for the money.—*Doherty v. Ramsey*, 1 Ind. App. 530, 27 N. E. 879, 50 Am. St. Rep. 223.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 128.

See, also, 18 Cyc. p. 1458.

IV. PROTECTION AND ENFORCEMENT OF RIGHTS.

§ 107. Process or other proceedings as against which exemption may be allowed.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. §§ 129-134.

See, also, 18 Cyc. pp. 1462-1465.

§ 108. — In general.

[a] (Sup. 1863)

Where a judgment was obtained against an insolvent owning an equitable interest in land, and an action was brought to subject his interest to the judgment, and the court found that the insolvent owned personal property to the value of about \$100, and was entitled to about \$200 out of the value of his equitable interest to make up the \$300 to which he was entitled as an exemption, and that he owed \$100 which was a lien on the land, and the land was sold and purchased by the judgment plaintiffs, and they tendered the amount of the lien, but did not tender the \$200 exemption, an order to convey to the purchaser

the equitable estate in fee was unauthorized.—*Smith v. Vanscoten*, 20 Ind. 221.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 129.

### § 109. — Levy of attachment or execution.

Exemption as defense to attachment, see ATTACHMENT, § 227.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. §§ 130, 131.

See, also, 18 Cyc. p. 1462.

### § 112. — Foreclosure proceedings.

[a] (Sup. 1880)

The statute exempting property from seizure and sale for debt does not apply to cases where the debtor voluntarily conveys, by way of mortgage, his property to the creditor.—*Love v. Blair*, 72 Ind. 281.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 133.

See, also, 18 Cyc. p. 1464.

### § 113. — Set-off and counterclaim.

[a] (Sup. 1882)

A. obtained against B. a judgment for an amount less than the statute exemption. A. had no property whatever from which he could claim his exemption, except this judgment. *Held*, that B. could not set off against it a judgment against A. which B. had obtained by assignment.—*Puett v. Beard*, 86 Ind. 172, 44 Am. Rep. 290.

[b] (Sup. 1885)

In an action to have defendant's judgment set off against one held by the plaintiff, and for judgment for the balance, the defendant has a right to claim his judgment as part of his exemption from execution, all of his property, including such judgment, being less in value than \$600.—*Butner v. Bowser*, 104 Ind. 255, 3 N. E. 889.

[c] (Sup. 1888)

Under Rev. St. 1881, § 5124, a party will not be permitted to set off a judgment held by him against one held by a husband and wife, where the husband and wife claim their interest in the judgment held by them as exempt.—*Junker v. Hustes*, 113 Ind. 524, 16 N. E. 197.

[d] Under Rev. St. 1881, § 703, providing that "property, not exceeding in value \$600, owned by any resident householder, shall not be liable to sale on execution or any other final process," a plaintiff, whose entire property does not exceed \$600, may claim as exempt the demand in suit, and thus defeat a judgment pleaded against him in set-off.—(Sup. 1888) *Carpenter v. Cool*, 115 Ind. 134, 17 N. E. 266; (App. 1891) *Coppage v. Gregg*, 1 Ind. App. 112, 27 N. E. 570.

[e] (Sup. 1890)

In an action on a promissory note, defendant pleaded, by way of set-off, plaintiff's indebtedness to him, exceeding the note sued on; to which plaintiff replied that he was a resident householder of the state, and had less property than the law exempted from execution, and claimed the note in suit as exempt. *Held*, on demurrer, that the reply was good. A debtor may rightfully claim a promissory note as exempt from execution, although the maker holds notes or judgments against him.—*Smith v. Sills*, 126 Ind. 205, 25 N. E. 881.

[f] (App. 1891)

Where, in an action on a note by the assignee thereof, the assignor was made a party plaintiff, and the proceeds of the note, were claimed as exempt against a judgment pleaded in set-off by defendant, and which had been obtained before the assignment, the fact that no execution had been issued on the judgment did not divest the right of exemption.—*Pickrell v. Jerauld*, 27 N. E. 433, 1 Ind. App. 10, 50 Am. St. Rep. 192.

[g] (App. 1891)

A debtor may have his right of exemption against a set-off, although the creditor be dead; Rev. St. 1881, § 352, having no application to the case of an insolvent debtor who seeks to have his property exempted from judicial process.—*Coppage v. Gregg*, 27 N. E. 570, 1 Ind. App. 112.

Under Rev. St. 1881, § 703, providing that property not exceeding in value \$300 owned by any resident householder shall be exempt from sale on execution or any other final process, a plaintiff whose entire property does not exceed \$300 may claim as exempt the demand in suit, and thus defeat a judgment pleaded as a set-off against him.—*Id.*

[h] (App. 1893)

A debtor, plaintiff in an action on a note, and whose property does not exceed \$600, may claim such note as exempt against a note pleaded as a set-off to his note, and may do this by way of reply to the answer of set-off.—*Coffing v. Dungan*, 6 Ind. App. 386, 33 N. E. 815; *Id.*, 6 Ind. App. 388, 33 N. E. 816.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 134.

See, also, 18 Cyc. p. 1463.

### § 114. Duties of officer making levy.

[a] (App. 1901)

Where defendant's land was advertised for sale under an execution against him, he cannot contend that he was not afforded an opportunity of claiming his exemption.—*Lahr v. Ulmer*, 60 N. E. 1009, 27 Ind. App. 107.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 136.

See, also, 18 Cyc. pp. 1465-1467.

**§ 115. Necessity for claim.**

Failure to make claim as waiver of right to exemptions, see ante, § 93.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Exemp. §§ 137, 138.

See, also, 18 Cyc. p. 1467.

**§ 116. — In general.**

[a] (Sup. 1864)

2 Gav. & H. St. p. 370 (2 Rev. St. p. 337), providing that no mortgage or sale of the real estate exempt under the act shall be valid, when executed by a married man, unless the deed be acknowledged by the wife in due form of law, such exemption is not made absolute; but, where a mortgage is placed on exempt property, it must be claimed as exempt in order to protect such right.—Sullivan v. Winslow, 22 Ind. 153.

[b] (Sup. 1873)

A debtor, desiring to have the benefit of the exemption, must claim it and give notice of claim; and notice under one execution does not dispense with notice under a different execution.—Finley v. Sly, 44 Ind. 266.

[c] (Sup. 1876)

Where, on supplementary proceedings, a finding is had that the execution debtor is a resident householder, and that he has no property subject to execution, except the amount exempt by law, defendant is entitled to a judgment in his favor without demanding his exemption.—Wallace v. Lawyer, 54 Ind. 501, 23 Am. Rep. 661.

[d] (Sup. 1882)

If one would claim property as exempt from levy, he must make the claim at the time and in the manner provided by law.—Boesker v. Pickett, 81 Ind. 534.

[e] (Sup. 1884)

Where a judgment debtor would avail himself of his exemption, he must make the schedule required by the statute.—Guerin v. Kraner, 97 Ind. 533.

[f] (Sup. 1889)

While it is true that the right to claim property as exempt from execution is the personal privilege of the debtor as such exemption is for his benefit, the law presumes that he will make such claim.—State ex rel. Hulman v. Harper, 22 N. E. 80, 120 Ind. 23.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Exemp. § 137.

See, also, 18 Cyc. p. 1467.

**§ 119. Time for making claim.**

Failure to make claim within required time as waiver of right to exemptions, see ante, § 93.

[a] (Sup. 1845)

A defendant, entitled to claim property as exempt, may exercise his right at any time before sale.—Pate v. Swann, 7 Blackf. 500.

[b] After the court has rendered final judgment for the sale of property attached, it is too late for the attachment defendant to claim it as exempt from sale.—(Sup. 1860) State ex rel. Biddinger v. Manly, 15 Ind. 8; (1868) Perkins v. Bragg, 29 Ind. 507; (1883) Haas v. Shaw, 91 Ind. 384, 46 Am. Rep. 607.

[c] (Sup. 1860)

A mortgagor cannot, after the mortgaged property has been ordered to be sold on foreclosure, claim the property as exempt from execution.—Slaughter v. Detiney, 15 Ind. 49.

[d] (Sup. 1883)

A mortgagor should assert his claim at the hearing for the appointment of a receiver, and is not entitled to claim as exempt from execution rents accruing from mortgaged property, where a decree has been rendered adjudging that the mortgagee is entitled to the rents, appointing a receiver, and directing him to collect and apply the rents to the mortgage debt.—Storm v. Ermantrout, 89 Ind. 214.

[e] (Sup. 1883)

Rev. St. 1881, § 918 (Code 1852, § 161), provided that an order of attachment should require the sheriff to seize and take into his possession the property of the defendant in his county not exempt from execution. *Held*, that if in any case defendant claimed that his attached property was exempt, and not subject to seizure under an order of attachment, it was necessary that he should assert such claim before final judgment in the attachment proceedings.—Haas v. Shaw, 91 Ind. 384, 46 Am. Rep. 607.

[f] (Sup. 1884)

A judgment defendant may assert his right to his exemption before levy.—State ex rel. Stallings v. Read, 94 Ind. 103.

[g] (Sup. 1899)

Where the issues in an action to set aside an alleged fraudulent conveyance have been submitted, and the court has made and filed special findings, the defendant cannot, by application to the court, raise the question of his right to exemption.—McNally v. White, 54 N. E. 794, 56 N. E. 214, 154 Ind. 163.

[h] (App. 1900)

A debtor whose property has been levied on under an execution may claim his exemptions at any time before the execution sale.—Stout v. Price, 24 Ind. App. 360, 55 N. E. 964, 56 N. E. 857.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Exemp. §§ 140-145.

See, also, 18 Cyc. pp. 1473-1477.

**§ 120. Form and requisites of claim.**

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. §§ 146-148.

See, also, 18 Cyc. pp. 1470-1473.

**§ 121. — In general.**

[a] Where the right to claim an exemption clearly exists, formal and technical objections should not be allowed to defeat it, if it has been asserted substantially as the law requires.—(Sup. 1883) *Haas v. Shaw*, 91 Ind. 384, 46 Am. Rep. 607; (1886) *Burdge v. Bolin*, 106 Ind. 175, 6 N. E. 140, 55 Am. Rep. 724.

[b] (App. 1891)

When a right of exemption is claimed in a pleading in court, the party claiming it must show that all the property of the debtor does not exceed \$600 in value.—*Coppage v. Gregg*, 27 N. E. 570, 1 Ind. App. 112.

[c] (App. 1904)

In an action to set aside a fraudulent conveyance from a husband to wife, the question of the right of the husband to an exemption as a resident householder cannot be raised by motion to modify, but should be presented by answer and tendering issue thereon before trial.—*Bass v. Citizens' Trust Co.*, 70 N. E. 400, 32 Ind. App. 583.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 146.

See, also, 18 Cyc. pp. 1470, 1471.

**§ 122. — Affidavit.**

[a] (Sup. 1883)

A wife's affidavit of exemption of property from levy, made in her husband's absence, is not to be deemed insufficient for a trifling and immaterial informality.—*Astley v. Capron*, 80 Ind. 167.

[b] (Sup. 1883)

Although a claimant of exemptions from execution owns other property than that mentioned in his schedule, and is liable for perjury on a false statement in the affidavit, he is not thereby precluded from claiming the property as exempt.—*Over v. Shannon*, 91 Ind. 90.

Where a claim for exemption is substantially in accordance with the statute, and the schedule is sworn to as the statute requires, the sheriff cannot refuse to appraise and set aside the property on the ground of perjury in the affidavit.—*Id.*

[c] (Sup. 1884)

A schedule filed by an execution defendant, to entitle him to exemption, is not bad because, after swearing that it contained "all my property," it omitted "within or without this state," and in enumerating "goods, credits, money," etc., it omitted "rights."—*State ex rel. Stallings v. Read*, 94 Ind. 103.

[d] (App. 1893)

Rev. St. 1881, § 715, provides that, when an execution defendant is absent from the state,

his wife may make out and verify the schedule of his property, and claim and receive the exemption provided in the act. *Held*, that where the wife, in her affidavit and schedule filed with the sheriff, sets out specifically all the property, credits, and rights of her husband, within and without the state, of which she has any knowledge, and her affidavit contains in substance all that the statute requires, the fact that she adds thereto the statement that there may be something which her husband owns in some other state of which she has no knowledge will not defeat the claim for exemption.—*Eisenhauer v. Dill*, 6 Ind. App. 188, 33 N. E. 220.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 148.

See, also, 18 Cyc. pp. 1471-1473.

**§ 123. — Inventory or schedule.**

Failure to file schedule as waiver of right to exemptions, see ante, § 93.

Necessity of setting out schedule in pleading in action to enforce rights, see post, § 147.

Pleading filing of schedule, see post, § 147.

[a] (Sup. 1860)

Under the provisions of the exemption law of 1852 (2 Rev. St. p. 336), the execution defendant was not required to make out a schedule of his property, but only to point out to the officer the property he claimed; and a claim to hold all his property as exempt from sale was good, under that law, without a designation of each article claimed.—*Mark v. State ex rel. Bowless*, 15 Ind. 98.

[b] (Sup. 1876)

An inventory presented by an execution defendant to the officer purported to be an inventory in the language of Act March 5, 1859, § 1, as amended in 1861, but omitted the words "within or without this state." The affidavit attached thereto stated that the foregoing inventory contained a full account of all the property held by him on the date of the issuing of the execution, and that none of said property had been since disposed of, except certain articles mentioned, and the inventory showed the disposition made of them and of the proceeds. *Held*, that it was sufficient.—*Gregory v. Latchem*, 53 Ind. 449.

[c] (Sup. 1878)

The omission of articles from the schedule of a judgment debtor's personal property does not deprive him of the right to claim his exemptions as to the articles actually scheduled.—*Douch v. Rahmer*, 61 Ind. 64.

A sheriff is not authorized by law to question the correctness of schedule of property claimed as exempt by an execution debtor.—*Id.*

Where an execution debtor presents an inventory and schedule of property, duly verified, claimed as exempt, evidence is not admissible in an action to recover the same to show that

such schedule did not include all his property.—Id.

[d] (Sup. 1884)

Where an officer is sued by an execution creditor for failure to seize property on execution, and it appears that the officer has accepted in good faith a schedule from the debtor, the schedule will receive a liberal construction, not only in behalf of the defendant, but also of the officer.—*State ex rel. Stallings v. Read*, 94 Ind. 103.

The caption of a debtor's schedule of exempt property was as follows: "Schedule of property belonging to" the debtor—followed by a date which was followed by a specific description of the property, which was followed by a sworn statement reciting that the debtor swore that the foregoing was a complete schedule of all his property owned and belonging to him on the specified date, and that he had not sold any property since that date to the present time other than that accounted for in the schedule. *Held*, that the schedule sufficiently showed that the debtor had not disposed of any property since the date of the issuance of the writ of execution.—Id.

Where the sworn statement following a debtor's schedule of exempt property recited that the debtor did swear that the foregoing was a full and complete schedule of all his property "real and personal, goods, credits, moneys and effects and choses in action," the schedule was not defective for failure to contain, after the word "money" in the statement, the words "or on deposit," nor was it bad for failure to use the word "rights."—Id.

Where a debtor's schedule of exempt property describes all the property owned by the debtor on the day of the issuance of the writ of execution and shows that he still owned it at the time the schedule was executed, the schedule is not open to the objection that it does not state that the debtor had not disposed of any property since the date of the issuance of the writ.—Id.

[e] (Sup. 1884)

In an action to set aside a sale of land which had been set apart as exempt from execution, a schedule describing the property as "a life estate in a house and two lots in A.," with an affidavit that plaintiff owned no other property, was sufficient.—*Barkley v. Mahon*, 95 Ind. 101.

[f] (App. 1891)

When a right of exemption is claimed in a pleading in court, it is only necessary that the party who pleads the exemption shall file a statement substantially complying with the requirements of the statute in a schedule.—*Coppage v. Gregg*, 27 N. E. 570, 1 Ind. App. 112.

[g] (App. 1899)

A schedule of a judgment debtor, claiming an exemption of property, is fatally defective,

where the affidavit thereto does not show that it contains all the debtor's real estate, as required by *Horner's Rev. St. 1897*, § 714.—*Kahn v. Hayes*, 53 N. E. 430, 22 Ind. App. 182.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 147.

See, also, 18 Cyc. pp. 1471-1473.

§ 125. Appraisement.

Waiver of appraisement as waiver of right to exemptions, see ante, § 93.

[a] (Sup. 1858)

Where an execution defendant claims land as exempt from execution, and selects a freeholder as an appraiser, and such freeholder is not a householder, the sheriff must choose an appraiser for him.—*Slaughter v. Detiney*, 10 Ind. 103.

[b] (Sup. 1878)

Under 2 Rev. St. 1876, p. 355, §§ 9-11, providing that the officer holding an execution, where the debtor claims property as exempt, shall cause the same to be appraised, the act required of the sheriff is ministerial, and he is without discretion in the matter.—*Pudney v. Burkhart*, 62 Ind. 179.

[c] (Sup. 1881)

Under an exemption statute providing that, in case either party failed to select an appraiser, the same shall be selected by the officer holding the execution, the failure of a debtor to select an appraiser competent to act does not deprive him of the benefit of the statute.—*Kelley v. McFadden*, 80 Ind. 536.

[d] (Sup. 1881)

Where a judgment under which an execution sale was made was for a sum exceeding \$1,000, more than \$300 of which was collectible under the judgment without relief from valuation or appraisement laws, it was not error to make the sale without appraisement.—*Mugge v. Helgemeier*, 81 Ind. 120.

[e] (Sup. 1883)

Where an execution defendant claimed real estate exempt in the manner required by statute, the sheriff cannot make a valid sale thereof by disregarding the claim of exemption and declining to have an appraisement of real estate claimed as exempt.—*Over v. Shannon*, 91 Ind. 99.

The fact that perjury was committed in swearing to false schedule will not give validity to a sale of real estate claimed as exempt on failure of the sheriff to make an appraisement as required by the statute.—Id.

[f] (App. 1891)

In the valuation of the plaintiff's property a demand in suit is to be taken at its real value, and not necessarily as the full amount of the demand.—*Coppage v. Gregg*, 1 Ind. App. 112, 27 N. E. 570.

Where a demand in suit is claimed as exempt against a judgment pleaded in set-off, and in a reply the plaintiff avers that all his property does not exceed the amount of the statutory exemption, and sets up a schedule thereof, it is not necessary that the property be appraised as in case of a levy under an execution.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Exemp. §§ 104, 150-153.

See, also, 18 Cyc. pp. 1480-1482.

**§ 126. Selection.**

Failure to make claim as waiver of right to exemptions, see ante, § 93.

[a] (Sup. 1881)

Where a levy is made on the property of a resident householder entitled to exemption, he is not required to designate the particular articles which he desires set off to him until an appraisal has been made, since until that time it could not be known but that his entire property would be exempt, and, if that was not so, he would be entitled to make his selection with reference to the respective items as appraised.—*Kelley v. McFadden*, 80 Ind. 536.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Exemp. § 154.

See, also, 18 Cyc. pp. 1478, 1479.

**§ 128. Allotment or setting apart.**

Record of as estoppel, see ESTOPPEL, § 2.

Record of proceedings as notice to purchaser at execution sale, see EXECUTION, § 272.

[a] (Sup. 1865)

Where an execution defendant notifies the sheriff who holds the execution that he claims certain property as exempt from seizure, and has the same set off to him, the property is relieved from the lien of the execution.—*Hall v. Hough*, 24 Ind. 273.

[b] (Sup. 1879)

In applying the exemption act of March 29, 1879, by the terms of which the exemption was not to extend to debts contracted before the passage of the act, the additional \$300 worth of property rendered exempt by the act is to be set apart from the bulk of the assets, and the debtor allowed such a portion thereof as his debts contracted after the act took effect bears to the whole of the debts, and distributing the residue thereof ratably to the creditors whose claims arose prior to the statute in addition to what they may receive in common with the subsequent creditors.—*O'Neil v. Beck*, 69 Ind. 239.

Where, on an assignment being made, there are debts contracted before Act March 29, 1879, increasing exemptions from \$300 to \$600, took effect, and also debts contracted after the taking effect of the act, the additional \$300 worth of property should be set aside from the bulk of the assets, and the debtor should be allowed such a proportion thereof as his subsequent

debts bear to the whole of his debts, and the residue thereof should be distributed to the prior creditors, in addition to what they may receive in common with the subsequent creditors.—Id.

[c] (Sup. 1884)

Where, in an action to set aside a sheriff's sale of certain real estate, the evidence fails to show that the property in controversy had been actually set apart to plaintiff by the sheriff before the commencement of the action as exempt from the execution under which it was afterwards sold by him, a finding for plaintiff cannot be sustained, as such evidence was indispensable to her right to recover.—*Barkley v. Mahon*, 95 Ind. 101.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Exemp. § 157; 21

CENT. DIG. Execution, § 382.

See, also, 18 Cyc. p. 1482.

**§ 130. Successive exemptions.**

[a] (Sup. 1890)

Under Rev. St. 1881, § 703, which allows judgment debtors an exemption to the amount of \$600, it is no answer to a claim for an exemption that the execution is an alias, and that defendant has been allowed an exemption as against the original execution.—*Chatten v. Snider*, 126 Ind. 387, 26 N. E. 166.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Exemp. § 159.

See, also, 18 Cyc. p. 1484.

**§ 131. Denial or infringement of rights.**

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Exemp. §§ 160-162.

**§ 133. — Levy on or sale of exempt property.**

[a] (App. 1893)

Where, before the sale of property levied on, the debtor delivers to the sheriff a schedule of his property, demanding that he set off the amount exempt from sale, and the sheriff fails to do so, the debtor may proceed against him for the amount of the exemption, and also against the execution creditor and purchaser, who, with full knowledge of the rights of the debtor, receives the benefit of such action by the sheriff.—*Eisenhauer v. Dill*, 6 Ind. App. 188, 33 N. E. 220.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Exemp. § 161.

**§ 134. — Evasion of exemption law.**

[a] (Sup. 1885)

Where a just debt is transferred outside the state, where, on account of different exemption laws, it is collected with greater facility and more effectually than it could have been within the state, no action for damages will lie therefor, though the debtor may have been annoyed and put to additional inconven-

ience by such transfer, and though the statute of the state makes such transfer a misdemeanor.—*Uppinghouse v. Mundel*, 103 Ind. 238, 2 N. E. 719.

[b] (Sup. 1889)

One who carries a claim "upon his own person" out of the state, with intent to deprive the debtor, who is within its jurisdiction, of the benefit of exemption laws, "sends" it out of the state, within the meaning of Rev. St. 1881, § 2162, which provides for the punishment of every person who, with intent to deprive a resident of the state of his rights under its exemption laws, "sends or causes to be sent" out of the state any claim against a debtor within its jurisdiction, for collection by garnishment.—*State v. Dittmar*, 120 Ind. 54, 22 N. E. 88; *Id.*, 120 Ind. 388, 22 N. E. 299.

[c] (App. 1891)

A creditor who, by assigning his claim to a resident of another state for the purpose of evading the exemption laws of his state, an act forbidden by Rev. St. 1881, §§ 2162, 2163, collects his claim against a debtor who resides in the same state with himself from property that would have been exempt had suit been brought in his own state, is liable therefor to his debtor in a civil action for damages.—*Kestler v. Kern*, 2 Ind. App. 488, 28 N. E. 726.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 162.

See, also, 18 Cyc. p. 1485.

§ 135. Motions and other summary remedies.

[a] (Sup. 1892)

Where a conveyance of land was set aside on the ground of fraud, a motion to allow defendant an exemption of \$300 out of the proceeds of the sale was properly refused, where no issue was tendered on the subject at the trial, and no evidence offered that defendant was a resident householder.—*Chandler v. Jessup*, 132 Ind. 351, 31 N. E. 1109.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 165.

See, also, 18 Cyc. p. 1487.

§ 136. Nature and form of action.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. §§ 166-168.

See, also, 18 Cyc. p. 1489; note, 36 L. R. A. 582.

§ 137. — In general.

[a] (Sup. 1897)

The grantee of land exempt from judgment liens and execution may maintain an action to quiet title against a lien by virtue of a judgment against his grantor, if the action is begun before sale under the judgment.—*Citizens' State Bank of Noblesville v. Harris*, 48 N. E. 856, 149 Ind. 208.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 166.

See, also, 18 Cyc. p. 1488.

§ 138. — Replevin.

[a] (Sup. 1878)

Where a sheriff refuses to have personal property included in an execution debtor's schedule of property claimed as exempt, appraised as required by law, such debtor may replevy from such officer personal property on the schedule not exceeding \$300 in value.—*Douch v. Rahner*, 61 Ind. 64.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 166.

See, also, 18 Cyc. p. 1489.

§ 140. — Injunction in general.

[a] (Sup. 1879)

Since under 2 Rev. St. 1852, p. 147 (2 Rev. St. 1876, p. 222, § 488), providing that death of an execution defendant after delivery of the writ for service shall not affect the sheriff's proceedings thereon, except that the absolute allowance of property to the widow shall be exempt from levy and sale, the interest of a widow in her deceased husband's real estate is exempted from sale under execution issued during his life, she cannot maintain an action to enjoin the sale.—*Mead v. McFadden*, 68 Ind. 340.

[b] (Sup. 1889)

The statute secures to a bona fide resident of the state certain property exempt from execution, and a person coming within its terms, being entitled to claim such property as exempt from execution, is entitled to an injunction to restrain the sheriff from selling it.—*Robinson v. Hughes*, 20 N. E. 220, 117 Ind. 293, 3 L. R. A. 383, 10 Am. St. Rep. 45.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 167.

See, also, note, 30 L. R. A. 98.

§ 142. Defenses.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. §§ 163, 164.

See, also, 18 Cyc. p. 1489.

§ 143. — In general.

[a] (App. 1893)

Where the sheriff and the execution creditor have, at the time the schedule and claim for exemption were filed, given strong assurances that the claim would be granted, and that there would be no trouble whatever about allowing it, they are not in a position to urge technical objections to defeat the right of exemption.—*Eisenhauer v. Dill*, 6 Ind. App. 188, 33 N. E. 220.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 163.

### § 146. Parties.

[a] (Sup. 1887)

The grantor and grantee of land which the former was entitled to claim as exempt from execution may join in a complaint against creditors of the former who had obtained judgments, issued executions, and filed transcripts of their judgments, which were taken before a justice of the peace, in the clerk's office, prior to such conveyance, the former to have his right to exemption established and the latter to have his title quieted.—*Barnard v. Brown*, 112 Ind. 53, 13 N. E. 401.

[b] (App. 1893)

Rev. St. 1881, § 715, provides that, when an execution defendant is absent from the state, his wife may make out and verify the schedule of his property, and claim and receive the exemption provided in the act, and "exercise all the rights which would belong to her husband were he present." *Held* that, where the sheriff and execution creditor fail to pay the amount of the statutory exemption, the wife may maintain an action therefor, either in her own name or in the name of herself and her husband.—*Eisenhauer v. Dill*, 6 Ind. App. 188, 33 N. E. 220.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 170.

See, also, 18 Cyc. pp. 1490, 1491.

### § 147. Pleading.

[a] (Sup. 1858)

Under 2 Rev. St. p. 404, § 71, providing that, in replevin before a justice, affidavit of plaintiff must state that the property has not been taken under execution or other writ against him, an affidavit that plaintiff was a resident householder, and entitled to possession of certain personalty; that said property was exempt; that he made a demand that it be set off to him, and defendant constable refused to set off said property after levy—*held* insufficient.—*Green v. Aker*, 11 Ind. 223.

[b] (Sup. 1881)

An allegation by one claiming an exemption of property from execution, that "defendant filed with the sheriff a schedule of his property," does not sufficiently show the filing of such a schedule as the law requires.—*Over v. Shannon*, 75 Ind. 352.

[c] (Sup. 1884)

In pleading the statutory exemption for goods seized on execution, it is not necessary for the execution defendant to set out the schedule.—*State ex rel. Stallings v. Read*, 94 Ind. 103.

[d] (Sup. 1884)

Where an exemption is made by an officer in a case not allowed by law and he subsequently sells the property regardless of the exemption, the facts on which he relies in justification of his act in selling it must be especially

pleaded by him.—*Barkley v. Mahon*, 95 Ind. 101.

[e] (Sup. 1884)

A complaint in replevin for property claimed to be exempt, which alleged the filing of a schedule, and that the property was of less value than \$600, but failed to allege that the schedule was such as the law requires, and that the judgment on which the execution was issued, under which the property was seized, was founded on contract, was insufficient.—*Newcomer v. Alexander*, 96 Ind. 453.

[f] (Sup. 1884)

A complaint to set aside a sheriff's sale of property claimed as exempt should allege the filing of a true schedule of all the debtor's property, as required by Rev. St. 1881, §§ 713, 714.—*Guerin v. Kraner*, 97 Ind. 533.

[g] (Sup. 1887)

In an action by the grantor and grantee of land which the former was entitled to claim as exempt from execution as against his creditors, who had issued executions against the land, it is sufficient that the complaint state the value of the grantor's property at the time of the filing of the transcripts of the judgments on which execution was to be issued, and of the conveyance, showing it to be exempt from execution at the time, without stating the value at the time of instituting the action, and no demand need be alleged.—*Barnard v. Brown*, 112 Ind. 53, 13 N. E. 401.

[h] (App. 1891)

Where a demand in suit is claimed as exempt, in order to defeat a judgment pleaded as a set-off, such exemption is sufficiently claimed by a reply which gives a schedule of all the plaintiff's property, and avers that it does not exceed the amount allowed the debtor as exempt.—*Coppage v. Gregg*, 1 Ind. App. 112, 27 N. E. 570.

[i] (App. 1893)

In a suit against an execution creditor and the sheriff for the amount of the statutory exemption, the fact that the complaint alleges that the debtor filed an affidavit and inventory containing a full account of all his property "at the date of the execution," while the statute requires the affidavit to state his property "at the date of issuing the writ," is immaterial.—*Eisenhauer v. Dill*, 6 Ind. App. 188, 33 N. E. 220.

[j] (App. 1903)

The right of exemption is given only upon contracts express or implied, and, when such right is pleaded, it must appear that the judgment was of a character entitling the claimant to the exemption.—*Franklin Ins. Co. v. Feist*, 68 N. E. 188, 31 Ind. App. 390.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. § 171; 21

CENT. DIG. Execution, § 730.

See, also, 18 Cyc. p. 1491.

## § 148. Evidence.

[a] (Sup. 1862)

In a suit to replevy property claimed to be exempt from execution, the claimant must prove a demand to have his property set off, that he furnished a schedule, and proved the value thereof.—*Graham v. Crockett*, 18 Ind. 119.

[b] (Sup. 1876)

A sufficient inventory of property claimed as exempt, presented to the officer holding the execution, before sale, is material evidence in an action by the execution defendant against said officer and the execution plaintiff to recover possession of articles sold by the officer to the execution plaintiff, under such execution, in disregard of the demand for their exemption from such sale.—*Gregory v. Latchem*, 53 Ind. 449.

[c] (Sup. 1882)

In replevy by a resident householder to recover property levied on as exempt from execution, the burden is on plaintiff to show that the judgment on which the writ issued was rendered on a contract, and that plaintiff owned the property.—*Thompson v. Ross*, 87 Ind. 156.

[d] (Sup. 1884)

In an action to set aside a sale of exempt property under execution, the execution, advertisement, and appraisal are proper evidence for plaintiff.—*Barkley v. Mahon*, 95 Ind. 101.

[e] (Sup. 1885)

A schedule and affidavit made by the wife of the debtor, who was absent, and presented to the sheriff, with a demand for exemption from levy, pursuant to the statute, are admissible in evidence in replevin against the sheriff for goods levied on by him under execution and claimed by plaintiff as exempt.—*Astley v. Capron*, 89 Ind. 167.

[f] (Sup. 1885)

An execution defendant in replevin for property seized must show that it was exempt from execution.—*Hartlep v. Cole*, 101 Ind. 458.

[g] (Sup. 1894)

In an action to set aside a sale under a judgment on the ground that the property sold was exempt, it must appear that the debtor was a resident householder at the time the execution was in the hands of the sheriff, or at the time of the sale; and the fact that he is a resident householder at the time of filing his complaint is insufficient.—*Kingen v. Stroh*, 136 Ind. 610, 36 N. E. 519.

[h] (App. 1896)

In attachment a schedule of the property seized, and claimed by defendant as exempt, filed with the answer as an exhibit, may be looked to for a description of the property, though not available in determining the sufficiency of the answer.—*Wagner v. Barden*, 13 Ind. App. 571, 41 N. E. 1067.

## FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. §§ 172-174;  
21 CENT. DIG. Execution, § 731; 42  
CENT. DIG. Replev. § 280.  
See, also, 18 Cyc. pp. 1493, 1494.

## § 150. Trial.

[a] (Sup. 1883)

In replevin for property alleged to have been taken on execution in violation of plaintiff's exemption rights as a householder, the court charged: "As to what constitutes a householder within the meaning of the statute, I instruct you that a householder is the father or head of a family whom he supports or assists in supporting. It is not necessary that the family should keep house in the ordinary sense of that term. The father, as the head of the family, may put his family out to board, and still be entitled to the benefit of the law. If the plaintiff, at the time of the demand for exemption, and after the bringing of the suit, was supporting his wife or aiding in her support, and was intending to continue to live with her and to return to Indiana to reside or remain permanently or indefinitely when his business in Colorado was terminated and finished, then he was a householder within the meaning of the term in the statute providing for the exemption of property from sale on execution." *Held*, that there was no substantial error in the instruction, and a contention that it was imperfect and ambiguous and not sufficiently clear and full as a definition of the term "householder" was untenable.—*Astley v. Capron*, 89 Ind. 167.

In replevin for property alleged to have been taken on execution in violation of plaintiff's exemption rights, the court charged that, "as to the nature of the debt to satisfy which the property was taken, the plaintiff introduced no evidence, but the judgment on which the execution was issued was read in evidence, and that shows it was founded upon a contract. This evidence was introduced by the defendant it is true, but the plaintiff is entitled to the benefit of it, as if he had introduced it himself." *Held*, that there was no substantial error in the instruction.—*Id.*

In replevin for property alleged to have been taken on execution in violation of plaintiff's exemption rights, the court charged that "it is unnecessary that I should give you any particular instructions in regard to value. The evidence is before you, and if, in your judgment, you can determine from it the value of the property to a reasonable certainty, it is sufficient. All you have to do is to say what that value is." *Held* that, the court having already told the jury that the value of the property must be established to a reasonable certainty by a preponderance of the evidence, a contention that the instruction was erroneous as likely to mislead the jury was untenable.—*Id.*

In replevin for property taken by an officer belonging to a debtor absent from the state,

the complaint averred that the debtor's wife filed a schedule claiming an exemption, as she was entitled to do under the statute in the absence from the state of her husband. The court charged that the affidavit attached to the inventory showed that certain articles therein named had been sold, but did not show what disposition was made of the proceeds, but that the same articles were mentioned in the inventory and referred to by the affidavit as marked B. and evidence of the value of the articles had been given to the jury; that, if the jury should find that the value of the articles together with the value of other property named in the inventory did not exceed \$300, then that would be a sufficient accounting of the proceeds of the articles sold to comply with the law in that respect. *Held*, that there was no error in the instruction.—Id.

[b] (Sup. 1888)

In a suit to set off judgments, a finding that defendant is insolvent, and has no property subject to execution, does not imply a finding that all his other property does not amount to \$600,—the exemption in cases founded on contract under Rev. St. 1881, § 703,—and so require a denial of relief.—*Carpenter v. Cool*, 115 Ind. 134, 17 N. E. 266.

[c] (App. 1891)

Where a judgment is pleaded in set-off to plaintiff's demand, and in reply plaintiff claims his demand as exempt, and avers that all his property, of which he files a schedule, does not exceed the amount of the statutory exemption, the truth of such averments is a question for the jury.—*Coppage v. Gregg*, 1 Ind. App. 112, 27 N. E. 570.

[d] (App. 1892)

A finding by the court in attachment proceedings that the debtor is entitled to hold exempt certain personal property which, when attached, was appraised at \$38.25, and also \$321, the balance due on a note executed to him by one of the garnishees, which together are worth less than \$600, is defective, in that it does not contain sufficient facts to make the aggregate value a matter of computation, and not of conjecture.—*Emerson & Fisher Co. v. Marshall*, 4 Ind. App. 265, 30 N. E. 1099.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Exemp. §§ 175-178.

See, also, 18 Cyc. p. 1494.

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## EXPLOSIVES.

### Scope-Note.

[INCLUDES regulation of manufacture, dealing in, and use of explosive substances, and liabilities for injuries therefrom caused by negligence.

[EXCLUDES powers of municipalities (see *Municipal Corporations*); transportation of articles dangerous to other goods or to passengers (see *Carriers; Shipping*); use of explosives constituting a nuisance (see *Nuisance*), or for purpose of malicious injury to property (see *Malicious Mischief*), or in firearms (see *Weapons*); steam (see *Steam*); and gas (see *Gas*). For complete list of matters excluded, see cross-references, post.]

### Analysis.

- § 3. Regulations of manufacture, storage, and sale.
- § 6. Injuries from accidental explosions.
- § 9. — Illegal or negligent sale.
- § 10. — Illegal or negligent use.
- § 12. Injuries from blasting.

### Cross-References.

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### § 3. Regulations of manufacture, stor- age, and sale.

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SEE 23 CENT. DIG. Explos. § 1.

See, also, note, 29 L. R. A. 718; note, 67  
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### § 6. Injuries from accidental explo- sions.

Injuries from explosion of gas, see **GAS**, §§ 15-  
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### § 9. — Illegal or negligent sale.

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FOR CASES FROM OTHER STATES,  
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**§ 12. Injuries from blasting.**

Acts of independent contractor, see MASTER AND SERVANT, § 319.

Liability of city, see MUNICIPAL CORPORATIONS, § 733.

Liability of city as for creation of nuisance, see MUNICIPAL CORPORATIONS, § 736.

Liability of city for acts of independent contractor, see MUNICIPAL CORPORATIONS, § 751.

[a] (Sup. 1876)

Where a person, in quarrying stone near a public highway, by a blast of gunpowder, threw fragments of stone against a traveler passing on said highway, whereby he was injured, the act which caused the injury being unlawful, the recovery of damages for the injury cannot be defeated by the fact that there was no negligence on the part of the person who did said act.—Wright v. Compton, 53 Ind. 337.

FOR CASES FROM OTHER STATES,  
SEE 23 CENT. DIG. Explos. §§ 9, 10; 37  
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See, also, 19 Cyc. pp. 7-10, 12-18.

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- Of mortgage debt as discharge of mortgage. **MORTGAGES**, § 306.
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**TRADE-MARKS AND TRADE-NAMES**, § 32.

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

# EXTORTION.

## Scope-Note.

[INCLUDES obtaining or attempting to obtain from another, under color of official or other right, money or other property, more particularly by the taking or claiming, by a public officer, of illegal or excessive fees or compensation for official services, and acts of oppression or other injuries to person, property, or rights, committed by such officer under color of official authority; nature and elements of the crimes of extortion under color of office or right, oppression, etc.; nature and extent of criminal responsibility therefor; and prosecution and punishment of such acts as public offenses.

[EXCLUDES obtaining money or other property by threats (see *Threats*); false personation of officer or other person exercising special authority (see *False Personation*); and civil liabilities of officers receiving illegal or excessive fees (see *Officers*). For complete list of matters excluded, see cross-references, post.]

## Analysis.

- § 3. Elements of offenses.
- § 4. — In general.
- § 11. Penalties and actions therefor.
- § 12. Indictment or information.
- § 13. — Requisites and sufficiency.
- § 14. — Issues, proof, and variance.

## Cross-References.

### See—

Civil liabilities of officers receiving illegal or excessive fees. *OFFICERS*, §§ 98, 1120.  
Conspiracy to commit. *CONSPIRACY*, § 43.  
*THREATS*.

### § 3. Elements of offenses.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Extort. §§ 3-8.

See, also, 19 Cyc. pp. 37-39; note, 116 Am. St. Rep. 446.

### § 4. — In general.

[a] (Sup. 1861)

A county treasurer who extorts and receives from a taxpayer a fee as for a distress and sale of his goods for taxes when none have been made, is guilty of extortion.—*State v. Burton*, 3 Ind. 93, 95.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Extort. §§ 3, 4.

See, also, 19 Cyc. p. 37.

### § 11. Penalties and actions therefor.

[a] (Sup. 1824)

In a declaration in debt on the statute against the clerk of a circuit court for receiving unlawful fees, it is no objection to the declaration that there are different fees charged to have been unlawfully demanded and received by him, all united in one suit and amounting to sufficient to give the circuit court jurisdiction on the ground that, if each item was sued for separately, they would all have

been cognizable by a justice of the peace.—*Jones v. Buntin*, 1 Blackf. 322.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Extort. § 11; 43 CENT. DIG. Sheriffs, § 840.

See, also, 19 Cyc. pp. 44-48.

### § 12. Indictment or information.

Amendment of indictment, see *INDICTMENT AND INFORMATION*, § 159.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Extort. §§ 12, 13.

See, also, 19 Cyc. pp. 40-42.

### § 13. — Requisites and sufficiency.

[a] (Sup. 1832)

An indictment for extortion is insufficient where it does not state that nothing was due the officer, or what was due, and what he took beyond his legal fees.—*State v. Cogswell*, 3 Blackf. 54, 23 Am. Dec. 379.

[b] (Sup. 1840)

In an indictment against a constable for extortion it is not necessary to allege what sum the defendant extorted.—*State v. Stotts*, 5 Blackf. 460.

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## [c] (Sup. 1841)

An indictment charged that the defendant, as constable, traveled four miles to serve an execution, for which travel he was entitled as mileage to 16 cents; that, corruptly, etc., he extorted 32 cents for said mileage, whereas but 16 cents were due, etc. *Held*, that the indictment was valid.—*Emory v. State*, 6 Blackf. 106.

## [d] (Sup. 1843)

An indictment for extortion, charging a constable with having collected more than was due on an execution, should set out the recital in the execution showing the judgment on which the execution issued, and the names of both parties to the execution should be alleged.—*Seany v. State*, 6 Blackf. 403.

## [e] (Sup. 1849)

In an indictment for extortion, a count alleging extortion of illegal fees from the board of justices of the peace of W. county, who were acting as county commissioners, is a sufficient allegation that the money was extorted from the county commissioners, under Act 1843, p. 62.—*State v. Moore*, 1 Ind. 548, Smith, 316.

## [f] (App. 1894)

An indictment, under Rev. St. 1881, § 2018 (Rev. St. 1894, § 2105), against an officer, for receiving excessive fees, must allege that the fees were claimed to be due as fees for official services.—*State v. Oden*, 37 N. E. 731, 10 Ind. App. 136.

## FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Extort. § 12.

See, also, 19 Cyc. pp. 40-42.

## § 14. — Issues, proof, and variance.

## [a] (Sup. 1843)

An execution for \$110.43 is not admissible in evidence to support an indictment for extortion, charging a constable with having collected more than was due on an execution for \$64. The indictment should have described the execution according to its face, and, if the amount called for had been reduced by payments, that fact should have been averred.—*Seany v. State*, 6 Blackf. 403.

## [b] (Sup. 1849)

A count alleging the extortion of money from the county of W. is good if the money be proved to have belonged to the county, and to have been extorted from its officers.—*State v. Moore*, 1 Ind. 548, Smith, 316.

## FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Extort. § 13.

See, also, 19 Cyc. p. 43.

## EXTRA ALLOWANCE.

Additional to dower or other interest of surviving wife, husband, or child, see EXECUTORS AND ADMINISTRATORS, § 179.

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# EXTRADITION.

## *Scope-Note.*

INCLUDES delivery, by one country or state to another, of persons charged with the commission of crime within the jurisdiction of such other country or state, either as matter of comity or under provisions of treaties, constitutions, or other compacts; nature and scope of the remedy in general; constitutional treaty, and statutory provisions relating thereto; in what cases, and as to what persons, and for what offenses extradition is allowed; jurisdiction over and proceedings to obtain extradition; issuance, requisites, and validity of demands, requisitions, warrants, etc.; arrest and delivery of persons accused; their rights and liabilities after extradition; review of proceedings; and costs and expenses of such proceedings.

[EXCLUDES delivery by one state to another of fugitives from service (see *Slaves*). For complete list of matters excluded, see cross-references, post.]

## *Analysis.*

### **I. International.**

§ 2. Treaties.

§ 19. Rights and liabilities of accused after extradition.

### **II. Interstate.**

§ 21. Nature, grounds, and scope of remedy.

§ 22. Constitutional and statutory provisions.

§ 27. Offenses ground for extradition.

§ 28. Persons subject to extradition.

§ 30. — Fugitives from justice.

§ 31. — Persons in custody on charge of other crime.

§ 32. Indictment or affidavit charging offense.

§ 36. Warrant for arrest and delivery.

§ 37. Arrest and bail.

§ 39. Examination, determination, and review of proceedings.

§ 41. Rights and liabilities of accused after extradition.

## *Cross-References.*

*See—*

Habeas corpus to defeat. HABEAS CORPUS,  
§§ 83, 84, 92, 103.

Riot in arresting fugitive. RIOT, § 2.

### **I. INTERNATIONAL.**

#### **§ 2. Treaties.**

[a] (Sup. 1906)

The right of one independent government to demand and receive the custody of an offender depends upon and is measured by the treaty stipulations between them.—Knox v. State, 164 Ind. 226, 73 N. E. 255, 108 Am. St. Rep. 291.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Extrad. § 2.

See, also, 19 Cyc. pp. 53-61.

#### **§ 19. Rights and liabilities of accused after extradition.**

[a] (Sup. 1906)

The right of a person extradited to return to the country from which he was surrendered

is not an inherent right of his own, but is based upon the right of his adopted sovereign to receive and protect him on such terms as it chooses.—Knox v. State, 164 Ind. 226, 73 N. E. 255, 108 Am. St. Rep. 291.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Extrad. §§ 22-24.

See, also, 19 Cyc. pp. 81-83; note, 85 C. C. A. 275.

### **II. INTERSTATE.**

False imprisonment of fugitive, see FALSE IMPRISONMENT, § 7.

#### **§ 21. Nature, grounds, and scope of remedy.**

[a] (Sup. 1906)

The principles governing international extradition have no application to cases of ex-

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tradition between states.—*Knox v. State*, 73 N. E. 255, 164 Ind. 226, 108 Am. St. Rep. 291.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Extrad. § 26.

See, also, 19 Cyc. p. 85.

**§ 22. Constitutional and statutory provisions.**

[a] (Sup. 1867)

Act 1867, directing that a person held in custody under a warrant issued by the governor of Indiana upon the requisition of the governor of another state, as a fugitive from justice, shall be taken before a judge of the circuit or common pleas court for identification, is constitutional, since the act of congress declaring that it shall be the duty of the governor to secure the arrest of the person demanded has not determined what steps he shall take, and how he shall identify the person arrested, and the act does no more than secure the writ of habeas corpus to every one so arrested.—*Robinson v. Flanders*, 29 Ind. 10.

[b] (Sup. 1907)

The right of interstate rendition rests on Const. U. S. art. 4, § 2.—*Kemper v. Metzger*, 169 Ind. 112, 81 N. E. 663.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Extrad. § 27.

See, also, 19 Cyc. p. 85; note, 32 Am. Rep. 355.

**§ 27. Offenses ground for extradition.**

[a] (Sup. 1874)

A misdemeanor punishable by a fine not exceeding \$5,000 is within the meaning of the word "crime," as used in section 2, art. 4, Const. U. S., relating to the surrender or extradition of fugitives from justice, fleeing from one state to another.—*Morton v. Skinner*, 48 Ind. 123.

[b] (Sup. 1906)

Where a fugitive from justice is extradited, he can lawfully be held to answer for any crime committed by him against the laws of the state without regard to the particular offense named in the extradition papers.—*Knox v. State*, 164 Ind. 226, 73 N. E. 255, 108 Am. St. Rep. 291.

If the offense for which one is extradited from another state is essentially the same as that for which he is tried, the fact that they are technically different is immaterial.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Extrad. § 30.

See, also, 19 Cyc. p. 86.

**§ 28. Persons subject to extradition.**

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Extrad. §§ 31-33.

See, also, 19 Cyc. pp. 86-88.

**§ 30. — Fugitives from justice.**

Right to rely on due process of law, see CONSTITUTIONAL LAW, § 252.

[a] (Sup. 1850)

To give a magistrate jurisdiction under the act of the legislature, approved February 12, 1838 (Rev. St. 1843), relative to fugitives from justice, it should be shown that the person sought to be arrested has left the state in which he committed the crime, for the purpose of escaping punishment for it.—*Degant v. Michael*, 2 Ind. 396.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Extrad. § 32.

See, also, 19 Cyc. pp. 86-88; note, 63 C. C. A. 104; note, 28 L. R. A. 289.

**§ 31. — Persons in custody on charge of other crime.**

[a] (Sup. 1886)

The appellant committed a felony in Michigan, and fled to Indiana, where he committed another felony, for which he was indicted, arrested, and imprisoned. While he was in prison a requisition from the governor of Michigan was delivered to the governor of Indiana, who issued his warrant. After this warrant was issued, the appellant escaped, and fled to Ohio; whereupon a requisition was obtained, and, on a warrant issued by the governor of Ohio, the appellant was brought back to the prison from which he had escaped, and after a time the prosecutor entered a nolle prosequi. *Held*, that the appellant was rightfully surrendered to the agents of the state of Michigan.—*Hackney v. Welsh*, 107 Ind. 253, 8 N. E. 141, 57 Am. Rep. 101.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Extrad. § 33.

See, also, 19 Cyc. p. 95.

**§ 32. Indictment or affidavit charging offense.**

[a] (Sup. 1840)

In requisition proceedings it is sufficient if the copy of the affidavit duly certified by the governor of the demanding state is produced and delivered by him, with the demand, to the governor of the state in which the accused is found.—*Johnston v. Vanamringe*, 5 Blackf. 311.

[b] (Sup. 1867)

In order to give the governor of this state jurisdiction to issue his warrant for the arrest, under the act of March 9, 1867, of a fugitive from justice of another state, an authentic copy of the affidavit charging the offense committed must be produced.—*Ex parte Pfitzer*, 28 Ind. 450.

[c] (Sup. 1878)

Mere recitals in the demanding governor's requisition are not sufficient, of themselves, to authorize the arrest and surrender of the alleged fugitive.—*Hartman v. Aveline*, 63 Ind. 344, 30 Am. Rep. 217.

## [d] (Sup. 1879)

A requisition of the governor of another state, accompanied by a copy of an affidavit charging petitioner with the commission of a certain act, and by a certificate of such governor that such act constitutes a crime under the law of that state, makes a prima facie showing authorizing petitioner's arrest.—*Tullis v. Fleming*, 69 Ind. 15.

## [e] (Sup. 1886)

Where the papers and information accompanying a requisition for a fugitive from justice are authenticated by the signature of the prosecuting attorney and by affidavit, it is sufficient.—*Hackney v. Welsh*, 107 Ind. 253, 8 N. E. 141, 57 Am. Rep. 101.

It is not necessary for the governor who issues a requisition for a fugitive from justice to certify that the information and other papers accompanying the requisition are genuine; it is sufficient to certify that they are duly authenticated.—*Id.*

## FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Extrad. §§ 36-38.

See, also, 19 Cyc. pp. 89-91.

## § 36. Warrant for arrest and delivery.

## [a] (Sup. 1866)

The governor of Kentucky made his requisition on the governor of this state for one C. as a fugitive from justice, and a writ for her arrest was issued. It set forth that requisition had been made, etc., in which was the allegation that C. had been indicted for, etc., a certified copy of which indictment accompanied the requisition, and directed C. to be delivered to N. as agent to convey her to Kentucky. N. returned, to a writ of habeas corpus, that he held C. in custody by virtue of the writ, which he annexed. *Held*, that it was not necessary that a copy of the indictment should accompany the writ, that the writ was prima facie evidence of the indictment as alleged, and that it sufficiently showed N.'s authority to make the arrest, without producing any authority from the governor of Kentucky.—*Nichols v. Cornelius*, 7 Ind. 611.

## [b] (Sup. 1867)

In case of the arrest of a person upon a requisition from the governor of another state, it is not necessary that a copy of any indictment or affidavit accompany the warrant, the warrant, and the indictment and requisition therein recited, constitute good cause for the arrest and detention.—*Robinson v. Flanders*, 29 Ind. 10.

Under the act of congress making it the duty of the executive authority of a state or territory to arrest and secure till notice, etc., a fugitive from justice from another state, a general warrant from the governor is good, though not directed to any named officer.—*Id.*

## [c] (Sup. 1879)

There is nothing either in Rev. St. U. S. § 5278, or in Rev. St. Ind. 1876, p. 420, upon

the subject of fugitives from justice, which requires that a warrant shall be issued for the fugitive upon the charge against him before his return can be demanded from the state or territory to which he may have fled. It is the indictment or affidavit, and not the issuing of a warrant, which constitutes the charge against a fugitive upon which his return can be required.—*Tullis v. Fleming*, 69 Ind. 15.

## [d] (Sup. 1907)

An extradition warrant should show a demand made on the Governor of the state of refuge that the prisoner has been charged before a tribunal with power to try, with the commission of a crime in the demanding state, and that a regular proceeding has been begun therein to punish accused for such crime, together with the time and place of the commission.—*Kemper v. Metzger*, 169 Ind. 112, 81 N. E. 663.

A requisition for the return of an alleged fugitive should show a copy of the indictment duly certified as authentic, charging the fugitive with the crime; but the Governor's warrant of arrest need not show that the crime was regularly and sufficiently charged in the demanding state.—*Id.*

A Governor's warrant in extradition, reciting a demand on him, and setting out a copy of a regular indictment pending in the demanding state, sufficiently shows the demand and the time and place of the commission of the offense.—*Id.*

Act Cong. Feb. 12, 1793, c. 7, § 1, 1 Stat. 302 (U. S. Comp. St. 1901, p. 3597) provides that when the Governor of any state demands any person as a fugitive from justice of the Governor of another state, and produces a copy of an indictment charging the person demanded with crime, certified as authentic by the Governor of the demanding state, it shall be the duty of the Governor of the state to which the fugitive has fled to cause him to be arrested. Acts Ind. 1905, p. 588, c. 169, § 26, provides that, upon the demand of the Governor of another state to surrender any fugitive, the Governor of this state shall issue his warrant reciting the fact of demand and the charge upon which it is based, with the time and place of the commission of the offense, directed generally to any sheriff, etc. *Held*, that such acts do not require that the Governor of this state shall make it appear in his warrant that a crime has been regularly and sufficiently charged against the person demanded by the laws of the demanding state, but requisition papers and warrant issued thereon, which are in strict compliance with the act of Congress and of this state, constitute a prima facie case that the person demanded is properly charged in the demanding state with a crime against its laws.—*Id.*

## FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Extrad. §§ 40-43.

See, also, 19 Cyc. pp. 92-95.

**§ 37. Arrest and bail.****[a] (Sup. 1871)**

Fugitives from justice returned to the county wherein the offense was committed under the act of May 27, 1852, may be let to bail until an examination be had.—*State v. Elder*, 35 Ind. 308.

**[b] (Sup. 1886)**

The fact that the sheriff in charge of the jail in which the appellant, a fugitive from justice, who had committed felonies in two states, was confined, knew that there was to be no trial of the indictment found against the appellant in his state, but that the appellant was detained there merely until he could be given up to the agents of the other state upon an extradition warrant, would not prejudice the right of the state obtaining the warrant to have the appellant delivered to it.—*Hackney v. Welsh*, 107 Ind. 253, 8 N. E. 141, 57 Am. Rep. 101.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Extrad. §§ 34, 44, 48, 50.

See, also, 19 Cyc. pp. 95, 96; note, 26 L. R. A. 33.

**§ 39. Examination, determination, and review of proceedings.**

Review by habeas corpus, determination of issues, see HABEAS CORPUS, §§ 85, 103.

**[a] (Sup. 1869)**

The state cannot appeal from the ruling of a judge discharging a prisoner brought before him for examination under Act March 9, 1867, relating to the arrest and surrender of fugitive from justice.—*State v. Morgan*, 31 Ind. 66.

**[b] (Sup. 1909)**

Under Burns' Ann. St. 1908, § 1890, providing that no resident of the state shall be surrendered under pretense of being a fugitive from justice from any other state where it appears to the judge holding the examination that such resident was in the state at the time of the commission of the offense, a resident of the state arrested under extradition proceedings is entitled to show that his restraint is illegal, and that he was not in the demanding state when the offense was committed, nor in a place or situation to render it possible for him to be the real offender.—*O'Malley v. Quigg*, 172 Ind. 350, 88 N. E. 611.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Extrad. §§ 45, 46.

See, also, 19 Cyc. pp. 99, 100.

**§ 41. Rights and liabilities of accused after extradition.****[a] (Sup. 1888)**

A prisoner returned on a requisition, stating that he was charged with embezzling money,

may be tried on an indictment charging embezzlement of money in one count, and of property in another, the same property being involved in each case.—*Waterman v. State*, 116 Ind. 51, 18 N. E. 63.

**[b] (Sup. 1892)**

On a prosecution for conspiracy to obtain money by false pretenses from an insurance company, a plea in abatement stating that defendant was indicted "for conspiracy to defraud an underwriter" does not show that he is being tried for an offense different from that for which he was extradited.—*Musgrave v. State*, 133 Ind. 207, 32 N. E. 885.

**[c] (Sup. 1905)**

A fugitive from justice, extradited on a charge of a specific crime, may be tried on another and different criminal charge without being afforded an opportunity to return to the state from which he was extradited.—*Knox v. State*, 73 N. E. 255, 164 Ind. 226, 108 Am. St. Rep. 291.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Extrad. §§ 51-53.

See, also, 19 Cyc. pp. 97, 98; note, 85 O. C. A. 275; notes 14 L. R. A. 128, 19 L. R. A. 206, 25 L. R. A. 593, 46 L. R. A. 711; note, 10 Am. St. Rep. 207.

**EXTRA FARES.**

See—

Carriage of passenger. CARRIERS, § 256.

Ejection for refusal to pay. CARRIERS, § 357.

**EXTRAORDINARY EXPENSES.**

Power of city to incur indebtedness for, see MUNICIPAL CORPORATIONS, § 860.

**EXTRAORDINARY LEGAL REMEDIES.**

See MANDAMUS.

**EXTRA SERVICE.**

See—

Allowance to county officer performing. COUNTIES, § 69.

To public officers. OFFICERS, § 99.

**EXTRA WORK.**

See—

Compensation for alterations and extra work by party to contract. CONTRACTS, § 232.  
To servant for. MASTER AND SERVANT, §§ 69, 72.

Extension of time for filing statement of mechanic's lien. MECHANICS' LIENS, § 132.  
HIGHWAYS, § 113.

Performance by contractor for public improvements. MUNICIPAL CORPORATIONS, § 360.

## EXTRINSIC EVIDENCE.

*See—*

Construction of statute. STATUTES, § 221.

Of will. WILLS, §§ 441, 485-490.

EVIDENCE, §§ 384-460.

## EYESIGHT.

*See—*

Defective eyesight as disqualifying juror.

JURY, § 40.

Presumptions as to. EVIDENCE, § 84.

## FACILITIES.

Traffic facilities between interstate carriers,  
see CARRIERS, § 33.

## FACT.

*See—*

Accessories before the fact. CRIMINAL LAW,  
§ 81.

Evidence of matters of fact or conclusions—  
CRIMINAL LAW, § 448.  
EVIDENCE, § 471.

Findings of. TRIAL, §§ 346-366, 388-405.

Judicial notice of facts—

CRIMINAL LAW, § 304.

EVIDENCE, §§ 1-52.

Matters of fact distinguished from matters of  
opinion. FRAUD, § 11.

Mistake of fact ground for recovery of pay-  
ments in general. PAYMENT, § 85.

Ground for recovery of taxes paid. TAXA-  
TION, § 540.

Ground for relief in equity—

EQUITY, § 8.

REFORMATION OF INSTRUMENTS, § 17.

Pleading matters of fact or conclusions—

INDICTMENT AND INFORMATION, § 63.

PLEADING, § 8.

Presumptions as to continuance of fact. EV-  
IDENCE, § 67.

Presumptions of fact, operation and effect.  
EVIDENCE, § 87.

Questions of law and fact, province of court  
and jury—

CRIMINAL LAW, §§ 733-749.

TRIAL, §§ 134-148.

Rebuttal of presumptions of fact. EVIDENCE,  
§ 89.

## FACTORIZING PROCESS.

See GARNISHMENT.

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# FACTORS.

## Scope-Note.

[INCLUDES the regulation and conduct of the business of receiving and selling goods consigned or otherwise intrusted to factors, commission merchants, etc., for sale; rights, powers, duties, and liabilities of persons engaged in such business and the principals or consignors, as between themselves and as to others, arising from such consignments, etc., and incidental transactions, such as advances, pledges, etc., especially as affected by their possession or control of the goods or of evidences of title.

[EXCLUDES agency in general, and on particular occasions only, not in the course of the agent's ordinary business (see *Principal and Agent*); and sales of goods through brokers not having possession or control of the property (see *Brokers*). For complete list of matters excluded, see cross-references, post.]

## Analysis.

- § 1. Who are factors.
- § 7. Duties and liabilities of principal in general.
- § 15. Control and care of goods.
- § 20. Powers, duties, and liabilities as to sale.
- § 23. — Effect of advances by factor.
- § 24. — Place, time, and manner of sale.
- § 26. — Credit to buyer.
- § 29. Del credere agency.
- § 32. Keeping and rendering accounts.
- § 42. Actions for proceeds of goods or for accounting.
- § 47. Lien.
- § 66. Actions by or against principals or factors.

## Cross-References.

See—

BROKERS.

PRINCIPAL AND AGENT.

Reasonableness of custom among commission merchants. CUSTOMS AND USAGES, § 7.

### § 1. Who are factors.

[a] (Sup. 1881)

One who carries on the business of slaughtering hogs, and curing, storing, and selling the product, as well for himself as for others, and makes advances to such customers, continuously holding possession of their product until he sells it, is a factor.—*Shaw v. Ferguson*, 78 Ind. 547.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FACT. § 1.

See, also, 19 Cyc. pp. 115, 116.

### § 7. Duties and liabilities of principal in general.

[a] (Sup. 1828)

Usages of commerce regulate the duties and privileges, and generally form the contracts, of commission merchants.—*Rapp v. Grayson*, 2 Blackf. 130.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FACT. § 11.

### § 15. Control and care of goods.

[a] (Sup. 1828)

It is as much the duty of a commission merchant to obey instructions with regard to the shipping of goods deposited with him to be shipped as it is to keep them safely while in his care.—*Rapp v. Grayson*, 2 Blackf. 130.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FACT. § 14.

See, also, 19 Cyc. p. 122.

### § 20. Powers, duties, and liabilities as to sale.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FACT. §§ 21-31.

See, also, 19 Cyc. pp. 125-132.

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**§ 23. — Effect of advances by factor.**

[a] (Sup. 1873)

Where goods were consigned to a factor for sale, without instructions as to the price for which they were to be sold, and the factor advanced money to the consignor to an amount greater than the value of the goods, and, after such advances, the consignor instructed the factor not to sell for less than a certain price, as he could do better by having the goods returned, and the factor thereupon informed the consignor that the goods had not been sold, and that it was doubtful whether they could be sold at the price fixed, and that he would await further instructions, stating that, if the consignor wished to remove the goods, an account of the advances would be rendered, and the amount could be remitted at the time the goods were ordered to be removed, to which the consignor made no response, *held* that, after the lapse of a reasonable time, the factor might sell the goods for the best price he could get in the market.—*Mooney v. Musser*, 45 Ind. 115.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FACT. §§ 23, 24.

See, also, 19 Cyc. p. 126.

**§ 24. — Place, time, and manner of sale.**

[a] (Sup. 1865)

An owner of clover seed shipped the same to a commission merchant, who sold it to a dealer in good standing for cash. The buyer had from three to seven days to make payment, but failed to do so. *Held*, that it was the duty of the commission merchant to repossess himself of the seed or to give prompt notice to the owner, so that he might have taken necessary steps to protect his interests; and, having failed to do either, on failure of the purchaser to pay for the same he must bear the loss.—*Babcock v. Orbison*, 25 Ind. 75.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FACT. § 25.

See, also, 19 Cyc. p. 128.

**§ 26. — Credit to buyer.**

[a] (Sup. 1865)

It is the duty of a factor, in the absence of instructions to the contrary, to sell for cash on delivery.—*Babcock v. Orbison*, 25 Ind. 75.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FACT. § 27.

See, also, 19 Cyc. pp. 130, 131.

**§ 29. Del credere agency.**

[a] (App. 1896)

An agent for the sale of goods who agrees to indorse all notes taken from customers is not bound to indorse a note taken for goods sold by a general agent of his principal over his protest, and after his statement that he would not indorse the note, though, after the sale, he delivered the goods, and took the note therefor, the same as other customers' notes.—

*Springfield Fertilizer Co. v. Tompkins*, 16 Ind. App. 403, 45 N. E. 615.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FACT. §§ 32, 33.

See, also, 19 Cyc. p. 133.

**§ 32. Keeping and rendering accounts.**

Actions for accounting, see post, § 42.

[a] (Sup. 1850)

A factor, receiving goods for sale on commission, undertakes to account for those he may sell, and to pay over the proceeds and redeliver the residue on demand.—*Lindley v. Downing*, 2 Ind. 418.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FACT. § 37.

See, also, 19 Cyc. p. 134.

**§ 42. Actions for proceeds of goods or for accounting.**

Actions by or against third persons, see post, § 66.

[a] (Sup. 1841)

Assumpsit lies for money had and received by a consignor against his factor to recover the proceeds of goods sold, which proceeds the factor has received.—*English v. Devarro*, 5 Blackf. 588.

[b] (Sup. 1850)

A factor will not be liable to a suit for goods sold and delivered in consequence merely of an unauthorized disposition of the goods.—*Lindley v. Downing*, 2 Ind. 418.

If an agent or factor make a wrong use of goods received for sale on commission, he may be sued in special assumpsit on his promise to perform his duty, or in case for his non-performance of that duty.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FACT. §§ 45-57.

See, also, 19 Cyc. pp. 144-150.

**§ 47. Lien.**

[a] (App. 1898)

A factor has a lien on property consigned to him by his debtor, not only for the expense of sale and commissions, but also for the balance due on their general account.—*Johnson v. Clark*, 50 N. E. 762, 20 Ind. App. 247.

A draft on a factor to cover the proceeds of a consignment of property to be sold on commission is not an assignment to the payee superior to the factor's lien.—*Id.*

A consignor of property to be sold on commission, when he has placed it in the hands of his creditor consignee without conditions, cannot, by drawing on the latter to cover the proceeds in favor of another creditor as payee, prefer the latter's claim.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FACT. §§ 65-71.

See, also, 19 Cyc. pp. 156-165.

**§ 66. Actions by or against principals or factors.**

[a] (Sup. 1880)

One to whom a factor sells goods in his own name, and without notice that he is not the principal, may be sued by the principal for the price of the goods, although the factor might sue therefor in the absence of any claim by the principal.—*Brooks v. Doxey*, 72 Ind. 327.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FACT. §§ 96-103.

See, also, 19 Cyc. pp. 183-186.

**FACTORY ACT.**

See MASTER AND SERVANT, § 121.

**FAILURE.**

See—

BANKRUPTCY.

INSOLVENCY.

**FAILURE OF CONSIDERATION.**

See—

BILLS AND NOTES, §§ 97, 476.

BONDS, § 30.

CONTRACTS, § 83.

DEEDS, § 19.

Defense in action to foreclose mortgage. MORTGAGES, § 415.

MORTGAGES, § 25.

PRINCIPAL AND SURETY, § 37.

Reply alleging failure of consideration of release of mortgage. MORTGAGES, § 456.

SALES, § 21.

VENDOR AND PURCHASER, § 15.

**FAILURE OF ISSUE.**

Estate created by will, see WILLS, § 594.

**FAILURE OF PROOF.**

See—

Direction of verdict—

CRIMINAL LAW, § 753.

TRIAL, §§ 167-170.

PLEADING, § 390.

**FAIRS.**

See AGRICULTURE.

**FAITH AND CREDIT.**

Given to foreign judgment, see JUDGMENT, §§ 814-820.

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**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

# FALSE IMPRISONMENT.

## *Scope-Note.*

[INCLUDES restraint of the person of another, without sufficient authority, not merely incident to a malicious prosecution; justification or excuse for such restraint; and liabilities and remedies therefor, civil or criminal.

[EXCLUDES right to make arrest (see *Arrest*); and remedy by writ of habeas corpus (see *Habeas Corpus*). For complete list of matters excluded, see cross-references, post.]

## *Analysis.*

### **I. Civil Liability.**

#### **(A) ACTS CONSTITUTING FALSE IMPRISONMENT AND LIABILITY THEREFOR.**

- § 1. Nature and elements of false imprisonment.
- § 2. — In general.
- § 3. — False imprisonment and malicious prosecution distinguished.
- § 4. — Intent and malice.
- § 7. — Illegality of arrest.
- § 8. — Illegality of detention after arrest.
- § 9. Defenses.
- § 11. — Exercise of authority or duty.
- § 13. — Probable cause.
- § 15. Persons liable.

#### **(B) ACTIONS.**

- § 16. Nature and form of remedy.
- § 20. Pleading.
- § 21. Evidence.
- § 22. — Presumptions and burden of proof.
- § 23. — Admissibility in general.
- § 25. — Character and condition of parties.
- § 26. — Justification.
- § 30. — Mitigation of damages.
- § 31. — Weight and sufficiency.
- § 32. Damages.
- § 34. — Elements of compensation.
- § 35. — Exemplary.
- § 36. — Amount awarded.
- § 37. Trial.
- § 39. — Questions for jury.
- § 40. — Instructions.

### **II. Criminal Responsibility.**

[No paragraphs or references in this Digest. But see 23 Cent. Dig. False Imp. §§ 122-126.]

## *Cross-References.*

See—

HABEAS CORPUS.

KIDNAPPING.

Liability of city for arrest by policeman. MUNICIPAL CORPORATIONS, § 747.

MALICIOUS PROSECUTION.

Right to damages for false imprisonment as property right. DAMAGES, § 7.

Right to make, and mode of making, arrest in general. ARREST, §§ 61-72.

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

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## I. CIVIL LIABILITY.

Abatement by death of plaintiff, see ABATEMENT AND REVIVAL, § 52.

Laws relating to as denial of due process of law, see CONSTITUTIONAL LAW, § 277.

### (A) ACTS CONSTITUTING FALSE IMPRISONMENT AND LIABILITY THEREFOR.

#### § 1. Nature and elements of false imprisonment.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Imp. §§ 1-73.

See, also, 19 Cyc. pp. 319-324; note, 118 Am. St. Rep. 719.

#### § 2. — In general.

[a] (App. 1902)

False imprisonment is an unlawful restraint upon one's freedom of locomotion or action.—Efroymsen v. Smith, 63 N. E. 328, 20 Ind. App. 451.

False imprisonment is the deprivation by one of the liberty of another without his consent.—Id.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Imp. § 1.

See, also, 19 Cyc. p. 319; note, 4 L. R. A. (N. S.) 451.

#### § 3. — False imprisonment and malicious prosecution distinguished.

[a] Where an imprisonment is without legal process, it is false imprisonment; but if it is under legal process, but commenced maliciously and without probable cause, it is malicious prosecution.—(Sup. 1871) Colter v. Lower, 35 Ind. 285, 9 Am. Rep. 735; (1873) Boaz v. Tate, 43 Ind. 60.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Imp. § 2.

#### § 4. — Intent and malice.

Pleading, see post, § 20.

[a] (Sup. 1873)

In an action for false imprisonment plaintiff need not prove malice or want of probable cause to entitle him to recover.—Boaz v. Tate, 43 Ind. 60.

[b] (Sup. 1885)

A complaint alleged that defendant locked plaintiff in a room, and by threats, with weapons in his hand, forced plaintiff to acknowledge breach of a promise of marriage, and to agree to pay damages therefor. *Held* to sufficiently charge false imprisonment.—Hildebrand v. McCrum, 101 Ind. 61.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Imp. § 16.

See, also, 19 Cyc. pp. 319, 320.

#### § 7. — Illegality of arrest.

Pleading, see post, § 20.

Presumptions and burden of proof, see post, § 22.

Sufficiency of evidence, see post, § 31.

[a] (Sup. 1830)

A person arrested on a justice's warrant for a breach of the peace cannot maintain an action of false imprisonment against the justice or constable in consequence of a mere informality in the warrant, provided the justice have jurisdiction.—Cooper v. Adams, 2 Blackf. 294.

[b] (Sup. 1830)

If a judicial officer, whether possessed of a general or special jurisdiction, acts erroneously, or even oppressively, in the exercise of his authority, an individual at whose suit he acts is not answerable as a trespasser for the error or misconduct of the officer.—Taylor v. Moffatt, 2 Blackf. 305.

If a judicial officer whose jurisdiction is special and limited transcend his authority, and act in a case of which he has no cognizance, his proceedings are coram non iudice, and no person, much less a suitor, can justify under them.—Id.

[c] (Sup. 1831)

Where, on an affidavit charging the crime of swindling to have been committed in Louisiana, the person accused was arrested in Indiana, the arrest was illegal; and, such charge not importing a crime and not being a punishable offense, the maker of the affidavit was liable for false imprisonment.—Hall v. Rogers, 2 Blackf. 429.

[d] (Sup. 1832)

A person, being imprisoned by virtue of a mittimus issued by a justice of the peace, which did not show the cause of commitment, brought an action of trespass against the justice, the constable who executed the mittimus, and the persons who assisted the constable. *Held*, that the mittimus was no justification.—Hawkins v. Johnson, 3 Blackf. 46; Hiday v. Gilmore, Id. 48.

[e] (Sup. 1834)

In justification of an imprisonment under a magistrate's warrant the constable must show that the magistrate had jurisdiction of the subject-matter, and that the warrant, on its face, was legal.—Poult v. Slocum, 3 Blackf. 421.

An action of trespass lies against a magistrate for an imprisonment by virtue of a warrant issued by him against the plaintiff, as father of a bastard child, without a complaint authorizing it.—Id.

[f] (Sup. 1837)

In an action against a constable for false imprisonment, his justification of the arrest under a capias need not show that an affidavit was filed before issuing the capias, though necessary if the action had been against the person

suing out the writ or the justice himself.—*Davis v. Bush*, 4 Blackf. 330.

[g] (Sup. 1839)

A magistrate who issues a warrant without a sufficient affidavit is liable to person arrested.—*Lair v. Abrams*, 5 Blackf. 191.

[h] (Sup. 1840)

Where the governor of one state demands a person of the governor of another state as a fugitive from justice, and the governor of the latter state causes the accused to be arrested and delivered to the person appointed for that purpose by the governor making the demand, such person is not liable for a false imprisonment by reason of any irregularity in the warrant of arrest.—*Johnston v. Vanamringe*, 5 Blackf. 311.

[i] (Sup. 1845)

A party who causes a magistrate to issue, and the magistrate who issues, legal process, are not responsible for an assault committed by the officer serving it unless they participate therein.—*Kreger v. Osborn*, 7 Blackf. 74.

[j] (Sup. 1848)

Where one sues out a *capias*, and delivers it to an officer, with directions to arrest the defendant immediately, the plaintiff not knowing at the time that the defendant is then privileged from arrest, and the officer arrests him while privileged, the defendant in the *capias* cannot maintain an action on the case therefor against the plaintiff. The direction to the officer must be understood as directing him to arrest as soon as the defendant should be subject to arrest.—*Sewell v. Lane*, 1 Ind. 293, *Smith*, 167.

[k] (Sup. 1852)

The marshal who makes an arrest, without process, for an affray, not occurring in his view, and the parties who, under his authority, assist him under such circumstances, are liable in an action of trespass to the party arrested.—*Pow v. Beckner*, 3 Ind. 475.

[l] (Sup. 1862)

The conviction and sentence of a person to confinement in the penitentiary by a court having no jurisdiction are nullities, and can afford no protection to any person keeping him in confinement.—*Patterson v. Prior*, 18 Ind. 440, 81 Am. Dec. 367.

[m] (Sup. 1869)

Where a sergeant of volunteers arrested some deserters at night, and while passing through a wood with the deserters in charge was fired upon, and arrested plaintiff on strong probability that he had interfered with the exercise by the sergeant of his military authority, and had fired upon him, an action for false imprisonment will not lie.—*Tengarden v. Graham*, 31 Ind. 422.

[n] (Sup. 1873)

If an imprisonment is extrajudicial, without legal process, it is false imprisonment.—*Boaz v. Tate*, 43 Ind. 60.

When an arrest is made upon valid process, issued by a court having jurisdiction, trespass for false imprisonment will not lie, though the arrest be maliciously procured by the prosecutor without probable cause.—*Id.*

[o] (Sup. 1873)

Where a party making an arrest is not a known public officer, but assumes to act by special appointment, persons aiding him are bound to know whether he is authorized to make the arrest; and, if he is a trespasser for want of authority, they are also trespassers, as is likewise a justice of the peace who commits a person thus illegally arrested, for he has acquired no jurisdiction over his person.—*Dietrichs v. Schaw*, 43 Ind. 175.

[p] (Sup. 1874)

Where an officer makes an arrest under a warrant and mittimus issued by a justice having jurisdiction of the offense, each good on its face, he is not liable in an action for false imprisonment.—*Jeffries v. McNamara*, 49 Ind. 142.

[q] (Sup. 1878)

Although an affidavit and warrant for the arrest of a person for a trespass be erroneous, if the same be not void a person assisting the constable in making the arrest, and using no unnecessary force, is not liable therefor in an action for damages for false imprisonment.—*Goodwine v. Stephens*, 63 Ind. 112.

Where a warrant for arrest is merely informal and erroneous, but not void, the officer executing it and the persons assisting him are protected.—*Id.*

That a warrant may protect a constable against an action for false imprisonment for making an arrest, it is necessary that it should be valid, but it is immaterial that it is informal and erroneous.—*Id.*

[r] (Sup. 1881)

Where the warrant on which the arrest complained of was made was directed to any constable of the county, but was put in the hands of a special constable, who arrested plaintiff, and took him before a justice of the peace, the arrest is, on its face, illegal.—*American Exp. Co. v. Patterson*, 73 Ind. 430.

[s] (Sup. 1884)

It is a good defense to an action for false imprisonment that defendant, as town marshal, found plaintiff intoxicated in the streets, having just assaulted a person, and arrested and detained him for three hours till a regular charge could be made against him.—*Wiltse v. Holt*, 95 Ind. 469.

[t] (Sup. 1889)

Where defendant merely directed the attention of a police officer to the acts of plaintiff, constituting, as he supposed, a violation

of a city hack ordinance, and committed in the presence of the officer, he was not liable for false imprisonment on the arrest of the plaintiff, although the charge against the plaintiff might not have been well founded.—*Veneman v. Jones*, 118 Ind. 41, 20 N. E. 644, 10 Am. St. Rep. 100.

[u] (Sup. 1891)

The mayor of a city, who, by Rev. St. § 3062, is given the same criminal jurisdiction as justices of the peace, which includes the offense of selling liquor to a minor, a misdemeanor, punishable by fine only (Rev. St. § 2094), is not liable to a civil action for false imprisonment for "corruptly and maliciously" retaining jurisdiction and imposing a fine, and imprisonment in default of payment, after defendant has moved for a change of venue, which, under Elliott's Supp. § 297, must be granted on proper affidavit by either party.—*State v. Wolever*, 127 Ind. 306, 26 N. E. 762.

[v] (App. 1908)

Where a felony has been committed, any citizen may, without warrant, arrest a person; but he assumes the hazard of being sued for damages for a wrongful arrest.—*Grand Rapids & I. R. Co. v. King*, 41 Ind. App. 701, 83 N. E. 778.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Imp. §§ 5-61, 79.  
See, also, 19 Cyc. p. 322; note, 92 C. C. A. 594; note, 51 L. R. A. 193.

§ 8. — Illegality of detention after arrest.

[a] (Sup. 1861)

Suit for false imprisonment. Answer that defendant, acting as city marshal, arrested the plaintiff, on view, for intoxication and noise in the streets on Sunday, in violation of the city ordinances, whereof three were set out,—(1) fixing a fine for intoxication; (2) against improper noise; (3) authorizing the marshal to arrest and conduct before the mayor's court persons found guilty of breach of city ordinances. The mayor's court not being in session on Sunday, defendant kept plaintiff in custody five hours, then released him on promise of his appearance in court next day, when he did appear and was fined for drunkenness. *Held*, that no statute made drunkenness a crime or misdemeanor, and, though the city might recover a forfeiture or penalty in a suit at law, yet this did not authorize the imprisoning of a man for an uncertain time by a ministerial officer of his own volition; the duty of such officer being to take the prisoner forthwith before a tribunal having jurisdiction, and then prefer a complaint against him. The answer was *held* bad on demurrer.—*Low v. Evans*, 16 Ind. 486.

[b] (Sup. 1873)

Where officers having charge of a person under arrest have no authority to fix the bail

and take a recognizance, or to receive in pledge any article of value as security for the appearance of the prisoner, their failure to take bail or receive such pledge is no evidence of malice.—*Boaz v. Tate*, 43 Ind. 60.

[c] (Sup. 1879)

Where a defendant, fined for violation of a city ordinance, was compelled to work out the fine by laboring on the streets, *held*, that he could maintain an action for false imprisonment.—*Torbert v. Lynch*, 67 Ind. 474.

[d] (Sup. 1891)

The act of the mayor in refusing to administer the oath to defendant on his affidavit for change of venue is judicial, under Elliott's Supp. § 297, providing that a change shall be granted "whenever affidavit shall be made before the justice [mayor] by either party," and protects the mayor from an action for false imprisonment.—*State ex rel. Egan v. Wolever*, 127 Ind. 306, 26 N. E. 762.

So is his decision as to the sufficiency of an affidavit made before a notary instead of himself.—*Id.*

[e] (App. 1897)

A police officer arresting a person for violation of the liquor law took him first to the mayor's office, then to a justice of the peace, and, finding both absent, started towards the office of another justice, when the prisoner refused to accompany him further, offering such physical resistance as to necessitate the assistance of another officer to force him to proceed. As it was early in the morning, and the justice was probably not in his office, the officer to protect the prisoner from injury caused by his resistance, and to facilitate matters, incarcerated the prisoner in the jail near by for a period of one hour, while he procured a warrant for his arrest. *Held*, that the temporary incarceration was justifiable.—*Weser v. Welty*, 47 N. E. 639, 18 Ind. App. 664.

[f] (Sup. 1902)

By Burns' Rev. St. 1901, § 1771, a sheriff is authorized to arrest without a warrant any person whom he may find violating any of the penal laws; but the section provides that the detention of the person so arrested is to continue only until a legal warrant can be obtained. *Held* that, if an officer detains a person for a longer period than necessary to obtain a warrant, he is liable for false imprisonment.—*Harness v. Steele*, 64 N. E. 875, 159 Ind. 286.

An officer who has made an arrest without a warrant should, on becoming satisfied thereafter that the accused is not guilty of the offense, release him; but, if either the arrest was unlawful, or the prisoner has been illegally detained or deprived of his liberty by the officer before such release or discharge, that the officer released the person arrested under such circumstances will not relieve him of an action at the instance of the injured party.—*Id.*

An officer arresting without a warrant cannot justify his action in holding or detaining the prisoner for an unreasonable time before obtaining a warrant upon the ground that such delay was necessary in order to investigate the case and procure evidence against the accused.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. False Imp. §§ 68-73.

See, also, 19 Cyc. p. 322.

**§ 9. Defenses.**

Evidence, see post, § 26.

Pleading, see post, § 20.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. False Imp. §§ 6, 7, 31, 59, 74-78.

See, also, 19 Cyc. pp. 338-356; note, 18 L. R. A. 356.

**§ 11. — Exercise of authority or duty.**

[a] (Sup. 1863)

A deputy provost marshal, directed by his superior officer to arrest and punish persons not connected with the army for retailing liquor at their usual place of business to soldiers, is not protected by such order from liability to the arrested persons for damages on account of such arrest.—Griffin v. Wilcox, 21 Ind. 370.

[b] (Sup. 1876)

Where defendants caused the arrest and imprisonment of plaintiff under an act thereafter found to be unconstitutional, they cannot justify under such enactment in an action for false imprisonment.—Sumner v. Beeler, 50 Ind. 341, 19 Am. Rep. 718.

[c] (Sup. 1887)

The detention or keeping in of pupils for a short time after dismissal of the rest of the class as a punishment for some misconduct has none of the elements of false imprisonment about it, however mistaken a teacher may be as to the justice or propriety of imposing such a penalty at the particular time, unless imposed from wanton, willful, or malicious motives.—Fertich v. Michener, 11 N. E. 605, 14 N. E. 68, 111 Ind. 472, 60 Am. Rep. 709.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. False Imp. §§ 75-77.

See, also, 19 Cyc. pp. 339-356.

**§ 13. — Probable cause.**

[a] (Super. 1872)

An officer is justified in arresting and imprisoning an offender for "probable cause," and, if there is reason to believe that a person is insane, and about to commit mischief, which, if committed by a sane person, would constitute a criminal offense, an officer may detain the offender until it may reasonably be presumed that he has changed his purpose.—Paetz v. Dain, Wils. 148.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. False Imp. §§ 6, 7, 31, 59.

See, also, 19 Cyc. pp. 351-353.

**§ 15. Persons liable.**

Pleading, see post, § 20.

[a] (Sup. 1873)

If a jailer after receiving a prisoner unnecessarily put him in a filthy place, or otherwise exceed his authority, the police officers who made the arrest are not liable for such acts, unless they advise, or in some manner participate in, such oppressive excess of authority.—Boaz v. Tate, 43 Ind. 60.

If police officers make an arrest and bring the prisoner to the jailer, and inform him of the arrest for a criminal offense committed in their view, the jailer, by receiving the prisoner as such, does not become liable for the former wrongful or oppressive acts of the police officers.—Id.

[b] (Sup. 1873)

Where a person is illegally under arrest, a justice of the peace is also a trespasser in committing the person so arrested to prison, as he has not acquired jurisdiction over his person.—Dietrichs v. Schaw, 43 Ind. 175.

[c] (Sup. 1881)

An express company which employs agents to pursue, arrest, and prosecute those who are supposed to have stolen the company's property is liable for the acts of its agents who falsely imprison parties suspected, notwithstanding that the company does not expressly authorize or sanction the illegal imprisonment.—American Exp. Co. v. Patterson, 73 Ind. 430.

[d] (Sup. 1885)

Where a railroad company employs a detective to arrest persons unlawfully obstructing its track, and he, acting within the terms of his employment, arrests an innocent person, the railroad company is liable therefor.—Evansville & T. H. R. Co. v. McKee, 99 Ind. 519, 50 Am. Rep. 102.

[e] (Sup. 1885)

A principal who selects an agent to detect and arrest offenders is responsible for the acts of the agent committed within the general scope of his employment, although the agent may have done an unlawful act, and have arrested an innocent man.—Pennsylvania Co. v. Weddle, 100 Ind. 138.

[f] (Sup. 1894)

A railroad company is not liable for the action of its local check clerk of freight, in prosecuting one, without probable cause, for the theft of articles from its cars.—Flora v. Russell, 138 Ind. 153, 37 N. E. 593.

[g] (App. 1902)

Where the watchman and floor walker of a department store, whose general duty it was to protect the goods from being stolen, wrong-

fully accused a customer of stealing, placed her under restraint, and searched her, the proprietors of the store were liable in an action for false imprisonment, though the particular acts of the employes complained of were willful, and not directly authorized.—*Efroymsen v. Smith*, 63 N. E. 328, 29 Ind. App. 451.

[h] (App. 1908)

The mere fact that a railroad employed a detective does not imply that he had authority to make arrest.—*Grand Rapids & I. R. Co. v. King*, 41 Ind. App. 701, 83 N. E. 778.

A corporation is responsible for the acts of an agent in arresting and imprisoning plaintiff, performed while engaged in the discharge of duties, within the general scope of his agency, although the particular act was willful, and was not directly authorized.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Imp. §§ 5-67;  
34 CENT. DIG. Mast. & S. § 1222.

See, also, 19 Cyc. 325-336; notes, 14 L. R. A. 791, 44 L. R. A. 795, 47 L. R. A. 593, 51 L. R. A. 193.

#### (B) ACTIONS.

Former judgment as barring action, see JUDGMENT, § 585.

Removability of cause to federal court, see REMOVAL OF CAUSES, §§ 21, 86.

#### § 16. Nature and form of remedy.

Waiver of tort and suit in assumpsit, see ACTION, § 28.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Imp. §§ 80-82.

See, also, 19 Cyc. p. 357.

#### § 20. Pleading.

Aider by verdict or judgment, see PLEADING, § 434.

Amendment to conform to proof, see PLEADING, § 237.

Conclusions, see PLEADING, § 8.

[a] (Sup. 1834)

Where, in trespass for false imprisonment against a magistrate, he pleaded in justification that the arrest, etc., was by virtue of a warrant issued by him against the plaintiff as the father of a bastard child, on the complaint of the overseers of the poor, and showed that the child was not then born, or omitted to state that the complaint was reduced to writing, or that the mother had failed to prosecute for the child's maintenance or that the warrant was in due form, the plea was insufficient.—*Poult v. Slocum*, 3 Blackf. 421.

[b] (Sup. 1837)

If an officer justify an arrest under process which he is bound to return, the return day being past, he must allege a return in his plea.—*Davis v. Bush*, 4 Blackf. 330.

[c] (Sup. 1839)

Where a constable justifies an arrest, etc., under a *capias ad satisfaciendum*, which under the statute he is bound to return, the plea must aver a return of the execution, or show a sufficient reason why a return had not been made.—*May v. Sly*, 5 Blackf. 206.

[d] (Sup. 1843)

In trespass for an assault and false imprisonment, it appeared that at and shortly before the time of the arrest there was in plaintiff's neighborhood an association of persons engaged in making and passing counterfeit money. *Held*, that the fact that plaintiff was one of that association, and had been engaged in passing counterfeit money knowingly and with intent to defraud the public, should be specially pleaded.—*Wasson v. Canfield*, 6 Blackf. 406.

In trespass for an assault and false imprisonment, A. pleaded that he was a justice of the peace, that a felony had been committed, that there was reasonable ground for suspicion that plaintiff was guilty of said felony, and that in consequence thereof he had ordered plaintiff to be arrested. *Held*, that the plea was insufficient, in that it omitted to set out the grounds upon which the suspicion and belief of plaintiff's guilt were founded.—*Id.*

In trespass for an assault and imprisonment, B. pleaded that he was a constable, that a felony had been committed, that a reasonable suspicion and belief existed that the plaintiff was guilty of said felony, that one A. and others, informed him (the defendant) that the plaintiff was guilty of said felony, and that for the purpose of carrying the plaintiff before some justice of the peace to be dealt with he had gently arrested him. *Held*, on general demurrer, that the plea was bad, for not showing that his informant stated the facts by which he knew or believed the plaintiff to be guilty, and for not setting out those facts.—*Id.*

[e] (Sup. 1846)

In trespass for an assault and battery and false imprisonment, the plea was that the defendant made oath before a justice of the peace that he had been threatened by the plaintiff, etc., and prayed surety of the peace; that the justice thereupon issued his warrants, etc. *Held*, that the plea amounted to the general issue.—*Crookshank v. Kellogg*, 8 Blackf. 256.

[f] (Sup. 1869)

An answer justifying an arrest made by the defendant as sheriff, by virtue of a *ca. ad resp.*, need not state that an affidavit was filed before the writ issued; but, if the return day be past, such answer must show a return.—*Caldwell v. Kenworthy*, 31 Ind. 238.

[g] (Sup. 1870)

To sustain an action for having arrested the plaintiff in a civil action, malice and want of probable cause must be averred and proved. A count that defendant caused the plaintiff to

be imprisoned, etc., under a false charge, etc., and whereby he was damaged, is defective.—*Seeger v. Pfeifer*, 35 Ind. 13.

[h] The complaint in an action for false imprisonment need not aver that the same was either wrongful, unlawful, malicious, or without probable cause.—(Sup. 1871) *Colter v. Lower*, 35 Ind. 285, 9 Am. Rep. 735; (1877) *Carey v. Sheets*, 60 Ind. 17.

[i] (Sup. 1872)

An answer which attempts to justify the arrest and imprisonment complained of must identify the arrest justified with the arrest complained of, or it will be bad on demurrer.—*Gallimore v. Ammerman*, 39 Ind. 323.

A complaint for arrest and false imprisonment need not aver that the facts complained of were done illegally, or wrongfully, or without competent authority.—Id.

[j] (Sup. 1873)

Where a complaint for false imprisonment alleges that the plaintiff was imprisoned on more than one charge, an answer justifying the arrest on only one of the charges is bad.—*Boas v. Tate*, 43 Ind. 60.

Where the gravamen of an action is for arresting and imprisoning the plaintiff without legal process, averments in the complaint relative to the malicious purposes of the defendant are only by way of aggravation.—Id.

In an action for false imprisonment the defense of justification is not available under a general denial.—Id.

[k] (Sup. 1874)

An answer of justification in an action for false imprisonment sufficiently identifies the imprisonment justified if it is stated to be the same imprisonment complained of by the plaintiff.—*Scircle v. Neeves*, 47 Ind. 289.

[l] (Sup. 1877)

In an action for false imprisonment, it need not be averred in the complaint that the matter complained of was wrongful or unlawful or malicious or without probable cause.—*Carey v. Sheets*, 60 Ind. 17.

[m] (Sup. 1881)

Where a complaint against a corporation for false imprisonment alleges that injury was done at the instigation and procurement of defendant, and there is no motion for more specific statement of facts, plaintiff may offer any evidence tending to show the truth of the allegation.—*American Exp. Co. v. Patterson*, 73 Ind. 430.

A complaint against an express company for false imprisonment, which alleges that the acts of the agent who caused plaintiff's arrest and imprisonment were done "at the instigation and procurement of the defendant," sufficiently charges defendant with responsibility for the agent's acts.—Id.

The failure of a complaint against a corporation for false imprisonment to sufficiently allege the means and manner by which it procured the false imprisonment, while subjecting it to a motion to make more specific, does not render it obnoxious to demurrer.—Id.

[n] (Sup. 1884)

Justification for false imprisonment by pleading a warrant must show that the arrest was for the same trespass as charged in the complaint.—*Young v. Warder*, 94 Ind. 357.

[o] (App. 1897)

In an action for false imprisonment by an officer, an answer in justification, after stating the facts of the arrest, alleging that the officer "was justified in making the arrest and causing the imprisonment of the plaintiff complained of," is sufficient to identify the imprisonment justified as the imprisonment alleged in the complaint.—*Weser v. Welty*, 47 N. E. 639, 18 Ind. App. 664.

[p] (Sup. 1902)

A complaint for false imprisonment is sufficient without alleging that the act complained of was illegal or wrongful, or that the arrest or imprisonment was without competent authority, or malicious, or without probable cause.—*Harness v. Steele*, 64 N. E. 875, 159 Ind. 286.

[q] (App. 1908)

A complaint in an action against a railroad for false imprisonment by a railway detective, showing that the detective was employed by defendant with authority to arrest all persons who had stolen its property, and that the detective within the scope of his employment, but without warrant of law, and without any criminal offense being committed by plaintiff in his presence, arrested and imprisoned plaintiff, and that said arrest was caused by appellant through its agents, servants, detectives, and employes, while acting in the scope of their employment, is not defective, in that by its allegations the detective's authority and the scope of his employment is measured and defined by the word "detective."—*Grand Rapids & I. R. Co. v. King*, 41 Ind. App. 701, 83 N. E. 778.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Imp. §§ 86-97.  
See, also, 19 Cyc. pp. 358-362.

## § 21. Evidence.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Imp. §§ 98-108.  
See, also, 19 Cyc. pp. 362-366.

## § 22. — Presumptions and burden of proof.

[a] (App. 1903)

In an action for false imprisonment, proof that plaintiff was imprisoned is sufficient to raise the presumption that such imprisonment was illegal, and the burden of establishing the

contrary is on defendant.—*Black v. Marsh*, 67 N. E. 201, 31 Ind. App. 53.

[b] (App. 1905)

In a suit for false imprisonment, an instruction that the fact that plaintiff was imprisoned was sufficient to raise the presumption that such imprisonment was illegal, and that the burden of establishing the contrary was on defendants, was not erroneous.—*Grand Rapids & I. R. Co. v. King*, 41 Ind. App. 701, 83 N. E. 778.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Imp. §§ 98–99.  
See, also, 19 Cyc. p. 362.

§ 23. — Admissibility in general.

Hearsay evidence, see EVIDENCE, § 317.

Opinion evidence, see EVIDENCE, § 471.

Self-serving declarations, see EVIDENCE, § 271.

[a] (Sup. 1878)

In an action for false imprisonment, a note given by one of the defendants to a third person, which had no connection with the case or with plaintiff, was properly excluded from the evidence.—*Stewart v. Maddox*, 63 Ind. 51.

[b] (Sup. 1881)

In an action for false imprisonment, plaintiff may give evidence of the proceedings upon a writ of habeas corpus by which he was discharged from custody.—*American Exp. Co. v. Patterson*, 73 Ind. 430.

Where the warrant on which an arrest was made was directed to any constable of the county, but was put in the hands of a special constable, who arrested plaintiff and took him before a justice of the peace, evidence of the proceedings before the justice were admissible in a subsequent action for false imprisonment.—*Id.*

[c] (App. 1903)

In an action for assault and false imprisonment, it was immaterial who had been with defendant during the day, or whether she had been alone in the house, from which she came about 4 o'clock in the afternoon, when she saw plaintiff, as she alleged, stealing her cherries.—*Golibart v. Sullivan*, 66 N. E. 188, 30 Ind. App. 428.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Imp. § 100.  
See, also, 19 Cyc. p. 364.

§ 25. — Character and condition of parties.

[a] (Sup. 1881)

In suit for damages for false imprisonment, evidence of plaintiff's good character is not admissible in the first instance; but after defendants, in mitigation of damages, have set up that they acted in good faith, and have introduced evidence tending to cast suspicion on plaintiff's character, then evidence of good char-

acter becomes pertinent and is admissible.—*American Exp. Co. v. Patterson*, 73 Ind. 430.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Imp. § 102.  
See, also, 19 Cyc. p. 365.

§ 26. — Justification.

[a] (App. 1903)

In an action for assault and false imprisonment of a boy by defendant for stealing her cherries, evidence as to the tree having been raided before by boys during the same day, or as to how many times it was so raided, was properly excluded.—*Golibart v. Sullivan*, 66 N. E. 188, 30 Ind. App. 428.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Imp. §§ 103, 104.

§ 30. — Mitigation of damages.

[a] (Sup. 1843)

A warrant, illegal on its face, which had been issued by one defendant, A., as justice of the peace, and under which another defendant, B., had made the arrest complained of, and which had been referred to by the plaintiff's witness, was admissible evidence for the defendants in mitigation of damages.—*Wasson v. Canfield*, 6 Blackf. 406.

In trespass for an assault and false imprisonment, defendants might prove, in mitigation of damages, that at and shortly before the time of the arrest there was in the plaintiff's neighborhood an association of persons engaged in making and passing counterfeit money, and that plaintiff was generally reputed and believed there to have been one of that association.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Imp. §§ 106, 107.

§ 31. — Weight and sufficiency.

[a] (App. 1893)

In an action against a justice of the peace for imprisonment under an alleged illegal mittimus, a recital in the mittimus that the justice has found that plaintiff has money on his person, which he fraudulently withholds and conceals, so that execution cannot be levied thereon, with intent to defraud the execution creditor, and that he has refused to turn the same over to the court, warrants a finding by the jury that judgment had been entered and signed by the justice before issuing the mittimus, as required by Rev. St. 1881, § 1480, though the judgment is dated a day later than the mittimus.—*Van Vleck v. Thomas*, 9 Ind. App. 83, 35 N. E. 913.

[b] (Sup. 1902)

In action for false imprisonment, evidence held to sustain a verdict for plaintiff.—*Harness v. Steele*, 64 N. E. 875, 159 Ind. 286.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Imp. § 108.

**§ 32. Damages.**

Evidence of mitigation of damages, see ante, § 30.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Imp. §§ 109-115.

See, also, 19 Cyc. pp. 367-372.

**§ 34. — Elements of compensation.**

[a] (Supp. 1878)

In an action for false imprisonment, and compelling plaintiff by assault and menaces to execute and deliver a promissory note, compensatory damages may include delay in business, permanent disability and disfigurement, bodily pain, mental anguish from a sense of humiliation, and any injury to the plaintiff's business, profession, reputation, or social position.—*Stewart v. Maddox*, 63 Ind. 51.

[b] (Supp. 1902)

Wounded pride, humiliation, and mortification from a public arrest are elements of damage in an action for false imprisonment against an officer and one causing his arrest.—*Harness v. Steele*, 64 N. E. 875, 159 Ind. 286.

[c] (App. 1903)

In an action for assault and false imprisonment, damages are recoverable for physical and mental pain, including humiliation, if any, caused by the injury.—*Golibart v. Sullivan*, 66 N. E. 188, 30 Ind. App. 428.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Imp. § 111.

See, also, 19 Cyc. pp. 368, 369.

**§ 35. — Exemplary.**

[a] (Supp. 1878)

In an action for false imprisonment, and meanwhile compelling plaintiff by assault and menaces to execute and deliver a promissory note, compensatory, but not exemplary, damages may be recovered.—*Stewart v. Maddox*, 63 Ind. 51.

Where the facts alleged in the complaint in an action for false imprisonment amount to a criminal offense, exemplary damages cannot be granted.—*Id.*

[b] (Supp. 1902)

Where, in an action for false imprisonment, the evidence discloses that plaintiff was accused in the presence of others of being a thief, and, when he protested his innocence, called a liar, exemplary damages were proper.—*Harness v. Steele*, 64 N. E. 875, 159 Ind. 286.

In false imprisonment exemplary damages do not depend alone upon malice on the part of the wrongdoer, but they may be rightfully awarded when the wrongful act is willfully done in a wanton or oppressive manner, or done with reckless disregard of the rights of the complaining party.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Imp. § 112.

See, also, 19 Cyc. p. 371.

**§ 36. — Amount awarded.**

[a] (App. 1902)

Plaintiff, a woman whose appearance did not in any way invite suspicion or discourtesy, was publicly wrongfully accused of stealing by defendants' watchman and floorwalker, while she was carrying some shoes, which she proposed to purchase, across defendants' store, with the permission of a clerk, in order to show them to some one, and was forcibly restrained of her liberty and searched by the watchman and floor walker, who, though requested by her so to do, refused to ask the clerk anything about the matter. The clerk, however, interposed, and plaintiff was released, but no apologies were made by any one, nor any regret expressed to her. *Held*, that a verdict of \$2,000 was not so excessive as to show partiality, prejudice, or corruption on the part of the jury.—*Efroymsen v. Smith*, 63 N. E. 328, 29 Ind. App. 451.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Imp. §§ 110, 113-115.

See, also, 19 Cyc. p. 372.

**§ 37. Trial.**

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Imp. §§ 116-120.

See, also, 19 Cyc. pp. 373-375.

**§ 39. — Questions for jury.**

[a] (App. 1903)

In an action against a husband and wife for an assault and false imprisonment by the wife, evidence examined, and *held* to warrant submission to the jury, including the question as to the consent of the husband to his wife's acts.—*Golibart v. Sullivan*, 66 N. E. 188, 30 Ind. App. 428.

[b] (App. 1903)

Whether defendant in an action for false imprisonment procured and directed the unlawful arrest is a question of fact.—*Black v. Marsh*, 67 N. E. 201, 31 Ind. App. 53.

[c] (App. 1908)

Whether a railway detective was acting within the scope of his employment in making an illegal arrest *held*, under the evidence, a question for the jury.—*Grand Rapids & I. R. Co. v. King*, 41 Ind. App. 701, 83 N. E. 778.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Imp. §§ 116-118.

See, also, 19 Cyc. pp. 373, 374.

**§ 40. — Instructions.**

Applicability of instructions to pleadings and evidence in general, see TRIAL, § 251.

Error in instructions cured by withdrawal or giving other instructions, see TRIAL, § 296. Instructions as to evidence and matters of fact in general, see TRIAL, § 234.

[a] (Sup. 1902)

In an action for false imprisonment, the evidence showed that plaintiff was arrested for stealing a watch, the officer making the arrest having no warrant, and acting on information; and that plaintiff was detained against his will for some time, without being taken before any magistrate, or any formal charge being made against him. The court charged that it is the duty of a sheriff arresting a person without a warrant, upon information, when he has reasonable or probable cause to believe that such person has committed a felony, without delay to take the person arrested before some magistrate, to be charged with such offense by affidavit. Defendant contended that the court should have charged that a peace officer is not required in all cases to take his prisoner before a magistrate, but may release him. *Held*, that the instruction was applicable to the evidence.—*Harness v. Steele*, 64 N. E. 875, 159 Ind. 286.

In an action against two defendants for false imprisonment the court instructed as to the measure of damages if they found for one of defendants, and in another instruction stated the damages if they found against such defendant. Such defendant contended the first instruction was erroneous, as the jury must have understood they would not be justified in finding in his favor, and that the second was erroneous in that it gave the jury to understand

they could not find in his favor unless they found in favor of both. *Held*, that the contention was of no merit, the court having instructed as to form of verdict if they found for both defendants, and that they might find against both, or in favor of one and against the other.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Imp. § 119.

See, also, 19 Cyc. p. 374.

## II. CRIMINAL RESPONSIBILITY.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Imp. §§ 122-126.

See, also, 19 Cyc. pp. 376, 377.

## FALSE PERSONATION.

See—

Element of offense—

FALSE PRETENSES, § 19.

LARCENY, § 14.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Pers.

See, also, 19 Cyc. pp. 379-383.

## FALSE PLEADING.

See PLEADING, §§ 24, 359, 360.

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

# FALSE PRETENSES.

## Scope-Note.

[INCLUDES fraudulently obtaining or attempting to obtain from another personal property, or the making or indorsement by him of a negotiable instrument, or the execution of any instrument in writing, or any benefit or advantage, by false tokens or representations; nature and elements of the crimes of cheating, swindling, obtaining money or goods by false pretenses, larceny by false pretenses, etc.; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.

[EXCLUDES fraud not involving use of false tokens or representations (see *Fraud*); personation of another (see *False Personation*); forgery of instruments in writing, and uttering such forged instruments (see *Forgery*); making, passing, etc., counterfeit coin or other money, securities, etc. (see *Counterfeiting*); and obtaining board or lodging with intent not to pay therefor (see *Innkeepers*). For complete list of matters excluded, see cross-references, post.]

## Analysis.

1. Nature of offense in general.
2. Statutory provisions.
3. Elements of offenses.
5. — Intent.
6. — False token.
7. — Nature of pretense.
11. — Nature of property, right, or benefit obtained.
13. — Procuring written instrument or signature.
14. — Injury from fraud.
16. Obtaining money or property by trick or device or confidence game.
18. Fraudulent presentation of claim to public officer.
19. False personation of officer or another person.
22. Defenses.
23. Persons liable.
24. Venue.
25. Indictment or information.
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27. — Intent.
28. — Description of person defrauded.
29. — Description of false token or pretense or other instrument or means of fraud.
30. — Falsity of pretense and knowledge thereof.
31. — Reliance on pretense and inducement to act.
32. — Description, value, and ownership of property obtained.
33. — Description of written instrument or signature obtained.
34. — Obtaining money, property, or written instrument, or signature.
37. — Presentation of fraudulent claim.
38. — Issues, proof, and variance.
39. Presumptions and burden of proof.
40. Admissibility of evidence.
43. — False token or pretense, or other instrument or means.
49. Weight and sufficiency of evidence.
50. Trial.
51. — Questions for jury.
52. — Instructions.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

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*Cross-References.*

See—

Bona fide purchaser of goods obtained by.  
SALES, § 234.Conspiracy to obtain money by. CONSPIRACY,  
§§ 38, 43, 45, 48.

COUNTERFEITING.

FORGERY.

Fraud constituting criminal offense not involving false pretense or representation. FRAUD,  
§§ 68, 69.

Jurisdiction of offense. CRIMINAL LAW, § 97.

Larceny or obtaining money by. LARCENY,  
§ 14.Matters to be shown by record on appeal.  
CRIMINAL LAW, § 1086.

Words imputing crime of as constituting libel or slander. LIBEL AND SLANDER, § 7.

**§ 1. Nature of offense in general.**

[a] (Sup. 1889)

Defendant bargained for carpets, giving a false name (Mrs. K.), and representing that she had a good income, and that she lived at a certain street and number. The contract was executed by defendant as Mrs. K., and provided that title should remain in the seller, and the goods should remain at said street and number till paid for. Defendant arranged with the persons living at that number to allow Mrs. K., who she said owned the goods, to come there and help make the carpets. After they were delivered, she stated that Mrs. K. wanted them shipped to her house, and they were boxed and sent to defendant's home in another state, where defendant received them. Defendant made false statements to others as to how she obtained the goods. *Held*, that the evidence was sufficient to convict of larceny.—*March v. State*, 117 Ind. 547, 20 N. E. 444.

[b] (Sup. 1889)

Where defendant succeeds, by considerable negotiation, in exchanging a \$4 watch for a \$30 horse, such act is not necessarily indictable as obtaining goods under false pretenses, though it be of such nature that an action at law would lie for the difference in value.—*State v. Fields*, 118 Ind. 491, 21 N. E. 252.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Pret. § 1.

See, also, 19 Cyc. pp. 386, 387.

**§ 2. Statutory provisions.**

[a] (Sup. 1858)

2 Rev. St. p. 410, § 27, punishing any person who shall, with intent to defraud, designedly by color of any false token or writing or any false pretense, obtain the signature of any person to any written instrument or obtain from any person any money or thing of value, seems to be broad enough to embrace any and every false representation made by a party by means of which he has fraudulently obtained the property of another. It cannot intend to have a range so wide as its terms would seem to indicate because if it be liberally construed breach of contract and crime will scarcely be divided by an appreciable line and the pretenses must be of some existing fact made for the

purpose of inducing the prosecutor to part with his property and to which a person of ordinary caution would give credit.—*State v. Magee*, 11 Ind. 154.

[b] (Sup. 1883)

Rev. St. 1881, § 2204, provides that whoever, with intent to defraud another, designedly, by color of any false token or writing, obtains from any person anything of value, shall be imprisoned, etc., and omits the words, "or any false pretense," contained in Act June 10, 1852, § 27, on the same subject. *Held*, that the quoted words were repealed by section 2204.—*Wagoner v. State*, 90 Ind. 504.

[c] (Sup. 1903)

Burns' Rev. St. 1901, § 2178 (*Horner's* Rev. St. 1901, § 2083), which provides that whoever allures, entices, or persuades another to any place on any pretense, and by duress or fraud compels such person to win or lose or advance money, etc., is guilty of bunco steering, and on conviction shall be punished, etc., has no extraterritorial force, and the offense defined thereby cannot be committed partly in Indiana and partly in another state.—*Cruthers v. State*, 67 N. E. 930, 161 Ind. 139.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Pret. § 2.

See, also, 19 Cyc. pp. 390-393.

**§ 3. Elements of offenses.**

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Pret. §§ 1, 3-18, 25.

See, also, 19 Cyc. pp. 387-416; note, 14 L. R. A. 264.

**§ 5. — Intent.**

Allegations in indictment, see post, § 27.

[a] (Sup. 1869)

The statute relative to false pretenses (2 Gav. & H. St. p. 445, § 27) does not require as an element of the offense thereby defined that the false representation should be made for the purpose of accomplishing the particular thing which does result. A false pretense such as would tend to produce the result accomplished, an obtaining thereby, and designedly, a thing of value from another, and an inten-

tion by the transaction to defraud that other, are the only elements of the offense.—*Todd v. State*, 31 Ind. 514.

If a particular result is designed to be accomplished by making the false pretense, which, however, fails, and another thing of value is obtained and accepted with like intent to defraud, the law imputes to the person making the false pretense a design from the beginning to consummate the latter result.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Pret. § 3.

See, also, 19 Cyc. pp. 413-416.

### § 6. — False token.

Admissibility of evidence, see post, § 43.

Description in indictment, see post, § 29.

#### [a] (Sup. 1875)

The gravamen of the crime defined by 2 Gav. & H. St. p. 445, § 27, consists in obtaining the signature of any person to any written instrument, or in obtaining from any person any money, transfer, note, bond, or receipt, or think of value. The offense may be committed either by color of any false token or writing, or by any false pretense. A printed business card purporting to be that of a firm, but which is not the business card of such firm, exhibited by one who claims to act as agent of such firm in making contracts, is a token or writing, within the meaning of the statute.—*Jones v. State*, 50 Ind. 473.

"Token," as used in a statute punishing false pretenses, signifies "a sign," "a mark," "a symbol"; and a "written token" includes matter printed or lithographed.—*Id.*

#### [b] (Sup. 1882)

A fraudulent use of an order to sell corn which the holder of the order had already sold is not the use of a false token or writing on which an indictment will lie, under Rev. St. 1881, § 2204 (Rev. St. 1876, p. 436, § 27), although the offense might be indictable as a false representation.—*Shaffer v. State*, 82 Ind. 221.

#### [c] (Sup. 1883)

Rev. St. 1881, § 2204, provides that whoever, with intent to defraud another, designedly, by color of any false token or writing, obtains from any person anything of value, shall be imprisoned, etc. *Held* that, in a prosecution for violation of such statute, it is not essential that the state show that the offense was committed by color of a false token or writing alone, unaided by any verbal representation or pretense, and that the words, "by color of false token or writing," mean by making the false token or writing to appear different from what it is, or by representing such false token or writing to be true and genuine.—*Wagoner v. State*, 90 Ind. 504.

#### [d] (Sup. 1906)

A postdated and postpayable check, on the faith of which goods are obtained, cannot be made the basis of a prosecution for false pretenses, either under Acts 1905, p. 751, c. 169, § 677, prescribing the punishment for obtaining anything of value by color of any false token or writing, or under section 678, prescribing the punishment for obtaining property from another by color or aid of a check or order for the payment of money, when the drawer or maker of the check or order is not entitled to draw on the drawee for the sum specified therein.—*Brown v. State*, 76 N. E. 881, 166 Ind. 85.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Pret. § 4.

See, also, 19 Cyc. p. 388.

### § 7. — Nature of pretense.

[a] A false pretense, under the statute, must relate to a past event or existing fact. Any representation in regard to a future transaction is excluded.—(Sup. 1858) *State v. Magee*, 11 Ind. 154; (1875) *Keller v. State*, 51 Ind. 111.

#### [b] (Sup. 1858)

An indictment alleged that accused, with intent to cheat and defraud B., falsely and fraudulently represented that C. was indebted to accused, and, if B. would lend accused \$5, C. would on demand repay the same; that B., believing the representation, loaned accused \$5; that in truth the representations were false; that B. demanded of C. the sum loaned, but he refused to repay it. *Held*, that the indictment did not charge the crime of false pretenses; the allegations being nothing more than a promise by accused that C. on demand would repay the amount loaned.—*State v. Magee*, 11 Ind. 154.

#### [c] (Sup. 1868)

Representations, by one applying for the loan of an accommodation note, that his indebtedness was but \$2,000, when he knew it to be \$12,000, and that his property was unincumbered by debts, when it was under executions and judgments to the amount of \$6,000, *held* representations of material facts, and indictable.—*State v. Pryor*, 30 Ind. 350.

#### [d] (Sup. 1869)

Indictment charging that "A. and B., on, etc., did, feloniously, designedly, and with intent to defraud C., represent and pretend to said C. that a certain bank check and order for the payment of money [here set out in *hæc verba*, purporting to be drawn by D., payable to E., and indorsed by the latter in blank] which the said A. then had in his possession, was good and of the value stated on its face, to wit, eight hundred dollars in currency; by means of which false pretense said A. and B. did then and there obtain from said C. [certain money specified], the goods, etc., of said C.;

and the said A. and B. then and there delivered said check to said C., to be kept by him as security for the payment of said money by him loaned to said A. and B., which was then and there obtained from said C. as aforesaid by them, with intent to cheat and defraud him; whereas in truth, etc., said check was not good, was not of the value of eight hundred dollars in currency, but was of no value whatever; all of which said A. and B. then and there well knew," etc. *Held*, that the indictment showed, not merely a false promise, but false pretense as to an existing fact, and was sufficient.—*Maley v. State*, 31 Ind. 192.

Representing a bogus check as good is an indictable false pretense as to an existing fact, and not a mere promise that the check should be paid.—*Id.*

[f] (*Sup.* 1869)

A false representation by one person to another that he owns a check on a bank, where he has neither funds nor credit, is a false pretense, within the statute.—*Casily v. State*, 32 Ind. 62; *Clarke v. Same*, *Id.* 67.

[f] (*Sup.* 1877)

Such false representations of a defendant's solvency and ability to pay for goods as might deceive a man of common intelligence are representations of alleged existing facts sufficient to support an indictment for obtaining the goods under false pretenses.—*Clifford v. State*, 56 Ind. 245.

[g] (*Sup.* 1877)

False representations made by seller, during negotiations for a sale of property to be paid for in a note of a third person, touching the pecuniary responsibility of the maker of the note, are material representations, and were fairly calculated to induce the injured party to part with his property.—*State v. Timmons*, 58 Ind. 98.

[h] (*Sup.* 1878)

The foreman of a gang of laborers having been indicted for obtaining money by means of fictitious names placed by him on the report made by him, and from which the pay rolls were prepared, but the indictment containing no allegation that it was the duty of the defendant to employ laborers, and that such duty was known both to the persons to whom he made his report and to those by whom the pay rolls were prepared, it was *held* that the indictment was fatally defective, since it charged no false pretenses which would or ought to induce a person of ordinary caution and prudence to part with his property, and that where the paymaster had paid to a person drawing the money in the name of such fictitious person, without identification, it amounted to negligence, with which the employer of such paymaster was chargeable.—*Bonnell v. State*, 64 Ind. 498.

[i] (*Sup.* 1880)

An indictment for obtaining money under false pretenses is sufficient if it states facts

which show that the representations used were such as would deceive a man of common intelligence.—*Miller v. State*, 73 Ind. 88.

[j] (*Sup.* 1889)

Representations that defendant was a witch doctor, and could kill and destroy witches; that the person to whom the representations were made was the victim of witches; and that unless he employed defendant to exorcise them they would kill him and his family,—constitute no offense, being mere expressions of opinion, and not calculated to deceive a man of common understanding.—*State v. Burnett*, 119 Ind. 392, 21 N. E. 972.

[k] (*Sup.* 1892)

False pretenses may consist of acts, without any verbal assertion.—*Musgrave v. State*, 32 N. E. 885, 133 Ind. 297.

[l] (*Sup.* 1899)

Under *Burns' Rev. St.* 1894, § 2352 (*Horner's Rev. St.* 1897, § 2204), declaring guilty of an offense one who with intent to defraud another designedly by a false pretense obtains from any person any money, the false pretense need not be such that a man of ordinary caution and prudence would give it credit, or that it could not be guarded against by ordinary care and prudence.—*Leffler v. State*, 54 N. E. 439, 153 Ind. 82, 45 L. R. A. 424, 74 Am. St. Rep. 300.

[m] (*Sup.* 1909)

False pretenses cannot be predicated upon the nonperformance of a future promise, but must be based upon some existing fact.—*State v. Ferris*, 86 N. E. 993, 171 Ind. 562.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Pret. §§ 5-12, 25.  
See, also, 19 Cyc. pp. 394-408.

## § 11. — Nature of property, right, or benefit obtained.

[a] (*Sup.* 1847)

The obtaining of a transfer of real property by false pretenses is not indictable.—*State v. Layman*, 8 Blackf. 330.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Pret. § 15.  
See, also, 19 Cyc. pp. 410, 411.

## § 13. — Procuring written instrument or signature.

Allegations in indictment, see post, § 33.

[a] (*Sup.* 1900)

*Burns' Rev. St.* 1894, § 2352 (*Rev. St.* 1881, § 2204; *Horner's Rev. St.* 1897, § 2204), provides that a person who, with intent to defraud by false pretenses, obtains the signature of another to a written instrument, or the transfer of any check, shall be imprisoned, etc. An indictment charged that defendant falsely represented to L., whom he had promised to marry and to provide with a home, that he intended to deposit a bank check in her name;

that the check he requested her to sign was for \$125, and that she, believing his statements, signed and delivered the check to defendant, intending to give him \$125; that all such representations and his promise to marry her were false and fraudulent; and that the check signed was in fact for \$725. *Held*, that the indictment sufficiently charged an offense within the statute, though L. intended to sign and deliver a check for a less sum than that named therein.—*State v. Styner*, 56 N. E. 98, 154 Ind. 131.

A gift of a check induced by false pretense may be the subject of an offense within Burns' Rev. St. 1894, § 2352 (Rev. St. 1881, § 2204; Horner's Rev. St. 1897, § 2204), authorizing the punishment of a person who, with intent to defraud another, designedly, by false pretenses, obtains his signature to a written instrument, or the transfer of any check, etc.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Pret. § 17.

#### § 14. — Injury from fraud.

[a] (Sup. 1868)

An indictment charging the obtaining, by false pretenses, of a signature to a note payable in bank to defendant's order, for the purpose of raising money thereon for the sole benefit of defendant, without consideration, was sufficient; the offense being completed when the signature was obtained by the false pretenses, though actual loss or injury was not sustained.—*State v. Pryor*, 30 Ind. 350.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Pret. § 18.

See, also, 19 Cyc. p. 411.

#### § 16. Obtaining money or property by trick or device or confidence game.

Trick or device as element of larceny, see LARCENY, § 14.

[a] (Sup. 1882)

Defendant, by false pretenses, obtained from a Masonic lodge a small sum of money for traveling expenses, which he promised to repay. It was contended that the amount was given in charity, and that therefore an indictment would not lie. *Held*, that the indictment would lie.—*Strong v. State*, 86 Ind. 208, 44 Am. Rep. 202.

[b] (Sup. 1903)

The phrase "any place," as used in Burns' Rev. St. 1901, § 2178, defining and prohibiting bunco steering, contemplates some place within the state of Indiana, and cannot be so enlarged as to include places beyond the state.—*Cruthers v. State*, 67 N. E. 930, 161 Ind. 139.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Pret. § 20.

#### § 18. Fraudulent presentation of claim to public officer.

Indictment or information, see post. § 37.

[a] (Sup. 1910)

Burns' Ann. St. 1908, § 8696, requires the board of public works of cities to keep the streets in repair, and section 8697 gives it general supervision over streets, and requires it to repair them, the cost to be paid out of the general fund, and makes it the duty of the board, whenever such work is payable out of the general treasury, to have it done either by independent contractors or employes of the board, as it deems best. Section 8690 requires the city comptroller to refuse to approve a warrant presented to him which for any cause, should not be approved. Section 2586 imposes a penalty on one who knowingly makes or presents for payment to the treasurer or other accounting officer of a city any false claim, etc., for the purpose of procuring its allowance out of the city treasury. *Held*, that the board of public works of the city of Indianapolis was an "accounting officer" within section 2586, for the purpose of allowing claims against the city for repairing streets, though the city comptroller could, in its discretion, refuse to approve warrants issued by it; it being necessary for the claimant to first present his claim to the board for allowance, so that the willful presentation to it of a false claim for work done in repairing streets, for the purpose of procuring its allowance against the city, was an offense within the statute.—*Brunaugh v. State*, 90 N. E. 1019.

One who knowingly presented, through an innocent person or agent, a false claim against a city for allowance, would be as guilty of the offense of presenting such claim as if he presented it in person.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Pret. § 22.

#### § 19. False personation of officer or another person.

Persons liable, see post. § 23

[a] (Sup. 1875)

Where defendant was indicted under 2 Gav. & H. St. p. 445, § 26, providing that every person who shall personate another, and in such assumed character receive any property intended to be delivered to the party so personated, shall be deemed guilty of larceny, the evidence must show that the money or property obtained by such false personation was intended to be delivered to the party personated.—*Williams v. State*, 49 Ind. 367.

[b] (Sup. 1879)

Where defendant falsely represented himself to be an officer with authority to arrest a certain person for passing counterfeit money by means of which he extorted money from such person and another for the purpose of settling the pretended offense, defendant was not guilty of larceny, but of obtaining money by means of false pretenses.—*Perkins v. State*, 65 Ind. 317.

[c] (*Sup.* 1879)

One who voluntarily represents to another that he is an officer with power to arrest such person for a pretended crime, and thereby obtains from such person money, is guilty of obtaining money by false pretenses, within 2 Rev. St. 1876, § 76.—*Perkins v. State*, 67 Ind. 270, 33 Am. Rep. 80.

It is essential, to constitute the offense of obtaining money, etc., by false pretenses, under the statute, that the person alleged to have been defrauded should have believed the false pretenses to be true, and that they should have been such that, if true, they would naturally operate upon an honest and ordinarily prudent person, and also that such person, in parting with his property, was not himself guilty of a crime. Therefore, *held*, on demurrer, that an indictment for obtaining property from a person, upon the false representation that the defendant was a constable and had a warrant against such person, issued by a justice of the peace, for a crime, and that he would settle the same if the person defrauded would give the defendant the property, could not be sustained.—*Id.*

FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. False Pret. §§ 23, 24.

## § 22. Defenses.

[a] (*Sup.* 1868)

That the money was loaned by the party defrauded for the purpose of enabling defendant to wager with a third person is not a defense on trial for obtaining money by false pretenses.—*Casily v. State*, 32 Ind. 62.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Pret. § 27.

See, also, 19 Cyc. p. 418.

## § 23. Persons liable.

[a] (*Sup.* 1883)

Where defendants, one of whom wore a badge and falsely pretended to be an express agent, entered a railway train and obtained money from another party by means of a fraudulent check, on the representation that they had goods on board the train and needed money to pay the express charges, and that they would cash the check at their destination, both were guilty of larceny.—*Grunson v. State*, 89 Ind. 533, 46 Am. Rep. 178.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Pret. § 28.

See, also, 19 Cyc. p. 417.

## § 24. Venue.

[a] (*Sup.* 1875)

Defendant is not liable to conviction in this state for obtaining property by false pretenses, where the property had been obtained outside the state, though the false pretenses were made here.—*Stewart v. Jessup*, 51 Ind. 413, 19 Am. Rep. 739.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Pret. §§ 29, 30.

## § 25. Indictment or information.

Certainty or particularity, see INDICTMENT AND INFORMATION, § 71.

Duplicity, see INDICTMENT AND INFORMATION, § 125.

Following language of statute in indictment or information, see INDICTMENT AND INFORMATION, § 110.

Pleading matters judicially noticed, see INDICTMENT AND INFORMATION, § 61.

Pleading matters of fact or conclusions, see INDICTMENT AND INFORMATION, § 63.

Pleading matters of presumption, see INDICTMENT AND INFORMATION, § 62.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Pret. §§ 31-53.

See, also, 19 Cyc. pp. 419-441; note, 30 Am. St. Rep. 134.

## § 26. — Requisites and sufficiency in general.

[a] (*Sup.* 1881)

An indictment charging the obtaining of money under false pretenses must specify the pretenses, aver that defendant knew them to be false, and describe the goods obtained and the owner thereof.—*Johnson v. State*, 75 Ind. 553.

[b] (*Sup.* 1883)

Rev. St. 1881, § 2204, provides that whoever, with intent to defraud another, designedly, by color of any false token or writing, obtains from any person anything of value, shall be imprisoned, etc. *Held*, that an indictment for violating such statute which fails to allege that the token or writing was delivered by defendant and received by the prosecuting witness in exchange or payment of goods or other thing of value is bad.—*Wagoner v. State*, 90 Ind. 504.

[c] (*Sup.* 1900)

That facts stated in an indictment for obtaining property under false pretenses showed larceny is no objection thereto, since different offenses may spring from the same act.—*State v. Styner*, 56 N. E. 98, 154 Ind. 131.

[d] (*Sup.* 1901)

Where, in a prosecution for obtaining personality under false pretenses by giving Confederate money in exchange therefor and representing it to be valuable, an information alleging that the accused "did, \* \* \* with intent to defraud, \* \* \* buy" from the complaining witness the property described, is not insufficient, as precluding fraud by the use of the word "buy," since the gist of the offense was the false representation of the value of the Confederate money, and not the buying of the property.—*Pinney v. State*, 59 N. E. 383, 156 Ind. 167.

[e] (*Sup.* 1903)

*Burns'* Rev. St. 1901, § 1645 (*Horner's* Rev. St. 1901, § 1570), declares that every per-

son who shall, while in Indiana, aid in and abet the perpetration or attempt to perpetrate an offense in another state which by the laws of Indiana is a felony, shall be deemed guilty of a felony, and on conviction shall be punished as an accessory before the fact to the commission of such felony. *Held*, that where defendant was charged with aiding and abetting in the commission of the offense of bunco steering in the state of Illinois, but it was not charged that the acts of the principal perpetrated in Illinois constituted a public offense in that state, it was insufficient.—*Cruthers v. State*, 67 N. E. 930, 161 Ind. 139.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Pret. § 31.

See, also, 19 Cyc. pp. 419-421.

#### § 27. — Intent.

[a] (Sup. 1889)

Indictment against T. for obtaining money and a signature as surety by false pretenses charging that the defendant "on, etc., at, etc., feloniously, designedly, and with intent to defraud one G., did falsely pretend to said G. that he, said T., was then and there the owner of a certain house and lot in a town named, in an adjoining state named, of great value, to wit, twenty-six hundred dollars, and a certain harness-shop in another town named, in said adjoining state named, of great value, to wit, six hundred and fifty dollars; by means of which false pretenses, he said G. relying upon and believing the same to be true, said T. did then and there feloniously obtain from said G., on his, said T.'s sole and individual credit, the sum of four hundred dollars, lawful money, as a loan for nine months, and the signature of said G., etc., with intent then and there to defraud said G.; whereas, in truth said T. was not then and there the owner," etc. *Held* that, though it was not alleged expressly that in making the representations the defendant's intention was to accomplish the particular result which was in fact obtained, though the indictment was not so certain as to exclude the conclusion that the defendant may have designed to accomplish his fraudulent purpose in another mode, yet it sufficiently showed a connection between the false representations made and the result produced.—*Todd v. State*, 31 Ind. 514.

[b] (Sup. 1894)

An indictment charged that defendant and another had conspired to cause it to be generally believed that defendant had been accidentally burned to death, with intent to defraud a certain accident insurance company, in which defendant was insured; that false proofs of the defendant's death, and a claim for \$5,000 insurance money, were to be sent to the company by the beneficiary of defendant, and the company, by relying on such false proofs, should pay such sum; that, with such intent, they procured a human skeleton, and placed it in an old house in which defendant was stay-

ing, and caused the house to be burned, so that the bones might be found in the ashes; and that defendant, in pursuance of such conspiracy, fled from the state. *Held*, that the indictment sufficiently charged defendants with conspiring with an unlawful intent to obtain money from the insurance company by false pretenses, and it is not vitiated by surplusage and want of perspicuity, where no substantial right of defendant is affected thereby.—*Musgrave v. State*, 133 Ind. 297, 32 N. E. 885.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Pret. § 32.

See, also, 19 Cyc. p. 436.

#### § 28. — Description of person defrauded.

[a] (Sup. 1885)

In an indictment for obtaining goods from firm by false pretenses the names of the individual members of the firm need not be set out. It is sufficient to charge that the false pretenses were made to the partnership by its firm name.—*State v. Williams*, 103 Ind. 235, 2 N. E. 585.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Pret. § 33; 27

CENT. DIG. Ind. & Inf. § 277.

See, also, 19 Cyc. p. 425.

#### § 29. — Description of false token or pretense or other instrument or means of fraud.

[a] (Sup. 1847)

In an indictment for obtaining property under false pretenses, by representing that the bank bills in which defendant made payment were good, while in fact the bank was insolvent and its paper worthless, an allegation that all of the bills on said bank were worthless, and that the bills passed by defendant were on that institution, sufficiently describes the bills.—*State v. Layman*, 8 Blackf. 330.

[b] (Sup. 1875)

An indictment for false pretenses under 2 Gav. & H. St. p. 445, is not bad for using the word "pretend," instead of the word "represent."—*Jones v. State*, 50 Ind. 473.

[c] (Sup. 1875)

In an indictment for obtaining property by false pretenses, where it is charged as a part of the false pretenses that certain real estate was falsely represented to be free from prior incumbrances, the prior incumbrances should be set out or described.—*Keller v. State*, 51 Ind. 111.

[d] (Sup. 1879)

An indictment charging defendant with procuring board and lodging by falsely pretending that he owned a house and lot, and that he had money on interest, states an offense within 2 Rev. St. 1876, p. 436, § 27, defining the crime of obtaining money, or other thing

of value, by false pretenses.—*State v. Snyder*, 66 Ind. 203.

[e] (Sup. 1882)

Where it cannot be determined from an indictment under Rev. St. 1881, § 2204, for obtaining money by means of false token or writing, charging that defendant falsely pretended and represented to a certain person that a certain order or token in writing which he then had, purporting to be signed by another, authorized him to sell the interest of the signer in certain property in the county, whether it charges a sale of the property by defendant to such other person or a mere transfer of the order, a motion to quash the indictment should have been sustained.—*Shaffer v. State*, 82 Ind. 221.

[f] (Sup. 1882)

An indictment for obtaining money under false pretenses alleged that defendant, for the purpose of defrauding a certain lodge, falsely represented that he was a member of another lodge of the same order, located in Ohio, and as evidence that he was a member of that lodge exhibited a false and forged receipt for dues purporting to have been paid by defendant to such lodge, and represented that he was greatly in need of money and promising to repay the amount thereof on his arrival at a particular place, and, by reason of such pretenses, defendant obtained money from such lodge. *Held*, that though the promise to repay the money was not a representation as to an existing fact, but a mere promise to do something in the future, in determining the sufficiency of the indictment, it must be considered as a mere incident to the allegations respecting the other pretenses made by defendant, and the indictment considered as a whole was sufficient.—*Strong v. State*, 86 Ind. 208, 44 Am. Rep. 292.

[g] (Sup. 1883)

An indictment for obtaining goods by means of a false token, which fails to allege that a token was delivered by the defendant and received by the prosecuting witness in exchange for payment of goods, is bad.—*Wagoner v. State*, 90 Ind. 504.

[h] (Sup. 1883)

An indictment under Rev. St. 1881, § 2204, providing that "whoever sells \* \* \* any promissory note \* \* \* knowing the signature of the maker thereof to have been obtained by any false pretense, shall be imprisoned in the state prison," need not charge that the false pretenses were of themselves sufficient to constitute a crime under the statute.—*State v. Adams*, 92 Ind. 116.

[i] (Sup. 1900)

An indictment charging that defendant falsely represented to prosecutrix that he intended to marry her, provide her a home, and deposit a check in her name for \$1,000, and that the check which he induced her to sign

and deliver to him was for a greater amount than that stated by him, sufficiently shows the operative cause inducing prosecutrix to sign the check, since proof of any one of such false pretenses would be sufficient to support an indictment.—*State v. Styner*, 56 N. E. 98, 154 Ind. 131.

FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. False Pret. §§ 34-36.

See, also, 19 Cyc. pp. 423-425.

### § 30. — Falsity of pretense and knowledge thereof.

[a] (Sup. 1847)

An indictment charged that the defendant falsely pretended to one A. that B., C., and D. were indebted to him (the defendant) in a certain sum, and that they were bound to pay a certain bill of exchange then in the defendant's possession and overdue, drawn by the defendant on said B., C., and D., payable to their order 90 days after date, and accepted by them, and which they indorsed to the defendant, who indorsed it to said A., and that by said false pretenses the defendant obtained from said A. certain goods, with intent to cheat, etc.; whereas, in fact, the said B. and C. were not indebted to the defendant, nor were said B., C., and D. bound to pay said bill. *Held*, that the first pretense was not sufficiently negatived, and, as to the second, that there should have been an averment that the defendant knew that B., C., and D. were not bound to pay the bill.—*State v. Smith*, 8 Blackf. 489.

[b] (Sup. 1879)

In an indictment under 2 Rev. St. p. 436, § 27, for obtaining board and lodging by false representations as to one's property, etc., a charge that they were "designedly" made with intent to defraud imputes a knowledge of the falsity of his representations.—*State v. Snyder*, 66 Ind. 203.

[c] (Sup. 1887)

An information which fails to negative the pretense upon which money was obtained does not charge a public offense.—*Pattée v. State*, 109 Ind. 545, 10 N. E. 421.

[d] (Sup. 1899)

An indictment for false pretenses, which fails to negative the representations which it charges were made, is defective.—*Campbell v. State*, 56 N. E. 665, 154 Ind. 309.

[e] (Sup. 1901)

An indictment for obtaining money under false pretenses, which states that defendant sold a piano by representing that it was secondhand, and that he had purchased it for \$250, which was less than it was worth, and that defendant was not in fact the owner of the piano, and had never owned it, is not insufficient in failing to specifically deny that the defendant purchased the piano for \$250, since the allegation that he was not and had never been

the owner was a sufficient denial thereof.—*Merrill v. State*, 59 N. E. 322, 156 Ind. 99.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. False Pret. § 37.

See, also, 19 Cyc. p. 426.

**§ 31. — Reliance on pretense and inducement to act.**

[a] (Sup. 1839)

An indictment for false pretenses must aver that the checks falsely pretended to be good were delivered to and accepted by the prosecutor as an inducement or payment, etc.—*Johnson v. State*, 11 Ind. 481.

[b] An indictment for obtaining money or goods by false pretenses is insufficient if it fails to allege that the injured party was induced to part with the ownership of the money or property acquired by the defendant, by means of the false pretenses, etc., alleged in the indictment.—(Sup. 1859) *State v. Orvis*, 13 Ind. 569; (1885) *Same v. Williams*, 103 Ind. 235, 2 N. E. 585.

[c] (Sup. 1875)

An indictment, charging that the defendant procured a signature to a note by false pretenses, used to induce the person whose signature is thus obtained to contract for the purchase of an article of property, is bad, if it does not state that the person whose name was procured relied upon such pretenses as true, and upon the faith thereof purchased the property, and in consideration thereof executed the note set out in the indictment.—*Jones v. State*, 50 Ind. 473.

[d] (Sup. 1877)

An indictment for obtaining goods by false pretenses charged that the owner of the goods, "relying upon said false representations," surrendered the goods to the defendant and was thereby defrauded. *Held* a sufficient allegation that the owner believed such representations to be true.—*Clifford v. State*, 56 Ind. 245.

[e] (Sup. 1877)

An indictment which charges that defendant presented to a certain merchant a false, forged, and counterfeit order, and represented and stated to such merchant that it was a true and genuine order, "and did then and there and thereupon receive from the said" merchant certain described goods, but which does not allege that the goods were obtained by defendant from such merchant by means of such writing and representation, is insufficient.—*Abbott v. State*, 59 Ind. 70.

[f] (Sup. 1882)

An indictment for obtaining the signature to a deed by false statements as to other land is defective if it fails to show how the false statements alleged induced the signing of the deed.—*Cooke v. State*, 83 Ind. 402.

[g] (Sup. 1885)

An indictment for obtaining goods from a firm by false pretenses is sufficient, as showing that the firm believed the representation to be true, which charges that they "relied on such false representations."—*State v. Williams*, 103 Ind. 235, 2 N. E. 585.

An indictment for obtaining goods under false pretenses, which did not make it appear that the goods were delivered in pursuance of the alleged false representations, but which merely averred that for the purpose of obtaining credit certain false representations were made, and that by means of representations defendant obtained "on credit certain goods," did not show the connection between the false pretenses and the obtaining of the goods on credit and was uncertain.—*Id.*

[h] (Sup. 1887)

An indictment for obtaining goods by false pretenses, which charges the accused with representing that his firm was doing a certain amount of business each year, and that it had a good financial standing, and that a merchant "relying on said representations and pretenses, and believing the same to be true, and being deceived thereby," sold the accused goods on credit, is insufficient; it not being averred that it was by means of such false representations that the merchant was induced to part with his goods.—*State v. Connor*, 110 Ind. 469, 11 N. E. 454.

[i] (Sup. 1899)

An indictment for obtaining money by false pretenses, alleging that they were made to induce a purchase of property, of which accused was not the owner, to obtain a sum of money, without averring that a sale was made, is insufficient, since no sale being alleged, no connection is shown between the alleged pretenses and the delivery of the money to accused.—*State v. Miller*, 54 N. E. 808, 153 Ind. 229.

[j] (Sup. 1900)

An indictment averring that defendant feloniously, falsely, etc., in writing, to wit: "The First National Bank: Send me four hundred dollars here by first express. J. H.,"—pretended to said bank, with intent to defraud, that he was J. H., a depositor, and the bank, relying on said representations, sent the money to defendant, was defective for uncertainty; it not appearing who wrote or transmitted the writing, or how the bank was led to send money to defendant by a writing signed with another's name.—*Campbell v. State*, 56 N. E. 665, 154 Ind. 309.

[k] (Sup. 1904)

An indictment for false pretenses, charging that defendant, in order to defraud the prosecutor, falsely pretended to him that he was the authorized agent of another to sell whisky and receipt for money owing and due from the prosecutor to that other, and that the prosecutor believed the pretenses to be true,

and relied upon them, so that defendant was thereby enabled to unlawfully obtain from the prosecutor a check, on which he received money, was bad, in failing to show that prosecutor was deceived by the false representations, or induced by the deceit to part with his money.—*Stifel v. State*, 72 N. E. 600, 163 Ind. 628.

[l] (Sup. 1906)

An information which alleges that accused, by means of the fraudulent manner in which he threw playing cards, induced the prosecutor to part with a specified sum of money on his ability to correctly describe one of the cards so thrown, states no offense under Burns' Ann. St. 1901, § 2178, punishing one who by fraud induces another to part with anything of value on any game, because it fails to charge that a wager was laid by the prosecutor or that he participated therein.—*Clark v. State*, 77 N. E. 52, 166 Ind. 288.

[m] (Sup. 1909)

An indictment for obtaining property by false pretenses charged that defendant gave the prosecuting witness his post-dated check for \$100, in payment of merchandise, and at the time said that he had \$80 or \$90 in the bank, and would increase his deposit to \$100, when as a matter of fact he had no money in the bank, and that the payee in the check relied on defendant's statements was insufficient, where it did not positively allege that the prosecutor was induced to give defendant time for payment by reason of his believing that the defendant had on deposit \$80 or \$90.—*State v. Ferris*, 171 Ind. 562, 86 N. E. 993.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Pret. §§ 38–41.

See, also, 19 Cyc. p. 429.

### § 32. — Description, value, and ownership of property obtained.

[a] An indictment for obtaining goods on false pretenses must allege the ownership of such goods.—(Sup. 1847) *State v. Smith*, 8 Blackf. 489; (1870) *Leobold v. State*, 33 Ind. 484.

[b] (Sup. 1870)

An indictment for obtaining under false pretenses "\$25 in money, the personal goods and chattels of," etc., was insufficient, as not properly describing the property.—*Smith v. State*, 33 Ind. 159.

[c] (Sup. 1873)

It is essential to the validity of an indictment for obtaining money by false pretenses, under 2 Gav. & H. St. p. 445, § 27, that the indictment should allege whose money was obtained.—*Halley v. State*, 43 Ind. 509.

[d] (Sup. 1899)

An indictment for obtaining money by false pretenses must state the ownership of the money alleged to have been obtained.—*State v. Miller*, 54 N. E. 808, 153 Ind. 229.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Pret. §§ 42–44;  
27 CENT. DIG. Ind. & Inf. § 280.

See, also, 19 Cyc. pp. 432–435.

### § 33. — Description of written instrument or signature obtained.

[a] (Sup. 1871)

An indictment for obtaining a signature, to a note by false pretenses, which charges that the pretenses were made to induce K. to become the surety of the defendant on a \$600 note, but shows that, instead of becoming a surety, K. became a principal, and made a note for \$600 payable to the defendant, is bad for uncertainty.—*State v. Locke*, 35 Ind. 419, 422.

[b] (Sup. 1878)

When a person is indicted for obtaining by false pretenses a check for the payment of money, the indictment should set out the substance of such check, at least, or present a substantial reason for a failure to do so.—*Bonnell v. State*, 64 Ind. 498.

An indictment charging the obtainment of a check under false pretenses, describing the check as that of a certain person "upon the Commercial Bank of Cincinnati for the sum of \$34.51, which check was then and there of the value of \$34.51," does not describe the check with sufficient accuracy and particularity.—*Id.*

[c] (Sup. 1881)

In an indictment for obtaining money by false pretenses that defendant's buggy had been injured by a defective bridge, an indictment alleging that defendant by such representations obtained from the county board of commissioners a certain warrant for the payment of money of the value of \$5, etc., did not sufficiently describe the warrant.—*Johnson v. State*, 75 Ind. 553.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Pret. § 45.

See, also, 19 Cyc. p. 433.

### § 34. — Obtaining money, property, or written instrument or signature.

[a] (Sup. 1847)

Under Rev. St. 1843, p. 965, § 24, which provides that if any person shall by false pretenses "obtain the signature of any person to any written instrument, or obtain from any person any \* \* \* order for the payment of money, or delivery or transfer of property," he shall be punished, an indictment for obtaining the transfer of real estate by falsely representing that the bank notes in which the consideration was paid were good, while in fact worthless, should be predicated on defendant's obtaining the grantor's signature to the written instrument by which the land was conveyed.—*State v. Layman*, 8 Blackf. 330.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Pret. § 46.

See, also, 19 Cyc. pp. 431, 432.

### § 37. — Presentation of fraudulent claim.

[a] (Sup. 1881)

An indictment for false pretenses in procuring the payment of a claim against a county is bad, where it does not accurately describe the alleged pretense, nor the warrant or order held by the accused, nor state to whom it was made payable, nor the amount, nor the connection between the pretenses upon which it was allowed by the county board and the act of the county treasurer in paying the amount allowed. —*Johnson v. State*, 75 Ind. 533.

[b] (Sup. 1901)

Under Burns' Rev. St. 1894, § 1820 (Rev. St. 1881, § 1751; Horner's Rev. St. 1897, § 1751), providing that in an indictment a description of an instrument by any name or description by which it is usually known, or by the purport thereof, shall be sufficient, an indictment for making, verifying, and presenting to the board of commissioners a false and fraudulent claim against a county is not defective because the claim presented is not set out, since the description of the claim was sufficient. —*Wilson v. State*, 59 N. E. 380, 60 N. E. 1086, 156 Ind. 631.

Since Burns' Supp. 1897, § 7848a (Acts 1897, p. 188, § 4), provides that no claim shall be allowed by the board of commissioners unless it is duly itemized and verified, filed in the auditor's office, and placed on the claim docket, it is not necessary to allege in the indictment that a claim docket was kept in the office of the county auditor on the ground that there is no law requiring him to keep such a docket. —*Id.*

In a prosecution under Burns' Rev. St. 1894, § 2353 (Rev. St. 1881, § 2205; Horner's Rev. St. 1897, § 2205), providing that whoever, knowing the same to be false and fraudulent, presents for payment, or certifies as correct to the board of commissioners, a false or fraudulent claim, to procure its allowance or an order for its payment, shall be imprisoned, etc., an indictment alleging that defendant filed in the auditor's office, and caused to be entered on the claim docket and presented to the commissioners, a fraudulent claim, with an affidavit thereto, to procure an order for the payment thereof out of the county treasury, and with knowledge that it was fraudulent, was sufficient, though the commissioners were only authorized to allow claims against the county, and not to issue orders for their payment. —*Id.*

[c] (Sup. 1908)

Public Offense Act 1905, Acts 1905, p. 750, c. 169, § 675 (Burns' Ann. St. 1901, § 2353), provides that whoever knowing the same to be false or fraudulent presents for payment, or certifies as correct, a claim to procure its allowance for payment, shall be punished. Burns' Ann. St. 1901, § 8087, provides that the compensation for publishing notices shall be for each advertisement, per square of 250 ems each,

first insertion \$1, for each additional insertion 50 cents, and that where the printing is done for the county the commissioners shall pay for the same according to such rate. *Held*, that an indictment for presenting a false and fraudulent claim against a county for publishing the county tax rate sheet for three weeks, merely alleging that the amount charged was \$54, when according to the legal rate it should have been only \$40, but failing to allege the number of squares of printed matter printed in each of the insertions, or facts showing that the claim was excessive other than the pleader's conclusion, was fatally defective under the rule requiring an indictment to state a specific description of the offense. —*State v. Metsker*, 169 Ind. 555, 83 N. E. 241; *Id.*, 169 Ind. 701, 83 N. E. 1135.

[d] (Sup. 1910)

The indictment alleged that a certain company procured a contract for repairing the streets of a city, and that accused superintended such repairs for it, and unlawfully and knowingly, with intent to defraud the city, made out and presented to the board of public works, for the purpose of procuring its allowance, a false claim wherein the amount of the repairs made during April were stated at so many yards, and a certain amount was given as justly due on account thereof, when the number of yards of repairs made and the amount due therefor was much less than the number and sum stated in said claim, and that accused, when he made out such false claim, knew that the number of yards claimed was greatly in excess of the amount of work done, and that the amount due was much less than that claimed. Burns' Ann. St. 1908, § 2586, imposes a penalty upon one who knowingly makes or presents for payment to the treasurer or other accounting officer of a city a false claim, for the purpose of procuring its allowance. *Held*, that the indictment alleged with sufficient particularity the presentation of a false claim within the statute. —*Brunaugh v. State*, 90 N. E. 1019.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Pret. § 49.

### § 38. — Issues, proof, and variance.

[a] (Sup. 1869)

On a trial for false pretenses consisting in misrepresenting the value of property, the sum named in the indictment as having been alleged by the prisoner as the value of the property is material, and should be proved as laid. —*Todd v. State*, 31 Ind. 514.

On an indictment for obtaining a loan under false pretenses that defendant owned a house and lot worth \$2,650, it was a fatal variance that the proof showed that the property was worth but \$2,200 or \$2,300. —*Id.*

[b] (Sup. 1870)

An indictment for obtaining money under a false pretense set out, as the pretense, a bank check without date; and it was averred that a

more particular description of the check could not be given because it has been torn and partially destroyed by the defendant. On the trial a check dated "Ja. 16, 1869," was read in evidence, over the defendant's objection. *Held*, that the admission of this evidence was error.—*Smith v. State*, 33 Ind. 159.

[c] (Sup. 1885)

Where the indictment charges the defendant with obtaining money by false pretenses, and alleges that he represented his indebtedness to be a specified sum, when, in fact, it was much greater, it is competent to prove an item of indebtedness not specifically stated in the indictment, although some items are therein specified.—*State v. Long*, 103 Ind. 481, 3 N. E. 169.

FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. False Pret. §§ 50-53.

See, also, 19 Cyc. pp. 438-441.

### § 39. Presumptions and burden of proof.

[a] (Sup. 1892)

In a prosecution for false pretenses, where it is shown that the defendants conspired to deceive the beneficiary in an insurance policy and procured her to make a false claim for the insurance, which she believed to be due, the presumption is that the beneficiary would enforce the policy and secure a benefit by the payment of the insurance if the scheme of the conspirators had succeeded.—*Musgrave v. State*, 32 N. E. 885, 133 Ind. 297.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Pret. § 54.

See, also, 19 Cyc. p. 441.

### § 40. Admissibility of evidence.

Admissions by accused, see CRIMINAL LAW, § 406.

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Evidence of representations similar to those charged in the indictment, see CRIMINAL LAW, § 372.

Remoteness, see CRIMINAL LAW, § 384.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Pret. §§ 55-61.

See, also, 19 Cyc. pp. 441-445.

### § 43. — False token or pretense, or other instrument or means.

[a] (Sup. 1894)

On a trial for larceny by obtaining goods and money by the use of a worthless Confederate bill, the bill itself is admissible in evidence, and may be inspected by the jury.—*Fleming v. State*, 136 Ind. 149, 36 N. E. 154.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Pret. § 57.

### § 49. Weight and sufficiency of evidence.

[a] (Sup. 1910)

In a prosecution for knowingly presenting a false claim for allowance against a city for work done in repairing streets, evidence held to sustain a conviction.—*Brunaugh v. State*, 90 N. E. 1019.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Pret. § 62.

See, also, 19 Cyc. pp. 445, 446.

### § 50. Trial.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Pret. §§ 63-65.

See, also, 19 Cyc. pp. 446, 447.

### § 51. — Questions for jury.

[a] The question whether the pretenses and representations stated in an indictment for obtaining money by false pretenses are such as might deceive a man of common intelligence is a question of fact for the jury.—(Sup. 1881) *Miller v. State*, 79 Ind. 198; (1883) *Wagoner v. Same*, 90 Ind. 504; (1884) *Shaffer v. Same*, 100 Ind. 365.

[b] (Sup. 1889)

In a prosecution for obtaining money under false pretenses, the question of the sufficiency of false representations to deceive a man of common understanding is one of law for the court.—*State v. Burnett*, 119 Ind. 392, 21 N. E. 972.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. False Pret. § 63.

See, also, 19 Cyc. p. 446.

### § 52. — Instructions.

Error in instruction cured by other instructions, see CRIMINAL LAW, § 823.

[a] (Sup. 1910)

In a prosecution for knowingly presenting for allowance a false claim to the board of public works of a city for work done in repairing streets, the evidence showed that accused superintended the work for the contractor, and that the record of the amount of work done was made up by accused from the books of the city's inspectors, and one of the inspectors testified that accused told him he was glad the city placed him on the job, and if he would raise the amount of work done accused would pay him a certain amount, to which witness replied that it was all right and he would treat accused fair. The city's inspectors freely permitted accused, each day, to take possession of their books and keep them for some time, and he made changes in the entries as to the amount of work done by the contractor; the contractor's record being copied from the city inspectors' records as changed by accused. The evidence justified a finding that the contractor's cashier acted innocently in making out and presenting the claim from the false records made by accused. *Held*, that the evidence authorized in-

structions on the theory that accused aided a principal in committing the offense, or himself committed it through some innocent person or agent; accused being personally absent when the claim was presented.—*Brunaugh v. State*, 90 N. E. 1019.

A theory, in a prosecution for knowingly presenting a false claim against a city, that accused aided or abetted a principal in committing the offense, was not theoretically inconsistent with one that accused committed the offense through an innocent person or agent whom he caused to present the false claim, so as to prevent the state from having both theories presented by charges if raised by the evidence.—*Id.*

In a prosecution for knowingly presenting a false claim against a city for repairing streets, the court instructed that the indictment charged that the fraudulent claim was for a certain number of square yards, while the amount of work actually done was a less number, leaving a certain number of yards in excess of the amount of work actually done, so as to make the claim in excess of the amount actually due, that the state must prove that the claim was for some number of square yards in excess of the number actually done and a sum in excess of the amount actually due, and that accused made changes in the city's books, from which the claim was presented, showing the number of yards of work done, would not make him guilty of presenting a false claim, but the state must show that the claim made was for work in excess of that actually done and for a sum in excess of the amount actually due. *Held*, that the jury could not have misunderstood from the instruction, as a whole, the meaning of the phrase "for a quantity in excess of that actually done."—*Id.*

FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. False Pret. § 64.

See, also, 19 Cyc. p. 447.

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**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

# FENCES.

## Scope-Note.

[INCLUDES structures for inclosing lands in general; statutory provisions relating thereto; rights, duties, and liabilities of proprietors or occupants of lands in respect of such structures; and legal proceedings relating thereto.

[EXCLUDES fences as indicating boundaries (see *Boundaries*); fencing railroads (see *Railroads*); and fencing excavations or dangerous premises or machinery (see *Master and Servant*; *Mines and Minerals*; *Negligence*). For complete list of matters excluded, see cross-references, post.]

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- § 2. Statutory provisions.
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Subjects and titles of acts authorizing construction. STATUTES, § 123.

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### § 1. Duty to erect and maintain in general.

[a] At common law, the owner of a close was not obliged to fence against the cattle of the occupant of an adjoining close. The statute imposing the duty on adjoining proprietors of land to erect and maintain fences recognized the same principle; for the object and design of fencing is not to keep the cattle of others off the premises, but to keep at home the cattle of the occupant. This principal has equal application to the owners of land adjoining public highways.—(Sup. 1852) *Terre Haute & R. R. Co. v. Jones*, 8 Ind. 183; (1854) *Williams v. New Albany & S. R. Co.*, 5 Ind. 111; (1856) *Smith v. Terre Haute & R. R. Co.*, 7 Ind. 553.

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See, also, 19 Cyc. p. 469.

### § 2. Statutory provisions.

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FOR CASES FROM OTHER STATES,

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### § 5. Duty to erect and maintain partition fences.

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FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fences, §§ 7-15, 17.

See, also, 19 Cyc. pp. 469-479.

### § 6. — In general.

[a] (Sup. 1857)

Both parties to a partition fence are equally bound to maintain the same. Either may repair, and enforce contribution from the other, but failure to do so leaves them upon their respective common-law rights and obligations.—*Myers v. Dodd*, 9 Ind. 290, 68 Am. Dec. 624.

[b] (Sup. 1874)

The provision of 1 Gav. & H. St. p. 343, § 15, that partition fences "shall be maintained throughout the year, equally by both parties," is not limited to repairs simply, but applies as well to the rebuilding of a fence destroyed by fire.—*Rhodes v. Mummery*, 48 Ind. 216.

[c] (App. 1892)

Rev. St. § 4849, provides for notice by an adjoining landowner for the examination of

partition fences by disinterested freeholders, and, if the examiners deem said fence insufficient, they shall assess the amount required to make it sufficient. By section 4850, if the person to whom notice has been given fails to repair, the person giving notice may do so, and recover from the other the amount assessed. *Held*, that a fence erected on the land of plaintiff to inclose his fields, no part being nearer defendant's land than 5 feet, and the greater part being from 165 feet to 330 feet, and some parts being nearly one-eighth of a mile therefrom, was not a partition fence, the defendant never having agreed that it should be such, or that he would repair it; and defendant was not liable to plaintiff for the expense of repairing it.—*Byers v. Davis*, 3 Ind. App. 387, 29 N. E. 798.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fences, §§ 7, 9-13.

See, also, 19 Cyc. p. 469.

### § 9. — Agreements of landowners.

[a] (Sup. 1879)

Under 1 Rev. St. 1876, p. 496, § 15, providing that, except when otherwise specially agreed, partition fences dividing land occupied on both sides should be maintained equally by both parties, a contract between the parties that one would build and maintain one part of a partition fence in consideration that the other party would maintain the other part is valid, and made on a good consideration.—*Baynes v. Chastain*, 68 Ind. 376.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fences, § 15.

See, also, 19 Cyc. pp. 470, 471.

### § 11. Division of partition fence between landowners.

Applicability of partition fence law to fencing railroad right of way, see RAILROADS, § 412.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fences, §§ 18-28.

See, also, 19 Cyc. pp. 473-479.

### § 14. Proceedings to compel erection of partition fence or contribution.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fences, §§ 29-44.

See, also, 19 Cyc. pp. 473-479.

### § 15. — In general.

[a] (Sup. 1886)

That adjoining landowners have agreed that each shall keep up certain specified portions of a partition fence does not prevent a resort to the statutory method for the assessment of damages against the party in default. —*Bruner v. Palmer*, 108 Ind. 397, 9 N. E. 354.

A written notice to assess damages for failure to "keep up" a partition fence, informing the party in default that, on a day and at an hour named, the plaintiff would call upon two disinterested freeholders "to examine all of the partition fences between my land and your land, in Daviess county, state of Indiana, and assess the amount that may be required to make said fences sufficient and lawful fences, if they are insufficient," is sufficiently definite.—*Id.*

[b] (Sup. 1904)

Acts 1897, p. 184, c. 122 (Burns' Rev. St. 1901, § 6568), relative to partition fences, and providing for proceedings for the erection of the same, contains a proviso that persons owning land not inclosed by a fence to retain stock shall not be required to make or maintain a partition fence. *Held* that, inasmuch as such proviso is not contained in the enacting clause of the statute, a complaint in an action to enforce a lien for building a fence was not insufficient because it did not allege that the lands therein described were inclosed by a fence to retain stock.—*Tomlinson v. Bainaka*, 70 N. E. 155, 163 Ind. 112.

Where, in an action to foreclose a statutory lien for building a partition fence, defendant's answer was a general denial, it was necessary for plaintiff to prove all the facts necessary to give the township trustee authority to contract for the building of the fence, etc., as provided for by the statute (Burns' Rev. St. 1901, § 6566).—*Id.*

[c] (App. 1906)

In an action to enforce a lien for the construction of a partition fence between adjoining landowners, it is proper to admit in evidence the "miscellaneous records" of the county in which is recorded the certificate delivered by the township trustee to the contractor.—*Burck v. Davis*, 73 N. E. 192, 35 Ind. App. 648.

In an action by a landowner under Burns' Ann. St. 1901, § 6564 et seq., to recover of an adjoining landowner the expense of maintaining a partition fence, it is not necessary for plaintiff to allege that he had performed his obligation to keep his portion of the fence in repair.—*Id.*

In an action to enforce a lien for the construction of a partition fence, plaintiff is entitled to a reasonable attorney fee under Burns' Ann. St. 1901, § 6566, providing for the foreclosure of such liens "under the same rules that mechanics' liens are foreclosed," and section

7267, providing that in suits for the enforcement of mechanics' liens, "if plaintiff or lienholder shall recover a judgment in any sum, he shall be entitled to reasonable attorneys' fees."—*Id.*

Under Burns' Ann. St. 1901, § 6564, providing that all fences now used by adjoining landowners as partition fences, unless otherwise specially agreed on, shall be deemed partition fences, and shall be maintained and paid for as in the statute provided, a complaint to recover from an adjoining landowner the expense of maintaining a fence is sufficient if it shows that the fence was such as must be deemed a partition fence, without showing how it became such, whether by agreement or otherwise.—*Id.*

A complaint for the foreclosure of a lien for the repair of a partition fence should allege the steps taken under the statute (Burns' Ann. St. 1901, § 6564; Acts 1897, p. 184, § 1), culminating in a valid lien.—*Id.*

An action to foreclose a lien for the repair of a partition fence is not one for damages for breach of a contract obligation.—*Id.*

Where plaintiff, in an action to foreclose a lien for the repair of a partition fence, proceeds definitely on the theory that the parties were the owners of the lands in fee simple, an objection that the complaint does not expressly so allege is not well taken.—*Id.*

[d] (Sup. 1906)

Burns' Ann. St. 1908, § 7381, providing that persons owning land not inclosed by a fence to retain stock shall not be required to maintain a partition fence, states an exception or defense, and in an action to foreclose a lien for the cost of a partition fence, an affirmative finding of fact is not required that defendant's land was inclosed by a fence to retain stock, but a failure to make any finding is equivalent to a finding that the land was not within the excepted class.—*Collins v. Wilber*, 89 N. E. 372.

A complaint to foreclose the lien, given by Burns' Ann. St. 1908, § 7379, for the cost of a partition fence need not set out the contract between plaintiff and the township trustee under which the fence was built, since the action is in rem, founded upon the statute, and not upon contract, and defendant was not a party to the contract.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fences, §§ 29-35, 40-44.

See, also, 19 Cyc. p. 473.

### § 16. — View and assessment by fence viewers.

[a] (Sup. 1873)

Where a defendant had inclosed his theretofore uninclosed land, and by so doing a fence owned by the plaintiff became a partition fence,

and the plaintiff thereafter called upon the defendant and demanded pay for one-half of the value of such partition fence, and the defendant did not object that the value had not been estimated, but denied his liability, and stated that he would pay no amount whatever, such refusal waived an estimate of the value as a prerequisite to the maintenance of an action.—*Bartlett v. Adams*, 43 Ind. 447.

[b] (*Sup.* 1886)

In an action to recover the expense incurred by plaintiff in putting up a partition fence, under a statute providing for an assessment by appraisers of the amount required to be expended, the assessment of the appraisers is admissible in evidence, although not signed by them.—*Bruner v. Palmer*, 108 Ind. 397, 9 N. E. 354.

[c] (*Sup.* 1904)

*Burns' Rev. St.* 1901, § 6565, relative to partition fences and the proceedings for the erection of the same, describes seven kinds of fences, either of which is declared to be a lawful fence, but requires the township trustee to adopt "the plans and materials for such fence as is most commonly used by farmers in the township." *Held*, that in proceedings for the erection of a fence it was proper for the township trustee to limit the kinds of fence which might be erected to those varieties most commonly used in the township.—*Tomlinson v. Bainaka*, 70 N. E. 155, 163 Ind. 112.

*Burns' Rev. St.* 1901, § 6566, relative to the erection of partition fences and proceedings therefor, requires that the statement which the township trustee gives to the contractor on the completion of the fence shall be recorded in the mechanic's lien record of the county. *Held*, that such provision is not ineffective for the reason that there is no such record as the mechanic's lien record, but there is a compliance with the statute where the statement is filed in the record in which mechanics' liens are required to be recorded.—*Id.*

FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. FENCES, §§ 36-38.  
See, also, 19 Cyc. pp. 475-479.

**§ 17. Failure to erect or maintain partition fence.**

[a] (*Sup.* 1895)

A complaint against a township trustee for neglecting to repair a partition fence as required by *Rev. St.* 1894, §§ 6564, 6565, is demurrable unless it alleges that such trustee "examined the fence, and declared it to be insufficient." Till this is done the trustee is under no obligation to repair such fence, under the act. It is not enough to allege that he failed to act in the matter.—*State ex rel. Magnet v. Kemp*, 141 Ind. 125, 40 N. E. 661.

FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. FENCES, §§ 16, 39.  
See, also, 19 Cyc. p. 488.

**§ 22. Injuries caused by fences.**

FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. FENCES, §§ 48-51.

See, also, 19 Cyc. pp. 487, 488; note, 54 Am. St. Rep. 513.

**§ 23. — In general.**

[a] (*Sup.* 1887)

Though the erection of a barbed wire fence is not in itself a tort, the manner in which it is constructed and maintained may be such as to make the person erecting and maintaining it guilty of negligence, and a complaint showing that defendant was negligent in constructing and maintaining such a fence is sufficient.—*Sisk v. Crump*, 14 N. E. 381, 112 Ind. 504, 2 Am. St. Rep. 213.

FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. FENCES, § 48.

**§ 24. — Personal injuries.**

[a] (*App.* 1903)

Whether a child who, while playing with other children, ran into a wire fence at the boundary of a third person's land, the existence of which she did not know, was guilty of contributory negligence precluding a recovery for the injuries sustained, was for the jury.—*Cincinnati & H. Spring Co. v. Brown*, 69 N. E. 197, 32 Ind. App. 58.

FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. FENCES, § 49.  
See, also, 19 Cyc. p. 487.

**§ 25. — Domestic animals.**

[a] (*Sup.* 1887)

Plaintiff alleged that, in the city where she and defendant resided, animals were by law allowed to run at large; that defendant had constructed a barbed-wire fence along the highway so negligently that the wires hung loosely from the post and near the ground; and that plaintiff's horse attempting to cross the fence from the highway into defendant's field, in which his horses were grazing, was entangled, thrown down, and killed. *Held* not demurrable.—*Sisk v. Crump*, 112 Ind. 504, 14 N. E. 381, 2 Am. St. Rep. 213.

[b] (*App.* 1892)

Where, after allowing the public to drive across his lot from one street to another for several years, the owner stretched a barbed wire across the track without other notice that the license to use the road was terminated, he is liable for an injury from the wire to a horse driven over such road after dark.—*Carskaddon v. Mills*, 5 Ind. App. 22, 31 N. E. 559.

[c] (*App.* 1894)

A complaint alleging that it was defendant's duty to construct and maintain part of a partition fence between his land and adjoining land in which plaintiff's horse was pastured; that this was done negligently, the posts being too far apart to support the wires, and the wires sagging in such a manner as to induce

horses to attempt to cross the fence, and become entangled therein, and that plaintiff's horse became entangled in such wires, and was killed by wounds from the bars thereon, is sufficient on demurrer.—*McFarland v. Swihart*, 11 Ind. App. 175, 38 N. E. 483, 54 Am. St. Rep. 499.

Where defendant constructed a partition fence of barbed wire, fastened to posts which were insufficient and too far apart to sustain the wires and keep them from sagging, and the space between the wires was from 18 to 24 inches, and plaintiff's horse, depasturing on the adjoining premises, was injured by coming in contact with the wires, such injury was the natural and probable consequence of the negligent construction and maintenance of the fence by defendant which any prudent man should have foreseen in the exercise of ordinary care.—*Id.*

Where plaintiff's horse was injured by coming in contact with a partition fence so constructed by defendant as to be dangerous to horses depasturing on the adjoining premises, in the face of an averment by plaintiff that he was without fault, he cannot be charged with such notice of defendant's negligence as would as a matter of law charge him with contributory negligence.—*Id.*

[d] (App. 1895)

One, who, in erecting a division barbed-wire fence, lays the wire on the ground without protection, is liable to an adjoining landowner, whose stock are injured by the wire.—*Lowe v. Guard*, 11 Ind. App. 472, 39 N. E. 428, 54 Am. St. Rep. 511.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fences, §§ 50, 51.  
See, also, 19 Cyc. pp. 487, 488.

§ 26. Removal or destruction of fences.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fences, §§ 52-67.  
See, also, 19 Cyc. pp. 480-486.

§ 27. — Civil liability.

[a] (Sup. 1858)

It seems that one desiring to remove a partition fence should, under Rev. St. 1852, pp. 203, 204, ascertain its value, and how much he may remove, by means similar to those ordained for assessing the expense of erection.—*Haines v. Kent*, 11 Ind. 126.

[b] (Sup. 1878)

1 Rev. St. 1876, p. 497, § 23, provides that a person "shall not take away any part of his fence which forms a partition fence between him and the inclosure of any other person, until he shall have first given six months' notice" of his intention to remove the fence. *Held*, that the fences, including the partition fence, to constitute an "inclosure" within the meaning

of the statute, must surround the adjoining land, or some part of it.—*Gundy v. State*, 63 Ind. 528.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fences, §§ 40-44, 52-61.

See, also, 19 Cyc. pp. 480-483.

§ 28. — Criminal responsibility.

[a] (Sup. 1878)

The fact that G., the owner of a partition fence, removed it, without notice to S., an adjoining owner, after allowing S. to connect therewith a fence which S. was erecting to inclose his land, but had not completed, did not render G. guilty of malicious trespass.—*Gundy v. State*, 63 Ind. 528.

[b] (Sup. 1881)

Where, in an indictment for unlawfully removing fence rails, it was shown that the rails and stakes were in and composed a fence upon the land and were the property of the owner of the land, it was sufficiently shown that they were a part of the realty.—*Dorrell v. State*, 80 Ind. 506.

In an indictment under Rev. St. 1881, § 1961, for unlawfully removing from the land of another certain rails and stakes composing a fence, it is not necessary to give a particular description of the land.—*Id.*

In a prosecution for unlawfully removing fence rails and stakes from certain land, in violation of Rev. St. 1881, § 1961, it was not necessary that the information should state the number of rails and stakes, nor their separate values; they being sufficiently described as being in and composing a fence on the land of the prosecuting witness.—*Id.*

[c] (Sup. 1882)

Upon the trial of a criminal proceeding for unlawfully removing a fence, it may be shown that in a prior civil suit, to determine the boundary between defendant's land and the prosecutor's a judgment was rendered establishing a boundary upon which the fence was placed.—*Dorrell v. State*, 83 Ind. 357.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fences, §§ 62-67.  
See, also, 19 Cyc. pp. 483-486.

## FERÆ NATURÆ.

See ANIMALS, § 2.

## FERMENTED LIQUORS.

See INTOXICATING LIQUORS.

## FERRETS.

Tax ferret contract, see COUNTIES, § 111.

# FERRIES.

## *Scope-Note.*

[INCLUDES the establishment, maintenance, regulation, and use of ferries for the passage of the public over inland waters, subject to payment of tolls; organization, franchises, and powers of ferry companies; and rights, duties, and liabilities of individuals or corporations exercising ferry franchises, in their capacities as carriers as well as otherwise.

[EXCLUDES matters applicable to corporations in general (see *Corporations*); exercise of the power of eminent domain (see *Eminent Domain*); obstruction of navigation (see *Navigable Waters*); and taxation of ferries (see *Taxation*). For complete list of matters excluded, see cross-references, post.]

## *Analysis.*

### I. Establishment and Maintenance.

- § 5. Establishment by public authorities.
- § 9. Franchises and privileges.
- § 11. — Power to grant.
- § 12. — Persons who may acquire.
- § 14. — Proceedings to acquire.
- § 15. — Grant or sale or lease by public authority.
- § 16. — Extent and exclusiveness of franchise.
- § 19. — Infringement or disturbance.
- § 20. — Termination.

### II. Regulation and Operation.

- § 29. Statutory and municipal regulations.
- § 30. Licenses and taxes.
- § 32. Injuries incident to operation.
- § 33. Actions for injuries.
- § 35. Offenses incident to operation.

## *Cross-References.*

See—

Eviction of lessee. LANDLORD AND TENANT,  
§ 174.

Judicial notice. EVIDENCE, § 24.

### I. ESTABLISHMENT AND MAINTENANCE.

#### § 5. Establishment by public authorities.

[a] (Sup. 1819)

Even if the designation of a street on the recorded plat of an incorporated town were the exclusive grant to the corporation, and the street on a river, it would not vest in the corporation such a right to the soil as would authorize the establishment of a ferry, under the statute (Laws 1811, p. 8) which contemplates the ownership of land as an absolute prerequisite, as the way is not the land, but merely the privilege of passing over it.—Conner v. Town of New Albany, 1 Blackf. 43.

[b] (Sup. 1851)

The right to establish public ferries resides in the Legislature; and the extent of the ferry right conferred depends upon the terms of the legislative grant.—Bush v. Peru Bridge Co., 3 Ind. 21.

The circumstance that the boards of commissioners of the several counties have authority by law to establish ferries does not affect the right of the Legislature to exercise that power.—Id.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Ferries, §§ 5, 6.

See, also, 19 Cyc. pp. 498-497; note, 59

L. R. A. 513.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

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**§ 9. Franchises and privileges.**

Appeal from order of county board allowing filing of bond to secure ferry privilege, see **COUNTIES**, § 58.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. **Ferries**, §§ 9-66.

See, also, 19 Cyc. pp. 404-505; note, 37 L. R. A. 712.

**§ 11. — Power to grant.**

[a] (Sup. 1851)

A grant of the right of a public ferry is not exclusive, but is conferred subject to such further grants to other persons as public convenience may require.—*Bush v. Peru Bridge Co.*, 3 Ind. 21.

[b] (Sup. 1896)

Rev. St. 1894, § 6597 (Rev. St. 1881, § 4877), provides that, when any river shall be the boundary between two counties, any person holding land on either side of the river, who shall desire a public ferry across the same, may apply to the commissioners of the county in which the land lies, who may establish a ferry from the land of the applicant to the opposite side. *Held*, that a petition to the commissioners of K. county to establish a ferry from land in that county to land in another, which fails to show that the applicant has any interest in the K. county land, is insufficient on demurrer.—*Hazleton v. De Priest*, 143 Ind. 368, 42 N. E. 751.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. **Ferries**, §§ 11-17.

See, also, 19 Cyc. pp. 494-497.

**§ 12. — Persons who may acquire.**

[a] (Sup. 1819)

A town, vested with an exclusive easement in land along a river for a right of way, is not the owner of the land within the laws regulating the granting of ferry privileges, which makes ownership of the land bordering on the stream at the point where the ferry is to touch by the grantee of the privilege an absolute prerequisite to the granting of the privilege.—*Conner v. Town of New Albany*, 1 Blackf. 43.

[b] (Sup. 1819)

Where an applicant for a ferry neither owned land on that side of the river where the ferry was established, nor the land next adjoining the public common of any town where such common bordered on the river at the place of the ferry asked for, as required by St. 1818, p. 292, commissioners have no authority to grant the application.—*Horsley v. Damon*, 1 Blackf. 491.

[c] (Sup. 1827)

Under the act of assembly giving to the proprietor of land on the margin of a river or creek the right of having a ferry established, the exhibition of a deed by the petitioner, accompanied by possession, is sufficient proof of ownership to authorize a grant without tracing

title back to the government.—*Brown v. Harris*, 1 Blackf. 543.

[d] (Sup. 1866)

A ferry right, like the right to erect and maintain a wharf, has its foundation in the ownership of the soil, or in the exercise of the right of eminent domain.—*City of Jeffersonville v. Louisville & J. Steam Ferry Co.*, 27 Ind. 100, 89 Am. Dec. 495.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. **Ferries**, §§ 18-21.

See, also, 19 Cyc. pp. 497, 498.

**§ 14. — Proceedings to acquire.**

[a] (Sup. 1822)

The record of an order granting a ferry need not show that the rates have been fixed by the court, nor that the applicant has executed a bond according to law.—*Conner v. Paxson*, 1 Blackf. 189.

[b] (Sup. 1839)

The petitioner for a ferry must produce some other evidence of title to the land on which the ferry is prayed to be established than the mere fact of his being in possession.—*Mullis v. Cavins*, 5 Blackf. 77.

[c] (Sup. 1846)

From an order of county commissioners allowing a bond to be filed under St. 1844 to secure the privileges across the stream to a ferry previously established, an appeal lies to the circuit court.—*Davis v. Huff*, 8 Blackf. 276.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. **Ferries**, §§ 23-33.

See, also, 19 Cyc. pp. 496, 497.

**§ 15. — Grant or sale or lease by public authority.**

[a] The power "to regulate ferries," conferred upon the common council of a city by section 33 of the act for the incorporation of cities, etc. (1 Gav. & H. St. p. 223), does not include the authority to prohibit without a license first obtained therefor. In all instances in the act where it was intended that for the purpose of restraint a license might be imposed, the power is expressly declared, and is not, therefore, to be implied from other provisions.—(Sup. 1865) *Duckwall v. City of New Albany*, 25 Ind. 283; (1866) *Shallcross v. City of Jeffersonville*, 26 Ind. 193.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. **Ferries**, §§ 34-37.

See, also, 19 Cyc. p. 496.

**§ 16. — Extent and exclusiveness of franchise.**

[a] (Sup. 1827)

Under the act of assembly giving the proprietor of land on the margin of a river the right of having a ferry established, the prior

grant of a ferry to objectors to the granting of a petition presents no ground for reversal of the judgment granting the application; it being a matter of discretion with the board of justices and with the circuit court on appeal to grant another ferry where in their opinion the public requires it.—*Brown v. Harris*, 1 Blackf. 543.

[b] (Sup. 1851)

The Revised Statutes of 1838 do not confer upon the first grantee of a ferry privilege the exclusive right to maintain a ferry at the point where the same may be established, but reserve the right to establish bridges or other ferries at the same point, when the public convenience shall require them.—*Bush v. Peru Bridge Co.*, 3 Ind. 21.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Ferries, §§ 38-40.

See, also, 19 Cyc. pp. 499, 500.

### § 19. — Infringement or disturbance.

[a] (Sup. 1822)

In an action on the case for the disturbance of a ferry, the defendant proved that the ferry he occupied had been granted to him by a competent tribunal. *Held*, that the defendant's grant, though it might be erroneous, was, while unreversed, a bar to the suit.—*Conner v. Paxson*, 1 Blackf. 168.

[b] (Sup. 1825)

The exclusive privileges of ferries not being known until they were authorized by statute, and the statute authorizing them prescribing a specific penalty for their violation, the owners of ferries must rely for the securities of their rights upon the provisions of the statute.—*Lang v. Scott*, 1 Blackf. 406, 12 Am. Dec. 257.

[c] (Sup. 1862)

The objection that parties claiming and using a ferry have not paid license regularly may be a sufficient reason for instituting proceedings to declare the right forfeited, but will not be available as a defense to one who should disturb those who possessed the right in the enjoyment thereof, or who should destroy or injure the same.—*New Albany & S. R. Co. v. Huff*, 19 Ind. 315.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Ferries, §§ 46-59.

See, also, 19 Cyc. pp. 501-503.

### § 20. — Termination.

[a] (Sup. 1870)

The right of ferriage may be lost by non-user.—*The John Shallcross*, 35 Ind. 19.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Ferries, §§ 60-66.

See, also, 19 Cyc. p. 505.

## II. REGULATION AND OPERATION.

### § 29. Statutory and municipal regulations.

[a] (Sup. 1889)

Rev. St. 1881, § 3103, gives city councils power to establish and regulate ferries across any stream passing through or bordering on the city limits. A later enactment authorizes the county commissioners to regulate the hours during which ferryboats shall run on streams bordering on the state. *Held* that, as to interstate ferries, the city council can make only such regulations as are conformable to the regulations of the commissioners, and a complaint for violating, on Sunday, an ordinance of a city on a border stream, requiring ferryboats plying to and from points within the state to stop at the landing every 40 minutes, and not remain longer than 15 minutes at one time, will be dismissed, as it may reasonably be inferred that the regulations of the county commissioners did not require this on Sundays.—*City of Madison v. Abbott*, 118 Ind. 337, 21 N. E. 28.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Ferries, § 76.

See, also, 19 Cyc. pp. 506, 507.

### § 30. Licenses and taxes.

[a] (Sup. 1865)

A ferryboat is not a vehicle, within 1 Gav. & H. St. p. 223, § 42, giving cities a right to levy a specific tax on vehicles.—*Duckwall v. City of New Albany*, 25 Ind. 283.

[b] (Sup. 1889)

It is settled that a state may either directly, or through a grant of power delegated to a municipal corporation, exact reasonable license fees from the keepers of ferries living within the state, although their boats ply between landings lying in two different states, this being but the ordinary exercise of the police powers vested in the state or delegated by it to the municipal corporation.—*City of Madison v. Abbott*, 21 N. E. 28, 118 Ind. 337.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Ferries, § 77.

See, also, 19 Cyc. p. 507.

### § 32. Injuries incident to operation.

[a] (Sup. 1884)

A ferryman, receiving horses in charge of a driver for transportation, is not liable for an accident to them, in the absence of negligence on his part. The fact that between the apron of planks attached to the boat and thrown out at the landing, and the boat, there was a crack in which a frightened horse caught his leg and broke it, *held* not to show negligence.—*Yerkes v. Sabin*, 97 Ind. 141, 49 Am. Rep. 434.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Ferries, §§ 79-87.

See, also, 19 Cyc. pp. 509-513.

**§ 33. Actions for injuries.**

[a] (Sup. 1884)

Where, in an action for an injury to a horse while he was being transported on a ferry boat under the control of plaintiff, the plaintiff charged that the injury occurred through defendant's negligence in keeping and maintaining his boat in an unsafe and dangerous condition, and without any fault or negligence of plaintiff, the question of the defendant's negligence was in issue, and the burden of showing it was on the plaintiff.—*Yerkes v. Sabin*, 97 Ind. 141, 49 Am. Rep. 434.

[b] (Sup. 1893)

Plaintiff, while a passenger on defendant's ferryboat, was hurt by the falling of a stanchion, which was knocked down by the stage plank which had been run out to land the passengers, and which, by the falling away of the boat, was brought in contact with the stanchion. There was evidence that the stanchion had been shoved in to temporarily support the upper deck, which was heavily loaded, and that it was not perpendicular, nor fastened to the floor, and there was also evidence that the crew placed the stage plank so that it came in contact with the stanchion. There was, on the other hand, evidence that the stanchion was secure enough to resist any ordinary blow or strain, and that other passengers placed the stage plank so that it struck the stanchion. *Held* that, the burden of proof being on defendant, a verdict for plaintiff was justified by the evidence.—*Louisville & J. Ferry Co. v. Nolan*, 135 Ind. 60, 34 N. E. 710.

FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. *Ferries*, §§ 88-93.

See, also, 19 Cyc. pp. 511, 512.

**§ 35. Offenses incident to operation.**

[a] (Sup. 1856)

An information charging accused with hiring a boat to be used for ferrying persons over a stream is bad which fails to allege that any public ferries were established on said stream. The existence of ferries, as they are established by county commissioners, and not by direct public enactment of the legislature, being a fact to be proved, cannot be judicially noticed.—*State v. Wise*, 7 Ind. 645.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. *Ferries*, § 95.**FICTITIOUS ACTION.**

See—

ACTION, § 8.

Contempt of court. CONTEMPT, § 11.

Determination of constitutional questions. CONSTITUTIONAL LAW, § 46.

Jurisdiction of. COURTS, § 5.

**FICTITIOUS NAMES.**

See PARTIES, § 67.

**FIDUCIARY RELATIONS.**

See—

Affecting exercise of undue influence upon testator. WILLS, § 157.

ATTORNEY AND CLIENT.

Between corporations and their officers or agents. CORPORATIONS, §§ 307-324.

Breach of duty by person in fiduciary relation as creating constructive trust. TRUSTS, § 102.

BROKERS.

Contracts and transactions between persons in confidential relations as creating constructive trusts. TRUSTS, § 103.

Discharge of bankrupt, effect on debts created by fraud or defalcation in fiduciary capacity. BANKRUPTCY, § 426.

Disclosure of communications. WITNESSES, §§ 197-215.

Element of fraud. FRAUD, § 7.

Enforcement of liabilities of fiduciary against exempt property. EXEMPTIONS, § 72.

Execution of bill or note in fiduciary capacity.

BILLS AND NOTES, § 123.

Of bond in fiduciary capacity. BONDS, § 55.

FACTORS.

GUARDIAN AND WARD.

Indorsement of bill or note in fiduciary capacity. BILLS AND NOTES, § 197.

Jurisdiction in equity. EQUITY, § 21.

PARTNERSHIP.

Payment of fiduciary funds for conveyance to person holding fiduciary relation as creating resulting trust. TRUSTS, § 84.

PRINCIPAL AND AGENT.

Subrogation of persons acting in fiduciary capacity. SUBROGATION, § 10.

TRUSTS.

**FIELD NOTES.**

Description of boundaries, see BOUNDARIES, § 3.

**FIERI FACIAS.**

See EXECUTION.

**FIGHTING.**

See—

Homicide in mutual combat. HOMICIDE, § 114.

PRIZE FIGHTING.

**FIGURES.**

See—

Alteration. ALTERATION OF INSTRUMENTS, §§ 5, 6.

In indictment or information. INDICTMENT AND INFORMATION, § 78.

In pleading. PLEADING, § 29.

**FILING.**

See—

Abstract or evidence of title in ejectment. EJECTMENT, § 78.

Affidavit in support of motion. **MOTIONS**, § 30.  
 Or information in contempt proceedings. **CONTEMPT**, § 54.  
 Articles of consolidation of railroad companies. **RAILROADS**, § 142.  
 Assignment of errors. **APPEAL AND ERROR**, §§ 744, 745.  
 Of mortgage. **MORTGAGES**, §§ 229-231.  
**ASSIGNMENTS FOR BENEFIT OF CREDITORS**, §§ 163-170.  
 Bail bond. **BAIL**, § 61.  
 Bill of exceptions—  
   **CRIMINAL LAW**, § 1092.  
   **EXCEPTIONS, BILL OF**, § 57.  
 Bill or note with pleadings. **BILLS AND NOTES**, § 488.  
 Bond of liquor dealer. **INTOXICATING LIQUORS**, § 85.  
 On appeal—  
   **APPEAL AND ERROR**, § 387.  
   **JUSTICES OF THE PEACE**, § 159.  
 Briefs. **APPEAL AND ERROR**, § 765.  
 Case or statement of facts on appeal in lower court. **APPEAL AND ERROR**, § 573.  
 Certificate of evidence on appeal. **APPEAL AND ERROR**, § 574.  
 Of vote at local option election. **INTOXICATING LIQUORS**, § 86.  
 Charter or articles of association. **CORPORATIONS**, § 22.  
 Of foreign corporation. **CORPORATIONS**, § 644.  
 Claim against county. **COUNTIES**, § 203.  
 Against estate of decedent. **EXECUTORS AND ADMINISTRATORS**, § 228.  
 Or statement of mechanic's lien. **MECHANICS' LIENS**, §§ 128-130, 132, 155, 156.  
 Copy of account alleged in pleading. **PLEADING**, § 330.  
 Sued on. **ACCOUNT, ACTION ON**, § 5.  
 Criminal information or complaint. **INDICTMENT AND INFORMATION**, §§ 41-43.  
**DEPOSITIONS**, § 79.  
 Enumeration of school children. **SCHOOLS AND SCHOOL DISTRICTS**, § 43.  
 Failure to file instrument affecting its validity as to creditors. **FRAUDULENT CONVEYANCES**, § 154.  
 Findings of fact and conclusions of law by court. **TRIAL**, § 403.  
 Indictment or presentment. **INDICTMENT AND INFORMATION**, § 11.  
 Instrument constituting election under will. **WILLS**, § 793.  
 Sued on in justice's court as dispensing with complaint. **JUSTICES OF THE PEACE**, § 91.  
 Legislative bills. **STATUTES**, § 37.  
 Letters patent as prerequisite to right to sell inventions covered thereby. **PATENTS**, §§ 220, 221.  
 Mandate or remittitur from appellate court in lower court. **APPEAL AND ERROR**, § 1191.  
 Mortgage—  
   **CHATTEL MORTGAGES**, §§ 84-97.  
   **MORTGAGES**, §§ 90-95.

Motion. **MOTIONS**, § 17.  
 For new trial. **NEW TRIAL**, § 153.  
 Note for purchase price of land with complaint in suit to enforce vendor's lien. **VENDOR AND PURCHASER**, § 280.  
 Notice of appeal. **APPEAL AND ERROR**, § 428.  
 Of motion for new trial. **NEW TRIAL**, § 153.  
 Obscene matter with indictment for obscenity. **OBSCENITY**, § 12.  
 Orders in general. **MOTIONS**, § 56.  
 Petition and bond for removal of cause. **REMOVAL OF CAUSES**, § 89.  
 For annexation of territory to city. **MUNICIPAL CORPORATIONS**, § 33.  
 For rehearing on appeal. **APPEAL AND ERROR**, § 833.  
 Of property owner for making of public improvements. **MUNICIPAL CORPORATIONS**, § 292.  
 Pleading—  
   **EQUITY**, § 321.  
   **PLEADING**, §§ 331-340.  
 Proceedings for publication of process. **PROCESS**, § 90.  
 Record on appeal or writ of error—  
   **APPEAL AND ERROR**, §§ 619-624, 626-628.  
   **CRIMINAL LAW**, § 1100.  
   **JUSTICES OF THE PEACE**, § 164.  
 Remonstrance against grant of liquor license. **INTOXICATING LIQUORS**, § 68.  
 Removal of county seat. **COUNTIES**, § 34.  
 Report of referee. **REFERENCE**, § 98.  
 Of school teacher. **SCHOOLS AND SCHOOL DISTRICTS**, § 137.  
 Transcript of justice's judgment in court of record. **JUDGMENT**, § 291.  
 Written instruments. **RECORDS**, § 7.  
 Or copies thereof with pleading. **PLEADING**, § 308.

## FILIUS NULLIUS.

See **BASTARDS**.

## FILLING BLANKS.

See—

**ALTERATION OF INSTRUMENTS**, § 7.  
**Description of property in mortgage. MORTGAGES**, § 48.

## FINAL ACCOUNTS.

See—

**Assignees for benefit of creditors. ASSIGNMENTS FOR BENEFIT OF CREDITORS**, §§ 378-402.  
**EXECUTORS AND ADMINISTRATORS**, §§ 459-516.  
**Guardians. GUARDIAN AND WARD**, §§ 137-165.  
 Of insane persons. **INSANE PERSONS**, § 42.  
**Trustees. TRUSTS**, §§ 291-331.

## FINAL JUDGMENT.

See—

**Decisions reviewable. APPEAL AND ERROR**, §§ 75-84.

Termination of criminal prosecution. **MALICIOUS PROSECUTION**, § 36.

In particular actions or proceedings.

See—

Appeal—

APPEAL AND ERROR, §§ 1153, 1175.

CRIMINAL LAW, § 1187.

Award of arbitrators. **ARBITRATION AND AWARD**, § 59.

Default. **JUDGMENT**, § 128.

PARTITION, § 95.

Partnership accounting. **PARTNERSHIP**, § 344.

Sale on partition. **PARTITION**, § 112.

Trial of issues. **JUDGMENT**, § 217.

## FINAL SETTLEMENT.

See—

Commissioner to make partition. **PARTITION**, § 91.

Defined in relation to time for presentation of claims against decedents' estates. **EXECUTORS AND ADMINISTRATORS**, § 225.

## FINDING LOST GOODS.

### Scope-Note.

[INCLUDES the finding and taking possession of lost goods of another, whereby the finder may acquire title thereto; nature, requisites, and incidents of such finding and possession; and rights, duties, and liabilities of finders of lost goods as to the owners or losers and as to others in general.]

[EXCLUDES abandoned property (see *Abandonment*); wrecks and vessels and goods derelict at sea (see *Shipping*); estrays (see *Animals*); establishment of and actions on lost instruments in writing (see *Lost Instruments*); rights of finders of lost negotiable paper (see *Bills and Notes*); rewards for recovery of lost goods, etc. (see *Rewards*); and sales of lost goods (see *Sales*). For complete list of matters excluded, see cross-references, post.]

### Analysis.

§ 3. Evidence as to ownership.

§ 10. Title and rights of finder as to third persons.

### Cross-References.

See—

Abandoned property. **ABANDONMENT**.

Establishment of and actions on lost instruments in writing. **LOST INSTRUMENTS**.

Estrays. **ANIMALS**, §§ 58-65.

Rewards for recovery of lost property. **REWARDS**.

Taking as larceny. **LARCENY**, § 16.

Title to stranded property. **WATERS AND WATER COURSES**, § 95.

### § 3. Evidence as to ownership.

[a] (App. 1894)

Defendant found in a chest which he bought of the estate of W. interest coupons of United States bonds, which W.'s wife stated did not belong to her or W.'s estate, and which defendant then had redeemed. There was evidence that, years before, plaintiff's intestate, who was of a disordered mind, lived with W., and had several United States bonds, which he kept in the chest, and that before he went to another state he detached the coupons from his bonds. *Held*, that there was evidence to support a verdict for plaintiff.—*Rittenhouse v. Knoop*, 9 Ind. App. 126, 36 N. E. 384.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Finding L. G. § 3.

See, also, 19 Cyc. p. 542.

### § 10. Title and rights of finder as to third persons.

[a] (Sup. 1878)

An employé in a paper manufactory found in a bale of old papers, bought by the proprietor, which she was assorting, two lost genuine \$50 bank bills, inclosed in an unmarked and undirected envelope. In order to ascertain if they were genuine, she delivered them to the proprietor on his promise to return them to her, but he retained them, notwithstanding her demand for them. *Held* that, as against him, she was entitled to recover their value.—*Bowen v. Sullivan*, 62 Ind. 281, 30 Am. Rep. 172.

[b] (Sup. 1906)

The finder of money lost becomes the owner thereof as against all persons except the true

owner.—*Williams v. State*, 75 N. E. 875, 165 Ind. 472, 2 L. R. A. (N. S.) 248.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Finding L. G. § 9.

See, also, 19 Cyc. pp. 535-537; note, 1 L. R. A. (N. S.) 477; note, 18 Am. Dec. 55.

## FINDINGS.

*See—*

Conclusiveness of findings of court without judgment. JUDGMENT, § 658.

Conformity of judgment to. JUDGMENT, § 256.

Contrary to law or evidence, ground for new trial. NEW TRIAL, §§ 65-81.

Court. TRIAL, §§ 388-405.

Grand jury. INDICTMENT AND INFORMATION, § 10.

Interest on. INTEREST, § 21.

Irregularities or defects, ground for arrest of judgment. JUDGMENT, § 265.

Ground for new trial. NEW TRIAL, §§ 57-64.

Jury. TRIAL, §§ 346-366.

On submission of issues in equity. EQUITY, § 381.

Part of record on appeal. APPEAL AND ERROR, § 527.

Review in appellate court—

APPEAL AND ERROR, §§ 219, 220, 265, 266, 293, 527, 704, 740, 930, 931, 1007-1017, 1070, 1071.

CRIMINAL LAW, §§ 1157-1160, 1175.

**In particular actions or proceedings.**

*See—*

Bastardy proceedings. BASTARDS, § 122.

Cancellation of mortgage. MORTGAGES, § 311.

Condemnation proceedings. EMINENT DOMAIN, §§ 234, 235, 237.

Damages from overflow. WATERS AND WATER COURSES, § 179.

Declaration of trusts. TRUSTS, § 373.

Drainage proceedings. DRAINS, § 32.

Foreclosure of mortgage. MORTGAGES, § 480.

Of vendor's lien. VENDOR AND PURCHASER, § 284.

Inquisitions of lunacy. INSANE PERSONS, § 22.

REFERENCE, §§ 84-90.

Supplementary proceedings. EXECUTION, § 398.

Trial of disputed claim against estate of decedent. EXECUTORS AND ADMINISTRATORS, § 274.

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# FINES.

## Scope-Note.

[INCLUDES pecuniary punishments imposed by sentences of courts on convictions of crime; nature and scope of such punishment in general; constitutional and statutory provisions relating thereto; in what cases and for what offenses fines are imposed in general; jurisdiction over and proceedings for enforcement of fines; review of proceedings; costs in such proceedings; payment or working out fines and costs, and imprisonment for nonpayment thereof; discharge from fines or from imprisonment therefor; disposition of moneys received for fines; and recovery of fines paid.

[EXCLUDES penalties recoverable by action for violations of statutes (see *Penalties*); fines for particular offenses (see specific heads); punishment of contempt of court by fine (see *Contempt*); and effect of pardon or commutation of sentence (see *Pardon*). For complete list of matters excluded, see cross-references, post.]

## Analysis.

- § 1. Constitutional and statutory provisions.
- § 2. Enforcement in general.
- § 7. Actions.
- § 10. Imprisonment on nonpayment.
- § 11. — In general.
- § 12. — In satisfaction of fine.
- § 13. — Discharge of prisoner.
- § 18. Remission.
- § 20. Disposition of proceeds.

## Cross-References.

<i>See—</i>	
Application of proceeds of, by city. MUNICIPAL CORPORATIONS, § 860.	Paying over proceeds of, to county treasurer, duty of justice. JUSTICES OF THE PEACE, § 20.
Embezzlement of funds collected. EMBEZZLEMENT.	PENALTIES.
Excessive fines. CRIMINAL LAW, § 1214.	Restraining collection of— INJUNCTION, § 105. JUDGMENT, § 415.

**Imposition for particular acts or violations of particular orders or laws.**

*See—*  
Contempt. CONTEMPT, §§ 70-82.  
Municipal ordinances. MUNICIPAL CORPORATIONS, §§ 633, 643.  
Nonpayment of assessments on building and loan association stock. BUILDING AND LOAN ASSOCIATIONS, § 21.  
Obstruction of highway. HIGHWAYS, § 164.  
Regulations relating to militia. MILITIA, § 20.

### § 1. Constitutional and statutory provisions.

Presumptions as to distribution of acts, see EVIDENCE, § 83.  
Retroactive operation of repealing acts, see STATUTES, § 275.  
Time of taking effect, see STATUTES, § 250.

FOR CASES FROM OTHER STATES,  
SEE 23 CENT. DIG. Fines, § 2.

### § 2. Enforcement in general.

[a] (Sup. 1869)  
A judgment of conviction directing a fine and costs to be collected "without relief from valuation or appraisal laws" is erroneous. —Croy v. State, 32 Ind. 384.

FOR CASES FROM OTHER STATES,  
SEE 23 CENT. DIG. Fines, § 4.  
See, also, 19 Cyc. pp. 545, 549.

### § 7. Actions.

[a] (Sup. 1877)  
Where a defendant in a criminal prosecution is adjudged to pay a fine and costs, the payment of the costs is not such a payment on the judgment as will relieve it from the op-

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eration of the statute of limitations.—*Strong v. State ex rel. Attorney General*, 57 Ind. 428.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Fines, §§ 8, 9.

See, also, 19 Cyc. p. 546.

**§ 10. Imprisonment on nonpayment.**

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Fines, §§ 12-16.

See, also, 19 Cyc. pp. 551-556; note, 12 Am. St. Rep. 202.

**§ 11. — In general.**

[a] (Sup. 1881)

Act April 15, 1881, providing for the collection of judgments for fines and forfeitures by execution, and the imprisonment of defendant on the expiration of the stay secured to him by the entry of a replevin bill, so far as it relates to judgments replevied before that day is unconstitutional.—*Dinckerlocker v. Marsh*, 75 Ind. 548.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Fines, §§ 12, 13.

See, also, 19 Cyc. p. 551.

**§ 12. — In satisfaction of fine.**

[a] (Sup. 1861)

2 Rev. St. 1852, p. 378, § 128, providing that when defendant in a criminal case is adjudged to pay any fine and costs, he may be committed until the same are paid or replevied, is unconstitutional, so far as it authorizes commitment for costs, being in violation of Const. art. 1, § 22, which provides that there shall be no imprisonment for debt, except in case of fraud.—*Thompson v. State*, 16 Ind. 516.

[b] (Sup. 1864)

Neither the fine nor costs adjudged against the defendant because of his criminal act are within the meaning of Const. art. 1, § 22, providing that there shall be no imprisonment for debt except in cases of fraud.—*McCool v. State*, 23 Ind. 127.

[c] (Sup. 1864)

A sentence is not objectionable because providing for imprisonment until the fine and costs are paid or replevied.—*Smith v. State*, 23 Ind. 132.

[d] (Sup. 1889)

Where defendant was sentenced to imprisonment for 90 days, and until a fine of \$1 and costs was paid, when an imprisonment for 90 days had been completed, that portion only of the sentence was discharged, and defendant was not entitled to a credit of 50 cents per day on the fine and costs from the day when his imprisonment commenced.—*Ex parte Tongate*, 31 Ind. 370.

[e] (Sup. 1891)

Though it is the duty of a justice, if a defendant in a criminal cause does not immediately pay or replevy a fine adjudged against

him, to commit him to jail, yet, if he extends indulgence to him by giving him time without bail in which to pay it, the validity of the judgment is not thereby affected, and a mittimus subsequently issued thereon is not void.—*McLaughlin v. Etchison*, 127 Ind. 474, 27 N. E. 152, 22 Am. St. Rep. 658.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Fines, §§ 12, 13.

**§ 13. — Discharge of prisoner.**

[a] (Sup. 1878)

A person who had been committed to prison for failing to pay a judgment and costs rendered against him for violation of a city ordinance, and had been put at hard labor on the streets, under the statutes of the state, made his escape, and after the expiration of 30 days from the date of the judgment returned to the city, and was arrested by the marshal of said city without warrant or other authority. *Held*, that the 30 days mentioned in the statute must run continuously from the date of the judgment, and that the marshal had no right to arrest or detain such person in custody.—*Flora v. Sachs*, 64 Ind. 155.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Fines, §§ 14-16.

See, also, 19 Cyc. pp. 555, 556.

**§ 18. Remission.**

Time of taking effect of statute regulating remission of fines, see STATUTES, § 250.

[a] (Sup. 1857)

Under the constitution, providing that the governor shall have power to remit fines and forfeitures under such regulations as may be prescribed by law, the power of the governor to remit fines is not absolute, but can only be exercised pursuant to legislative direction.—*State v. Dunning*, 9 Ind. 20.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Fines, § 19; 37 CENT. DIG. Pardon, § 5.

**§ 20. Disposition of proceeds.**

[a] (Sup. 1849)

An action of debt to recover a penalty for selling spirituous liquors without a license, under the charter of Indianapolis (Loc. Laws 1838, p. 32, § 30), is a civil proceeding, and not within article 9, § 3, of the constitution, appropriating fines assessed for breach of penal laws to county seminaries.—*Town of Indianapolis v. Fairchild*, 1 Ind. 315, Smith, 122.

[b] (Sup. 1878)

All fines imposed by the court for contempt belong to the common school fund of the state.—*Swift v. State ex rel. Clark*, 63 Ind. 81.

[c] (Sup. 1892)

Act March 9, 1889, § 2, imposing a penalty for failure by a railroad to post notices as

to whether trains are on time, and providing that one half shall go to the county prosecuting attorney, and the remainder to the county to form a part of the common school fund, is not in conflict with Const. art. 8, § 2, which provides that the common school fund of the state shall consist of, and be derived from, "the fines assessed for breaches of the penal law of the state, and from all forfeitures which may accrue," since the constitution has reference to fines assessed in criminal prosecutions.—*State v. Indiana & I. S. R. Co.*, 32 N. E. 817, 133 Ind. 69, 18 L. R. A. 502; *Same v. Pennsylvania Co.*, 32 N. E. 822, 133 Ind. 700.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Fines, §§ 23, 24.

See, also, 19 Cyc. pp. 559-561.

**FIREARMS.**

See **WEAPONS.**

**FIRE DEPARTMENT.**

See **MUNICIPAL CORPORATIONS**, §§ 193-202.

**FIRE INSURANCE.**

See **INSURANCE.**

**FIRE LIMITS.**

In cities, see **MUNICIPAL CORPORATIONS**, § 603.

**FIREMEN.**

See—

Liability for injuries to, from defects in premises. **NEGLIGENCE**, §§ 31, 32.

**MUNICIPAL CORPORATIONS**, §§ 193-202, 747.

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## FIRES.

### *Scope-Note.*

[INCLUDES burning or setting fire to property other than buildings and similar structures and their contents, and refusing to aid in or obstructing extinguishment of fires; nature and extent of criminal responsibility therefor, and grounds of defense; prosecution and punishment of such acts as public offenses; and civil liability for willful burning or setting fire.

[EXCLUDES liabilities for injuries from fire caused by negligence (see *Negligence*). For complete list of matters excluded, see cross-references, post.]

### *Cross-References.*

#### *See—*

ARSON.

Burning of school house as affecting teacher's right to compensation. SCHOOLS AND SCHOOL DISTRICTS, § 144.

Cause of loss within policy of marine insurance. INSURANCE, §§ 405, 421.

Civil liability for injuries from fires caused by negligence. NEGLIGENCE, § 21.

Caused by operation of railroad. RAILROADS, §§ 453-488.

Danger from as element of compensation for property injured by construction and operation of railroad. EMINENT DOMAIN, § 111.

Destruction of buildings in case of fire as denial of due process of law. CONSTITUTIONAL LAW, § 320.

Duty of administrator to protect property of estate from fires. EXECUTORS AND ADMINISTRATORS, § 118.

Fire insurance. INSURANCE.

Liability of parent for injury caused by fire started by child. PARENT AND CHILD, § 13.

Loss of or injury to goods stored. WAREHOUSEMEN, § 24.

Municipal fire department. MUNICIPAL CORPORATIONS, §§ 193-202.

Regulations for prevention of and protection against fire. MUNICIPAL CORPORATIONS, § 603.

Rights as between vendor and purchaser on destruction of property by fire. VENDOR AND PURCHASER, § 203.

#### **§ 7. Civil liability for willful or criminal burning or setting fire.**

Civil liability for injuries from fires caused by negligence in general, see NEGLIGENCE, § 21.

Civil liability for injuries from fires caused by operation of railroad, see RAILROADS, §§ 453-488.

[a] (Sup. 1877)

The general denial, in an action for damages for maliciously burning a barn, does not admit evidence of the general good character of defendant.—Gebhart v. Burkett, 57 Ind. 378, 26 Am. Rep. 61.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FIRES, § 5; 15 CENT. DIG. Damag. § 204.

See, also, 19 Cyc. pp. 979-983.

## FIRMS.

See PARTNERSHIP.

### FIRST DEGREE.

Element of murder in first degree, see HOMICIDE, §§ 21-23.

## FISCAL MANAGEMENT.

#### *See—*

COUNTIES, §§ 149-196.

MUNICIPAL CORPORATIONS, §§ 859-1000.

SCHOOLS AND SCHOOL DISTRICTS, §§ 90-111.

STATES, §§ 113-167.

TOWNS, §§ 46-61.

UNITED STATES, §§ 79-90.

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# FISH.

## Scope-Note.

[INCLUDES animals inhabiting the water; regulations for their preservation; and nature and incidents of rights of fishery.

[EXCLUDES fishing on Sunday (see *Sunday*). For complete list of matters excluded, see cross-references, post.]

## Analysis.

- § 1. Nature of property.
- § 8. Power to protect and regulate.
- § 9. Constitutional and statutory provisions.
- § 14. Penalties for violations of regulations.
- § 15. Criminal prosecutions.

## Cross-References.

See—

Certainty of statute regulating catching of.  
STATUTES, § 47.

GAME.

Rights of fishery as vested rights. CONSTITUTIONAL LAW, § 93.

### § 1. Nature of property.

[a] Fish are *feræ naturæ*, and, as far as any right of property in them can exist, it is in the public, or is common to all, until they are taken and reduced to actual possession.—(Sup. 1868) *Gentile v. State*, 29 Ind. 409; (1883) *State v. Lewis*, 134 Ind. 250, 33 N. E. 1024, 20 L. R. A. 52.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fish, § 1.

See, also, 19 Cyc. p. 987.

### § 8. Power to protect and regulate.

[a] (Sup. 1893)

Rev. St. § 2117, making it a misdemeanor for any one to have in his possession a gill net or seine, except in certain cases, which are particularly specified, and prescribing a penalty therefor, is a constitutional exercise of the police power.—*State v. Lewis*, 134 Ind. 250, 33 N. E. 1024, 20 L. R. A. 52.

[b] (Sup. 1897)

Act April 14, 1881 (Acts 1881, p. 174), as amended by Act March 5, 1889 (Acts 1889, p. 102; Burns' Rev. St. 1894, § 2229), imposing a fine on one who takes fish in certain months from water mentioned with a gig, or other instruments named, and making it a misdemeanor to possess any gill net or seine, etc., is valid as a police regulation.—*Lewis v. State*, 47 N. E. 675, 148 Ind. 346.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fish, § 16.

See, also, 19 Cyc. p. 1014; note, 39 L. R. A. 581; note, 23 Am. St. Rep. 838.

### § 9. Constitutional and statutory provisions.

Deprivation of property without due process of law, see CONSTITUTIONAL LAW, § 278.

Local and special laws relating to protection of fish, see STATUTES, § 76.

Subjects and titles of acts, see STATUTES, § 107.

[a] (Sup. 1868)

The exception from the fish law (Sess. Acts 1867, p. 128) of the St. Joseph river does not apply to the St. Joseph's of the Maumee, but only to the one rising in the state of Michigan and running through the northern part of the counties of Elkhart and St. Joseph, and thence returning into Michigan.—*Gentile v. State*, 29 Ind. 409.

[b] (Sup. 1877)

2 Rev. St. 1876, p. 481, providing for the protection of fish, and prohibiting their taking during certain months, is not unconstitutional.—*Stuttsman v. State*, 57 Ind. 119.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fish, §§ 17, 18.

See, also, 19 Cyc. p. 1019; note, 1 L. R. A. (N. S.) 752.

### § 14. Penalties for violations of regulations.

[a] (Sup. 1877)

2 Rev. St. 1876, p. 481, § 1, prohibits, under penalties, the taking of fish with gig or spear at any time between March and December. *Held*, that an affidavit before a justice of the peace charging the defendant with taking fish with a spear "on or about" a certain

day in April was sufficient.—*Stuttsman v. State*, 57 Ind. 119.

FOR CASES FROM OTHER STATES,  
SEE 23 CENT. DIG. Fish, §§ 25, 26.  
See, also, 19 Cyc. pp. 1022–1024.

### § 15. Criminal prosecutions.

[a] (Sup. 1910)

An indictment for polluting a stream, charging merely that filth and offal "destroyed 'animal life'" therein, does not charge an of-

fense under Burns' Ann. St. 1906, § 2546, making it unlawful to pollute water so as to injure or destroy fish.—*United States Board & Paper Co. v. State*, 91 N. E. 953.

FOR CASES FROM OTHER STATES,  
SEE 23 CENT. DIG. Fish, §§ 27–30.  
See, also, 19 Cyc. pp. 1026–1030.

### FITNESS.

Warranty as to, see SALES, § 273.

## FIXTURES.

### *Scope-Note.*

[INCLUDES chattels affixed or annexed to real property; and rights and liabilities in respect of such fixtures incident to or affected by particular estates or interests in the realty.

[EXCLUDES distinction between real and personal property in general (see *Property*). For complete list of matters excluded, see cross-references, post.]

### *'Analysis.*

- § 1. Nature and requisites of conversion into realty in general.
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- § 13. Between landlord and tenant and their privies.
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- § 19. — Mortgagee of land and mortgagee of chattels.
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- § 33. — Waiver or loss of right.
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### *Cross-References.*

See—

Compensation for fixtures on appropriation of land for public use. EMINENT DOMAIN, § 133.

Distinction between real and personal property. PROPERTY, §§ 3–5.

Execution on. EXECUTION, § 25.

Lien for furnishing, installing, or repairing fixtures. MECHANICS' LIENS, §§ 30–32.

Mortgage of. CHATTEL MORTGAGES, § 121.

Status of buildings and machinery as affected by judgment of foreclosure. MORTGAGES, § 497.

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

### § 1. Nature and requisites of conversion into realty in general.

[a] (Sup. 1889)

The nature of the articles, and the manner in which they are affixed, and the intention of the party making the annexation, together with the policy of the law, are controlling factors in determining whether an article which may or may not be a fixture becomes a part of the realty by being annexed to the freehold.—Binkley v. Forkner, 19 N. E. 753, 117 Ind. 176, 3 L. R. A. 33.

[b] (App. 1901)

There is no general rule or test for determining whether or not an article personal in nature has acquired the character of realty by being attached thereto. In each particular case regard is to be had to the chattel itself, the injury that would result from its removal, and the intention in placing it upon the premises with reference to use or ornament.—McFarlane v. Foley, 60 N. E. 357, 27 Ind. App. 484, 87 Am. St. Rep. 264.

#### FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. FIXT. §§ 1, 6.

See, also, 19 Cyc. pp. 1035, 1036.

### § 4. Intent in making annexation.

[a] (Sup. 1876)

A stationary mill belonging to two partners jointly, placed under a temporary shed on the real estate for manufacturing purposes and fixed in the soil by means of posts, does not constitute a part of the realty, if treated by such owners as personalty.—Young v. Baxter, 55 Ind. 188.

[b] (Sup. 1882)

Sawmills and gristmills are not necessarily real estate. Whether they are, or not, depends on circumstances and on the intentions of the parties.—Price v. Malott, 85 Ind. 266.

#### FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. FIXT. §§ 3, 6.

See, also, 19 Cyc. pp. 1045-1048.

### § 6. Mode and sufficiency of annexation.

#### FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. FIXT. §§ 7-14.

See, also, 19 Cyc. pp. 1040-1045.

### § 7. — Actual.

[a] (Sup. 1832)

A carding machine situated in a building erected for the purpose of carrying on carding, ready to be put in operation, and standing on the floor in its usual place of operation, but not fastened to the building, is personal property, and subject to an execution issued by a justice of the peace.—Taff v. Warnick, 3 Blackf. 111, 23 Am. Dec. 383.

[b] (Sup. 1886)

A house, standing partly upon a street, will be considered personal property, notwith-

standing the claim that it was permanently affixed to an adjoining house, which was part of the realty.—Foy v. Reddick, 31 Ind. 414.

[c] (Sup. 1881)

A line shaft, connecting a stove machine erected under an adjoining shed with a gristmill, so that it can be run by the engine in the mill, and hung from a joist in the mill is not a fixture.—Balliett v. Humphreys, 78 Ind. 388.

#### FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. FIXT. §§ 7-13.

See, also, 19 Cyc. pp. 1040-1042.

### § 13. Between landlord and tenant and their privies.

Waiver of right to remove, see post, § 33.

#### FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. FIXT. §§ 22-31.

See, also, 19 Cyc. pp. 1065-1068; note, 1 L. R. A. (N. S.) 1192; notes, 11 Am. Dec. 241, 69 Am. Dec. 508.

### § 14. — In general.

[a] (Sup. 1830)

The wife of a tenant, after the expiration of his tenancy, sued the owner of the land for an alleged conversion of a house situated thereon. At the trial she showed that she had purchased the house from a former tenant, after his tenancy had expired. Held insufficient to establish her title as against the owner of the land, who had no knowledge of such purchase; there being no privity of contract between her and such owner.—Griffin v. Ransdell, 71 Ind. 440.

As between landlord and tenant, a dwelling house upon land is part of the realty; and a person claiming it to be personalty must show some fact changing its character to personal property.—Id.

[b] (Sup. 1882)

A tenant may remove fixtures and improvements erected for his own use at any time during the tenancy, and afterwards by agreement, and, where such right to remove exists, they are treated as personal property.—Price v. Malott, 85 Ind. 266.

#### FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. FIXT. §§ 22, 25.

See, also, 19 Cyc. p. 1065.

### § 15. — Trade fixtures.

Removal, see post, § 32.

[a] (Sup. 1864)

On failure of a parol contract to purchase the undivided one-half of land upon which the prospective purchaser had erected a mill, the relation of landlord and tenant is created, giving the tenant the right to remove fixtures erected by him for the purposes of manufacture, even in the absence of a special contract.—Yater v. Mullen, 23 Ind. 562.

[b] (App. 1909)

Machinery and fixtures placed on realty leased for gas and oil purposes did not become permanent fixtures nor parts of the freehold by reason of such annexation as was necessary to develop the premises according to the terms of the lease, and the title to such machinery and fixtures did not vest in the lessor on forfeiture of the lease.—*Perry v. Acme Oil Co.*, 88 N. E. 859.

FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. FIXT. §§ 23-29.

See, also, 19 Cyc. p. 1065.

#### § 16. — Agricultural fixtures.

[a] (Sup. 1855)

A pump, placed in a well by a tenant, may be removed by him at the expiration of his term.—*McCracken v. Hall*, 7 Ind. 30.

FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. FIXT. § 30.

See, also, 19 Cyc. p. 1065.

#### § 18. Between mortgagor and mortgagee of land and their privies.

[a] (Sup. 1845)

A steam engine, erected in a permanent manner in a tanyard, to facilitate the process of tanning, and used there for such purpose for two or three years, but which could be removed without injury to the building with which it was connected by braces, was *held* to be a fixture, and to pass by a mortgage of the land on which it was erected to the mortgagee.—*Sparks v. State Bank*, 7 Blackf. 469.

[b] (Sup. 1861)

A mortgage of a building used for manufacturing purposes carries the fixtures used therein.—*Millikin v. Armstrong*, 17 Ind. 456.

[c] (Sup. 1871)

Machinery put in a mill after the execution of a mortgage, to supply the place of old and worn-out articles, becomes a part of the realty, and is subject to the lien of the mortgage.—*Bowen v. Wood*, 35 Ind. 268.

[d] (Sup. 1878)

That a mill was personal property, and not subject to a mortgage on the lands, is sufficiently shown by an averment that when the mortgage was executed the mortgaged lands had upon them a portable steam sawmill, boiler, engine, and other attachments, which were personal property, and were always so treated, and had been from time to time moved, and were attached to the lands only so far as necessary to steady the machinery of the mill, and could be removed without injury to the realty, and that such mill and fixtures were not included in the mortgage.—*Taylor v. Watkins*, 62 Ind. 511.

FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. FIXT. §§ 32-46.

See, also, 19 Cyc. pp. 1061-1064; note, 13 Am. St. Rep. 153.

#### § 19. — Mortgagee of land and mortgagee of chattels.

[a] (Sup. 1889)

Where one purchasing machinery gives a chattel mortgage for its price, and orally agrees that it shall be treated as personalty until paid for, and the realty to which it is afterwards attached by him would not be injured by its removal, the machinery will be considered as personal property, as against a prior mortgagee of the realty.—*Binkley v. Forkner*, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33.

Where a vendee of machinery gives a chattel mortgage for its price, and orally agrees that it shall be treated as personalty, it will be so considered, as against a subsequent mortgagee of the realty, whose mortgage, after describing the land, provides that the mortgagor also mortgages and warrants all machinery, particularly enumerating it, and that none of the same shall be removed until the mortgage is paid.—*Id.*

FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. FIXT. §§ 42, 43.

#### § 20. — Mortgagee of land and vendor or vendee of chattels.

[a] (Sup. 1865)

Where a mill is built upon land of another under an express contract, by which it was to be the sole property of the builder until a judgment which was a lien upon the land should be paid by the owner, the builder has a right to remove the mill after a sale of the land on an execution issued upon such judgment.—*Yater v. Mullen*, 24 Ind. 277.

[b] (Sup. 1881)

After mortgaging certain mill property, A. placed machinery therein, secured simply by cleats, under agreement with the owner of the machinery to use it for 60 days, and, if satisfactory, to pay for it then. At the expiration of the time he refused to pay therefor; and, upon a suit by the mortgagee to foreclose, *held* that, as against the owner thereof, the machinery was a fixture.—*Hamilton v. Huntley*, 78 Ind. 521, 41 Am. Rep. 593.

A party in possession, but not the owner, of a flouring mill, was permitted by manufacturers of machinery to put in and annex to it in a temporary manner, as to admit of removal without injury to the mill, certain machinery, which, if found satisfactory after 60 days' trial, was to become his property upon giving notes for the price, and in event of his acceptance of the machinery. *Held* that, as between the manufacturers and the prior mortgagees of the mill, the machinery was a fixture and part of the real estate subject to the mortgages.—*Id.*

[c] (Sup. 1884)

If the owner of mortgaged land on which is a mill buys machinery for the mill, and so attaches it that it becomes a part of the realty, it becomes subject to the mortgage, notwith-

standing an agreement between the mortgagor and the seller of the machinery that title to it shall not pass until it is paid for.—*Bass Foundry & Machine Works v. Gallentine*, 90 Ind. 525.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FIXT. §§ 44-46.

## § 21. Between vendor and purchaser of land and their privies.

[a] (Sup. 1871)

Between grantor and grantee, the rule allowing removal of fixtures is less liberal than as towards tenants. Where land is sold and conveyed, having situate upon and attached and affixed to it a steam sawmill and machinery, if there is no reservation of the mill and machinery, they will be regarded as a part of the realty, and will pass to the grantee by the conveyance.—*Pea v. Pea*, 35 Ind. 387.

[b] (Sup. 1878)

A. sold to B., without reservation, a tract of land on which he had placed a cane mill, which was fixed to the ground, and afterwards sold the mill to C., who gave his note to A. for the purchase money. B., on taking possession of the property, refused to allow C. to remove the mill. *Held*, that the mill passed with the land to B.—*Kennard v. Brough*, 64 Ind. 23.

[c] (App. 1904)

Where a person puts machinery in a paper mill on his land, which machinery is essential to the use he makes of the land, with the intention that it shall remain there, the machinery is a fixture and passes with the land under an ordinary conveyance thereof.—*White v. Cincinnati, R. & M. R. R.*, 34 Ind. App. 287, 71 N. E. 276.

[d] (App. 1905)

As a general rule, a structure erected by a purchaser of land who was in possession but has not obtained title cannot be removed without the consent of the vendor.—*Union Inv. Co. v. McKinney*, 74 N. E. 1001, 35 Ind. App. 594.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FIXT. §§ 47-56.

See, also, 19 Cyc. pp. 1059-1061.

## § 25. Between owner of land and trespasser.

[a] (App. 1898)

Where a house is erected on the land of an adjoining owner as a permanent fixture to be used for a residence, it becomes a fixture to the property of the adjoining owner, notwithstanding the house is merely set on blocks.—*Dutton v. Ensley*, 51 N. E. 380, 21 Ind. App. 46, 66 Am. St. Rep. 340.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FIXT. § 6.

See, also, 19 Cyc. p. 1065.

## § 27. Agreements.

[a] (Sup. 1860)

An agreement, made contemporaneously with the execution of a mortgage upon a machine shop and the real estate upon which the same was situated, together with the "appurtenances," that the patterns, tools, and movable fixtures of said shop should not be regarded as real estate and embraced in said mortgage, but should remain unincumbered personal property, is valid, may control the character of movable fixtures as to being realty or personalty, and subsequent purchasers or mortgagees may be subject to and have the benefit of such agreement.—*Frederick v. Devol*, 15 Ind. 357.

[b] (Sup. 1865)

A. erected a mill on land owned by another, under a parol contract that if the owner should pay off a certain judgment which was a lien on the land, and should then convey to A. an undivided half of the land, he, the owner, should have one-half of the mill. Until the judgment was paid, the mill was to remain the individual property of A. The owner of the land failed to pay the judgment, and it was sold under an execution. *Held*, that A. had acquired no interest in the land as a purchaser, and his right to remove the mill did not depend on the law in relation to fixtures erected by him as tenant, but, on the contract, by virtue of which he acted.—*Yater v. Mullen*, 24 Ind. 277.

[c] (Sup. 1876)

Under 2 Rev. St. 1876, p. 354, authorizing a defendant in execution to claim his exemption in either real or personal property, where a stationary mill belonging to two persons had been affixed to the real estate of one of them for manufacturing purposes, under a temporary shed, under an agreement with the judgment creditor having a lien on the land that it should be treated as personalty, where an execution against the owner of such real estate is levied, he may demand that such realty may be set off to him as exempt by an appraisalment, without regard to any interest he may have in such mill, where the value does not exceed the sum of \$300, which sum under the law is exempt.—*Young v. Baxter*, 55 Ind. 188.

[d] (Sup. 1893)

Under an agreement to furnish water to a mill on condition that, if the water rent be not paid, the water company may enter on the premises, shut off the water, and take and hold possession of the machinery and fixtures until it is paid, from the nature of the contract, the machinery and fixtures must remain personal property as between the parties to the contract.—*St. Joseph Hydraulic Co. v. Wilson*, 33 N. E. 113, 133 Ind. 465.

[e] (App. 1902)

Where one erects a flour mill on leased premises, and fits it with machinery, etc., and

the same may be removed without permanently injuring the freehold, he having the right of removal, the mill, etc., is personality, and subject to mortgage as such.—*Gordon v. Miller*, 63 N. E. 774, 28 Ind. App. 612.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. FIXT. §§ 5, 22, 25, 44, 45, 54.

See, also, 19 Cyc. pp. 1048-1054; note, 19 C. C. A. 441.

**§ 28. Rights and remedies of creditors and purchasers at execution sales.**

Levy of execution, see EXECUTION, § 25.

**[a] (Sup. 1876)**

The fact that mill machinery belonging to two persons was attached to realty belonging to one of them, without the agreement of a judgment creditor having a judgment lien upon such land that it should be treated as personality, will not give to the latter the right to treat it as a part of the realty, where the owners of such machinery treated it as personality, and it can be removed without injury to the realty.—*Young v. Baxter*, 55 Ind. 188.

**[b] (Sup. 1889)**

Where the detachment of articles annexed to realty will occasion no damage to the realty, a lien on them may be enforced by court of equity in the same degree as if they had remained chattels according to the agreement, but, if the detachment would occasion diminution in the value as it would have stood had the detachment not been made, then the depreciation must be made whole and the rights of the parties adjusted by the chancellor according to the equity of the case.—*Binkley v. Forkner*, 19 N. E. 753, 117 Ind. 176, 3 L. R. A. 33.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. FIXT. §§ 58, 59; 30 CENT. DIG. JUDGM. § 1338.

See, also, 19 Cyc. pp. 1072-1076.

**§ 30. Removal.**

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. FIXT. §§ 62-66.

See, also, 19 Cyc. pp. 1069-1071.

**§ 31. — In general.**

**[a] (Sup. 1905)**

Where a house on certain land conveyed to defendant belonged to plaintiff, a stranger to the title to the land, a reservation thereof in the deed conveying the land to defendant was unnecessary to enable plaintiff to remove it.—*Adams v. Tully*, 73 N. E. 595, 164 Ind. 292.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. FIXT. § 62.

See, also, 19 Cyc. p. 1069.

**§ 32. — Time and manner of making.**

**[a] (Sup. 1872)**

The right of a tenant to remove trade fixtures put by him into the leased building must be exercised during the term of the lease, or during such further period as the tenant may lawfully and rightfully remain in possession. He can remove them after a voluntary surrender of the premises, or lawful eviction therefrom, only with the assent of the landlord.—*Allen v. Kennedy*, 40 Ind. 142.

**[b] (Sup. 1905)**

Plaintiff erected a house on real estate belonging to defendant's grantor under an agreement that it should be personality, and that plaintiff should be entitled to remove it. Defendant, on purchasing the property, had notice that the house was personality, and that it was in the possession of and owned by plaintiff, and agreed that plaintiff might remove it within six months if defendant did not purchase it. *Held*, that plaintiff was not bound to remove the house before expiration of his tenancy, but was entitled to remove it within the six months specified, or, in the absence of such agreement, within a reasonable time after the conveyance of the land to defendant.—*Adams v. Tully*, 73 N. E. 595, 164 Ind. 292.

**[c] (App. 1909)**

Where an oil and gas lease authorized the lessor to remove its fixtures "at any time," such right was not unlimited as to time, but the lessee was only entitled to remove within a reasonable time after the expiration of the lease.—*Perry v. Acme Oil Co.*, 88 N. E. 859.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. FIXT. §§ 63, 65.

See, also, 19 Cyc. p. 1071.

**§ 33. — Waiver or loss of right.**

**[a] (Sup. 1872)**

The general rule is that the tenant must remove fixtures put up by him before he quits the possession on the expiration of his lease. If not removed during the term, they become the property of the landlord.—*Cromie v. Hoover*, 40 Ind. 49.

**[b] (Sup. 1880)**

Since a tenant's right to remove a dwelling constructed by him on leased land is restricted to the duration of his tenancy, if he fails to remove it before the expiration of the tenancy the dwelling becomes a part of the freehold, and vests absolutely in the owner thereof.—*Griffin v. Ransdell*, 71 Ind. 440.

**[c] (Sup. 1885)**

A lessee, who erects on the demised premises a building which he has a right to remove, renounces that right by surrendering his leasehold interest to the lessor without reservation; and the right is not revived by his subsequently taking another lease of the same premises

from the same lessor.—*Hedderich v. Smith*, 103 Ind. 203, 2 N. E. 315, 53 Am. Rep. 509.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Fixt. §§ 64, 65.

**§ 34. — Wrongful removal.**

[a] (Sup. 1876)

Fence rails and stakes, unlawfully taken and retained by a wrongdoer, when used by him in the construction of a fence upon his real estate, thereby become part of the realty.—*Ricketts v. Dorrel*, 55 Ind. 470.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Fixt. § 66.

See, also, 19 Cyc. p. 1070.

**§ 35. Actions relating to fixtures.**

Grounds for demurrer to pleading, see PLEADING, § 194.

Oral agreement affecting agreement relating to, see EVIDENCE, § 441.

[a] (Sup. 1855)

Fixtures left by the tenant at the expiration of his term will be presumed to have been abandoned; but that presumption may be rebutted by proof of an oral agreement by which he was to have the right of removal at a subsequent day.—*McCracken v. Hall*, 7 Ind. 80.

[b] (Sup. 1880)

A builder, who had erected a house, finding that a mistake had been made in the lots upon which it was to be erected, and which were to be taken in payment, sold the house and removed it to a lot of the purchaser, placing it upon a permanent brick foundation. *Held*, that an action for the recovery of the house would not lie, since it has been made a fixture by annexing it to the land of the purchaser.—*Reese v. Jared*, 15 Ind. 142, 77 Am. Dec. 88.

A. employed B. to build a house, and, after it was erected and finished, B., without the knowledge or consent of A., sold it to C. and moved it upon his (C.'s) land, where it was set upon a permanent brick foundation. Suit by A. to recover possession of the house. *Held*, that the recovery should have been for the value of the house, and not for the house itself.—*Id.*

[c] (Sup. 1889)

Replevin will lie for the recovery of a house removed from land without the consent of the owner thereof, since it was a fixture appurtenant to the land, of which the owner may be considered still to retain constructive possession.—*Foy v. Reddick*, 31 Ind. 414.

In the absence of a conveyance in terms sufficient to cover a house as appurtenant to the lot conveyed, it may be presumed that it was treated as personalty by the parties.—*Id.*

[d] (Sup. 1871)

Since one who erects fixtures on the land of another without a license or right cannot remove the same, where a railroad company, without the consent of the owner and without color of title, entered on land and occupied the same, building a depot and hotel thereon, it is liable for the value of the land at the time of appropriation, with the value of the fixtures erected thereon.—*Graham v. Connersville & N. C. Junction R. Co.*, 36 Ind. 463, 10 Am. Rep. 56.

[e] (Sup. 1876)

Fence materials, wrongfully taken and used in the construction of a fence upon real estate belonging to the wrongdoer, cannot be replevied by the owner as personal property, since they have become fixtures.—*Ricketts v. Dorrel*, 55 Ind. 470.

An article severed from the realty by a wrongdoer may be replevied by the owner as long as its separate identity can be ascertained, since it is thereby made personal property.—*Id.*

[f] (Sup. 1881)

An instruction that if a line shaft used for running a machine in an adjoining shed from the mill, where the engine was located, was bolted and fastened securely to the joists of the mill, it was a part of the real estate upon which the mill was situate, was incorrect, since the purposes for, and the circumstances under, which the line shaft was fastened to the mill were proper subjects of inquiry for the jury.—*Bal-liett v. Humphreys*, 78 Ind. 388.

[g] (Sup. 1882)

Where saw and grist mills are erected by the owner thereof on the land of another, the presumption is in favor of their being personalty; but, where only the fact of one's owning of such mills without knowing who owns the land on which they are situated appears, the facts must be resorted to in order to determine their character.—*Price v. Malott*, 85 Ind. 266.

[h] (Sup. 1893)

When a building is erected, it is prima facie a part of the land on which it stands, and, in order to rebut the presumption of law, a state of facts must be shown to take it out of the operation of the general rule.—*Indianapolis, D. & W. R. Co. v. First Nat. Bank*, 33 N. E. 679, 134 Ind. 127.

[i] (App. 1900)

Where plaintiff furnished materials from which fence rails were made, which were used to erect a line fence under an agreement between plaintiff and defendant's grantors for the maintenance of certain portions of a fence as authorized by Burns' Rev. St. 1894, § 6564, and defendant tore down the fence, and threw the rails on his ground, without any intention to rebuild it, plaintiff was entitled to maintain replevin for the rails, since by such severance

they lost their character as realty.—*Moore v. Combs*, 56 N. E. 35, 24 Ind. App. 464.

[1] (*Sup.* 1905)

Where it was the intention of the parties that a building on certain land should be regarded as personal property, replevin will lie to recover it.—*Adams v. Tully*, 73 N. E. 595, 164 Ind. 292.

Where a complaint in replevin to recover a building alleged that it was personal property, it was sufficient to overcome the presumption that it was real estate, under *Burns' Rev. St.* 1901, § 379, requiring that, for the purpose of determining the effect of a pleading, its allegations shall be liberally construed, with a view to substantial justice.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fixt. §§ 67-79; 42

CENT. DIG. Replev. § 22.

See, also, 19 Cyc. pp. 1072-1076.

## FLAGMEN.

At railroad crossings, see *RAILROADS*, §§ 243, 306-308.

## FLATS.

See—

Ownership and control—

NAVIGABLE WATERS, §§ 36, 37.

PUBLIC LANDS, §§ 58-61.

WATERS AND WATER COURSES, § 92.

## FLIGHT.

See—

Accused as evidence of guilt—

CRIMINAL LAW, § 351.

HOMICIDE, § 174.

## FLOODING LANDS.

See—

Liabilities of mine owners. MINES AND MINERALS, § 123.

WATERS AND WATER COURSES, §§ 161-179.

## FLOUR.

Nature of contract to grind wheat into flour, see *SALES*, § 4.

## FLOUR MILLS.

As fixtures, see *FIXTURES*, § 27.

## FLOWAGE.

See *WATERS AND WATER COURSES*, §§ 161-179.

## FOAL.

Effect of sale of mare as to foal, see *SALES*, §§ 4, 5.

## F. O. B.

Judicial notice as to meaning of, see *EVIDENCE*, § 16.

## FŒTICIDE.

See *ABORTION*.

## FOLLOWING TRUST PROPERTY.

See *TRUSTS*, §§ 349-358.

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

# FOOD.

## Scope-Note.

[INCLUDES regulation of manufacture, sale, or use of articles of food and drink and of substitutes and imitations thereof; rights of property and traffic in unwholesome or adulterated articles used as food, etc.; liabilities for injuries from the sale, use, etc., thereof; and violations of laws relating to such articles, and prosecution and punishment thereof as public offenses.

[EXCLUDES medicines (see *Druggists*), intoxicants (see *Intoxicating Liquors*), and poisons (see *Poisons*); regulations regarding commodities as articles of commerce, more particularly as to commerce between the states, with foreign countries, etc. (see *Commerce*), and inspection for prevention of fraud or for commercial purposes (see *Inspection*); and adulteration as a public offense (see *Adulteration*). For complete list of matters excluded, see cross-references, post.]

## Analysis.

- § 2. Statutory and municipal regulations in general.
- § 11. Violations of regulations.
- § 14. — Illegal sale or use.
- § 17. Criminal prosecutions.
- § 19. — Preliminary proceedings.
- § 20. — Indictment or information.
- § 21. — Evidence.
- § 22. — Trial and review.

## Cross-References.

See—

Act authorizing boards of health to prepare regulations as unauthorized delegation of legislative powers. CONSTITUTIONAL LAW, § 66.  
Medicines. DRUGGISTS.

### § 2. Statutory and municipal regulations in general.

Subjects and titles of acts, see STATUTES, § 107.

[a] (Sup. 1901)

Acts 1899, p. 180, provides that no one shall, within the state, manufacture for sale, offer for sale, or sell any drug or article of food which is adulterated within the meaning of the act; and that whoever shall knowingly have in his possession, with intent to sell, any substance injurious to health, shall be fined. *Held*, that a contention that, having possession of adulterated food with intent to sell not being enumerated in the prohibitory section, the affixing of a penalty to such act in a subsequent section did not render such conduct unlawful, was without merit.—*Isenhour v. State*, 62 N. E. 40, 157 Ind. 517, 87 Am. St. Rep. 228.

[b] (Sup. 1908)

Crimes act (Laws 1905, p. 713, c. 168) § 547, declaring punishment for selling unwhole-

some milk, is repealed by pure food law (Laws 1907, p. 154, c. 104) § 3, which covers the same subject, is different and more comprehensive in its terms, adds new offenses, and prescribes new penalties for those enumerated in the prior act.—*State v. Squibb*, 170 Ind. 488, 84 N. E. 969.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Food, § 2.

See, also, 19 Cyc. pp. 1085-1090; note, 1 L. R. A. (N. S.) 926, 932; note, 51 Am. Rep. 347.

### § 11. Violations of regulations.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Food, §§ 9-14.

See, also, 19 Cyc. pp. 1001-1006.

### § 14. — Illegal sale or use.

[a] (Sup. 1881)

Under Rev. St. 1881, § 2070, providing a penalty for the sale of diseased animals, to constitute an offense the meat must be sold for food.—*Schmidt v. State*, 78 Ind. 41.

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Under Rev. St. 1881, § 2070, providing a penalty for the sale of diseased animals, to constitute a violation of the act, the meat must be sold with knowledge on the part of the seller that it is bad.—*Id.*

[b] (Sup. 1908)

Under pure food law (Laws 1907, p. 154, c. 104) § 3, declaring that "no person either by his servant or agent, or as the servant or agent of another," shall sell adulterated milk, it is no offense for one to sell as principal.—*State v. Squibb*, 170 Ind. 488, 84 N. E. 969.

[c] (Sup. 1908)

Acts 1907, p. 153, c. 104, § 2, makes it unlawful for any person to offer for sale or sell any adulterated or misbranded article of food. *Held*, that guilty knowledge or intent was not an element of such offense.—*Groff v. State*, 171 Ind. 547, 85 N. E. 769.

In a prosecution for violating Acts 1907, p. 153, c. 104, § 2, prohibiting the sale of adulterated food, by an alleged sale of oleomargarine for dairy butter, it was no defense that defendant's clerk made the sale in defendant's absence and in violation of his instructions.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Food, §§ 10-13.

See, also, 19 Cyc. pp. 1091-1094.

#### § 17. Criminal prosecutions.

##### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Food, §§ 20-23.

See, also, 19 Cyc. pp. 1097-1100.

#### § 19. — Preliminary proceedings.

[a] (Sup. 1901)

Pure food law (Acts 1899, p. 189), affixing a penalty for the sale or having for sale of adulterated foods, provides that it shall be the duty of the state board of health to enforce the law of the state governing food and drug adulterations. *Held*, that such provision did not exclude individuals from making complaint against one for the violation of the statute.—*Isenhour v. State*, 62 N. E. 40, 157 Ind. 517, 87 Am. St. Rep. 228.

#### § 20. — Indictment or information.

[a] (Sup. 1881)

An information under Rev. St. 1881, § 2070, making it a misdemeanor to kill for the purpose of sale any sick, diseased or injured animal, or to sell or have in one's possession, with intent to sell, the meat of any such animal, must allege that the meat was intended for use as food, and that the diseased and deleterious character thereof was known to the defendant, though such elements are not expressly stated in the statute, and are read into the statute by judicial construction.—*Schmidt v. State*, 78 Ind. 41.

The use of the word "unlawfully" in an information under Rev. St. 1881, § 2070, making it a misdemeanor to kill for the purpose

of sale any sick, diseased or injured animal, or to sell or have in one's possession, with intent to sell, the meat of any such animal, does not excuse the necessity for an averment that the defendant had knowledge of the diseased and deleterious character of the meat, since defendant might have unlawfully killed or possessed himself of the meat without possessing knowledge as to its character.—*Id.*

[b] (App. 1895)

An information under Rev. St. 1894, § 2164 (Rev. St. 1881, § 2070), making it a penal offense for any one to have in his possession, with intent to sell, the meat of any diseased animal, which alleges that defendant unlawfully and knowingly had such meat in his possession, with intent to sell, sufficiently charges defendant with knowledge that the meat was diseased.—*Brown v. State*, 14 Ind. App. 24, 42 N. E. 244.

[c] (App. 1896)

Rev. St. 1894, § 2164 (Rev. St. 1881, § 2070), provides that whoever kills, for the purpose of sale, a sick, diseased, or injured animal, or who sells, or has in his possession with intent to sell, the meat of any such animal, shall be fined, etc. *Held*, that an information for killing diseased animals for the purpose of selling for food need not state that the meat was to be sold within the state.—*Moeschke v. State*, 14 Ind. App. 393, 42 N. E. 1029.

An information under such statute which alleges that defendant did unlawfully, "knowingly," and wrongfully kill, for the purpose of selling for food, certain sick, diseased, and injured animals, etc., sufficiently shows that defendant knew the animals were sick, diseased, or injured at the time they were killed, and that his purpose was to sell them for food.—*Id.*

[d] (Sup. 1901)

An affidavit charging defendant with the violation of the pure food law (Acts 1899, p. 189), which affixes a penalty for having possession of adulterated food with intent to sell the same, was not insufficient because, while alleging possession of adulterated milk with intent to sell it, it did not contain an averment that the milk was adulterated by defendant.—*Isenhour v. State*, 62 N. E. 40, 157 Ind. 517, 87 Am. St. Rep. 228.

Where an affidavit charged defendant with the violation of the pure food law (Acts 1899, p. 189), and recited that he had in his possession, with intent to sell, one pint of milk, adulterated with a certain substance injurious to health, to wit, formaldehyde, the affidavit was not bad for want of an allegation that formaldehyde is either poisonous or injurious to health.—*Id.*

Pure food law (Acts 1899, p. 189) makes it an offense for one to have for sale any food adulterated with a substance injurious to health, and empowers the state board of health to make regulations as to the minimum stand-

ards of foods and drugs. *Held*, that an affidavit charging one with having for sale adulterated milk was not insufficient because it did not charge that the milk in defendant's possession violated a standard of purity established by the board of health.—*Id.*

It was not necessary that the affidavit should set out the proviso of section 1 of the statute, which provides that it shall not apply to mixtures or compounds recognized as articles of food, and not injurious to health.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Food, § 21.

See, also, 19 Cyc. pp. 1098-1100.

#### § 21. — Evidence.

[a] (*Sup.* 1901)

Defendant testified that he had never used any formaldehyde, and the milk contained none to his knowledge, but that in the morning in question he had put into the milk a substance known as "Palmer's Preserver," and that the maker had told him the preserver had no formaldehyde in it. He was then asked what representations had been made to him as to the preservative, but was not allowed to answer, and there was excluded a circular offered in evidence, which accompanied the preservative, and which stated that it was harmless, and guaranteed to contain no acid or injurious ingredient. *Held*, that the exclusion of the answer and the circular was reversible error.—*Isenhour v. State*, 62 N. E. 40, 157 Ind. 517, 87 Am. St. Rep. 228.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Food, § 22.

See, also, 19 Cyc. p. 1100.

#### § 22. — Trial and review.

[a] (*Sup.* 1901)

On a prosecution for the violation of the pure food law (Acts 1899, p. 189), making it an offense to have in one's possession for sale any article of food adulterated with a substance injurious to health, where it appeared that about 10 o'clock a. m., in the month of July, defendant was found with his milk wag-

on in the street, and on the demand of the milk inspector for a sample protested against giving up the same because it was the last milk he had, and that he would be required to purchase other milk to serve a customer, and the milk so surrendered was found to contain formaldehyde, it was proper to refuse to instruct that there should be a verdict for defendant on the ground that no knowledge had been shown in the defendant of the presence of the formaldehyde in the milk.—*Isenhour v. State*, 62 N. E. 40, 157 Ind. 517, 87 Am. St. Rep. 228.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Food, § 23.

### FORBEARANCE.

*See—*

Consideration for contract. CONTRACTS, §§ 70-73.

Element of usury. USURY, § 13.

Usurious consideration for. USURY, § 27.

### FORCE.

*See—*

Element of crime—

RAPE, § 6.

ROBBERY, § 6.

Excessive force in doing lawful act. ASSAULT AND BATTERY, § 7.

Use of force in committing incest. INCEST, § 7.

In ejection of passenger. CARRIERS, § 305.

### FORCED HEIRS.

See DESCENT AND DISTRIBUTION, § 23.

### FORCED SALE.

See JUDICIAL SALES.

### FORCIBLE DEFILEMENT.

*See—*

ABDUCTION.

RAPE.

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# FORCIBLE ENTRY AND DETAINER.

## *Scope-Note.*

[INCLUDES violently taking or retaining possession of property, with threats, force, or arms, against the will of another entitled to its possession, and without authority of law; nature and extent of liability therefor in general; remedies for recovery of possession; and criminal responsibility for such forcible entry or forcible detainer, and prosecution and punishment thereof as a public offense.

[EXCLUDES mere trespasses (see *Trespass*); and summary remedies for recovery of possession of lands demised (see *Landlord and Tenant*), mortgaged (see *Mortgages*), or sold (see *Vendor and Purchaser*). For complete list of matters excluded, see cross-references, post.]

## *Analysis.*

### I. Civil Liability.

- § 2. Statutory provisions.
- § 4. Nature and elements of forcible entry.
- § 5. Nature and elements of forcible or other unlawful detainer.
- § 6. Nature and form of remedy.
- § 8. Title to support action.
- § 14. Persons entitled to sue.
- § 16. Jurisdiction.
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### II. Criminal Responsibility.

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- § 55. Persons who may prosecute.
- § 56. Inquisition or other summary proceeding.
- § 57. Prosecution by indictment or information.

## *Cross-References.*

See—

Summary proceedings by landlord for recovery of demised premises. LANDLORD AND TENANT, §§ 293-318.

TRESPASS.

Unlawful detainer of demised premises, actions. LANDLORD AND TENANT, §§ 287-290.

### I. CIVIL LIABILITY.

#### § 2. Statutory provisions.

[a] (Sup. 1861)

2 Rev. St. 1852, p. 492, § 12, providing that any person who shall make unlawful or forcible entry into lands may be ousted, etc., must be construed as requiring such entry to be unlawful and forcible, and not in the alternative. —O'Connell v. Gillespie, 17 Ind. 459.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forc. E. & D. § 4.

See, also, 19 Cyc. p. 1112.

#### § 4. Nature and elements of forcible entry.

[a] (Sup. 1828)

A. removed from a house and lot, leaving a few articles in the house and on the lot, and fastening the door. In the night of the second

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day afterwards, the door being proved to have been still fast on the evening of that day, B. entered into the house and put a tenant in possession, directing him to prevent every person, and A. particularly, from taking possession, and threatening to beat and prosecute any one who should enter on the premises. There was no direct proof, however, that B. broke open the door. On the complaint of A. against B. for a forcible entry and detainer, *held* that the evidence would justify a finding against the defendant as to the forcible entry.—*Evill v. Conwell*, 2 Blackf. 133, 18 Am. Dec. 138.

## [b] (Sup. 1855)

Where plaintiff went into possession under color of title, and held possession for more than 20 years, evidence that defendants, knowing the land belonged to plaintiff, and that it was in charge of his agent, and part of it in possession of his tenants, entered into a portion of the cultivated part, commenced fencing, working night and day, surrounded by a force, some of it armed, and by threats repelled plaintiff's agents from their attempts to remove the fence, is sufficient to sustain a verdict of forcible entry and detainer.—*Bell v. Longworth*, 6 Ind. 273.

## [c] (Sup. 1878)

Under 2 Rev. St. p. 462, § 12, the plaintiff to maintain an action of forcible entry or detainer, must prove that he was in possession prior to the entry or detainer, and that the defendant's possession was taken or kept by such a show of force as reasonably to intimidate the plaintiff.—*Archey v. Knight*, 61 Ind. 311.

## [d] (Sup. 1879)

Evidence that defendants, in order to regain possession of premises from which they had been removed, acted under color of legal process, and caused the plaintiff to be arrested and carried from the premises after which defendants entered, showed a forcible entry.—*Tibbetts v. O'Connell*, 66 Ind. 171.

The wife of O.'s outgoing tenant delivered the key of the house to T., the next neighbor, to be delivered to O., but T. took possession of the house without O.'s permission. O., finding T. absent, broke into the house, and removed T.'s furniture into the street, and afterwards, at T.'s instance, put it upon another lot, having refused T.'s request to put it back into the house. O. then went to buy a lock, leaving the house in possession of an agent. T. caused O. and the agent to be arrested and taken to a justice's office by a constable, who soon after released them. Meanwhile T. took possession of the house without O.'s leave. *Held*, that O. could maintain against T. an action of forcible entry and detainer.—*Id.*

## FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forc. E. & D. §§ 5-22.

See, also, 19 Cyc. pp. 1123-1137; note, 51 Am. Rep. 366.

## § 5. Nature and elements of forcible or other unlawful detainer.

As a public offense, see post, § 52.

## [a] (Sup. 1828)

Plaintiff removed from a house and lot, leaving a few articles in the house and on the lot, and fastening the door. During the night of the second day afterwards, defendant entered the house and put a tenant in possession, directing him to prevent every person, and plaintiff particularly, from taking possession, and threatening to beat and prosecute any one who should enter on the premises. *Held*, that the evidence was sufficient to show a forcible detainer as well as forcible entry.—*Evill v. Conwell*, 2 Blackf. 133, 18 Am. Dec. 138.

## [b] (Sup. 1842)

To sustain a case of forcible detainer, there must be proof that the premises are unlawfully detained by force and violence.—*Barton v. Osborn*, 6 Blackf. 145.

Proceedings in a case of forcible detainer may be supported, under the statute, without proof that the entry was unlawful.—*Id.*

The complaint showed that the plaintiff had bought the land of the defendant, and that the latter, by agreement with the plaintiff, continued in possession until a certain day, and held over after that day by force and strong hand. *Held*, that the complaint was sufficient.—*Id.*

## [c] (Sup. 1883)

A lessee of land may maintain an action for damages against a prior lessee who, after the expiration of his term, has unlawfully kept the plaintiff out of possession.—*Boyce v. Graham*, 91 Ind. 420.

## [d] (Sup. 1889)

Where, in an action under Rev. St. § 5237, providing for the recovery of the possession of land lawfully obtained but unlawfully and forcibly withheld, the evidence shows that plaintiffs voluntarily gave defendant possession of the building, and that when possession was demanded he refused to surrender the premises, and peaceably retained possession, a verdict for defendant may be directed, as the essential element of force in retaining the possession is wholly wanting.—*Gipe v. Cummins*, 116 Ind. 511, 19 N. E. 466.

## [e] (App. 1892)

Defendant was tenant from year to year of certain lands. Plaintiff, without the consent of defendant, entered on part of said lands under a subsequent lease from the landlord, and put in a crop of wheat. On his return to harvest the same, defendant resisted his entry. *Held*, that the resistance was justified, defendant being in possession under a prior right.—

Berry v. Hubbard, 5 Ind. App. 401, 32 N. E. 331.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forci. E. & D. §§ 23-28.

See, also, 19 Cyc. pp. 1123-1137; note, 18 Am. Dec. 139.

§ 6. Nature and form of remedy.

[a] (Sup. 1878)

As the action of forcible entry and detainer is not intended to try the title to lands, plaintiff must prove that he was in possession of the lands before the forcible entry or forcible detainer.—Archey v. Knight, 61 Ind. 311.

[b] (Sup. 1903)

The action of forcible entry or detainer cannot be employed in either its civil or criminal form to try the right or title to property.—Peelle v. State, 68 N. E. 682, 161 Ind. 378.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forci. E. & D. §§ 29-33.

§ 8. Title to support action.

[a] (Sup. 1853)

To sustain an action for forcible entry, and detainer, it is not necessary to show a legal title to the property; a peaceable possession when the wrong was committed being sufficient.—Swails v. State, 4 Ind. 516.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forci. E. & D. §§ 35-36.

§ 14. Persons entitled to sue.

[a] (Sup. 1885)

Rev. St. 1881, § 5237, provides that any person "having right to possession" of premises who is ousted may maintain an action for restitution. *Held*, that a person in actual peaceable possession was entitled to maintain such action when ousted, though by the real owner.—Judy v. Citizen, 101 Ind. 18.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forci. E. & D. §§ 64-71, 73.

See, also, 19 Cyc. pp. 1138-1141.

§ 16. Jurisdiction.

Exclusive or concurrent jurisdiction, see COURTS, § 472.

Jurisdiction of justices of the peace as dependent on amount in controversy, see JUSTICES OF THE PEACE, § 43.

Jurisdiction of justices of the peace where title to real property is involved, see JUSTICES OF THE PEACE, § 36.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forci. E. & D. §§ 78-82.

See, also, 19 Cyc. pp. 1146-1148.

§ 17. Time to sue and limitations.

Retroactive operation of statute of limitations, see LIMITATION OF ACTIONS, § 6.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forci. E. & D. § 83.

See, also, 19 Cyc. p. 1143.

§ 22. Pleading.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forci. E. & D. §§ 105-133.

See, also, 19 Cyc. pp. 1150-1162.

§ 24. — Complaint or petition.

[a] (Sup. 1822)

The complaint filed with the justices, in cases of forcible entry and detainer, cannot be objected to for mere matter of form.—Moore v. Read, 1 Blackf. 177.

[b] (Sup. 1827)

The complainant, in an action of forcible entry and detainer, stated that the defendant, with force and arms, unlawfully and forcibly entered upon the plaintiff's land, and him (the plaintiff), with force and arms, did expel and unlawfully put out of possession. *Held*, that this complaint could not be objected to, after verdict, for not showing more particularly that the plaintiff had peaceable possession of the premises before the injury complained of.—Test v. Devers, 2 Blackf. 80.

[c] (Sup. 1834)

Though a person who has had quiet possession of an estate for three years, and whose interest remains undetermined, is protected by the statute from the action of forcible entry and detainer, yet the declaration in this action need not deny the existence of such a possession, or the continuance of the estate.—Ward v. Crane, 3 Blackf. 393.

[d] (Sup. 1837)

The complaint must show that the land is within the county, and that the detainer is unlawful.—Boxley v. Collins, 4 Blackf. 320.

[e] (Super. 1873)

If a complaint is good under the act of May 13, 1852, concerning the unlawful detention of lands and the recovery thereof, it is unimportant whether it is sufficient under section 595 of the Code.—Jackson v. Adams, Wils. 398.

[f] (Sup. 1882)

"Three and one-half acres off of" a certain tract is not a good description in an action for forcible entry and detainer.—Klingensmith v. Faulkner, 84 Ind. 331.

[g] (Sup. 1882)

2 Rev. St. 1876, p. 665, § 12, providing that "any person who shall make unlawful or forcible entry into lands, and shall either peaceably or forcibly retain the same against any person having right to possession thereof, or any person having peaceably obtained the pos-

session of lands who shall unlawfully and forcibly keep the same against any person having right to the possession thereof, may be ousted from such premises" in the same manner as is provided in the case of tenants holding over, confers jurisdiction on justices of the peace in cases where possession has been unlawfully "and" forcibly taken, and where possession has been peaceably taken, but is unlawfully and forcibly kept from the person entitled thereto, and a complaint which avers a peaceable taking of possession, but which does not allege that the possession was unlawful and forcibly kept from the plaintiff, did not show a cause of action within the scope of the statute.—*Burgett v. Bothwell*, 86 Ind. 149.

2 Rev. St. 1876, p. 665, § 12, confers on justices of the peace jurisdiction of actions to recover possession of land which possession has been peaceably obtained and "unlawfully and forcibly" kept, and a complaint which alleges a peaceable entry and that defendant "unlawfully" keeps plaintiff out of possession is insufficient, since the retention of possession must not only be unlawful, but forcible.—*Id.*

[h] (Sup. 1833)

A complaint describing the premises as "about one-fourth of an acre, situated in the northwest corner of section 25, township 12, range 1 west, being the same now occupied by defendant for toll house and garden," giving county and state, is bad on motion in arrest of judgment.—*College Corner & R. Gravel Road Co. v. Moss*, 92 Ind. 119.

A complaint must describe the lands with certainty, and the degree of certainty sufficient in a deed will not always be sufficient in a pleading.—*Id.*

Where description in complaint is not sufficient to ascertain the property to be delivered, the complaint is insufficient on demurrer.—*Id.*

[i] (App. 1894)

In forcible detainer, the county in which the land is situated is sufficiently described where the caption of the complaint is, "State of Indiana, Perry County," and in the body of the complaint the property is described as being in "said county."—*Hughes v. Windpfennig*, 10 Ind. App. 122, 37 N. E. 432.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forci. E. & D. §§ 107-120.

See, also, 19 Cyc. pp. 1150-1159.

### § 30. Damages.

[a] (Sup. 1850)

Under Rev. St. p. 794, relating to the action of disseisin, damages may be recovered in such action up to the time of trial.—*Pendergast v. McCaslin*, 2 Ind. 87.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forci. E. & D. §§ 141-152.

See, also, 19 Cyc. p. 1168.

### § 31. Trial.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forci. E. & D. §§ 155-159.

See, also, 19 Cyc. pp. 1170, 1171.

### § 36. — Verdict and findings.

[a] (Sup. 1837)

The verdict for the complainant, in forcible entry and detainer, must state that the premises are detained by force.—*Boxley v. Collins*, 4 Blackf. 320.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forci. E. & D. § 159.

See, also, 19 Cyc. p. 1171.

### § 37. New trial.

[a] (Sup. 1879)

Overruling a motion, in an action of forcible entry and detainer, that the cause be remanded, pursuant to 2 Rev. St. p. 607, § 12, to be certified by the justice of the peace to the circuit court, as to the title to real estate having been put in issue, is not a ground for a new trial. It must be assigned independently in the supreme court as error.—*Tibbetts v. O'Connell*, 66 Ind. 171.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forci. E. & D. §§ 160-162.

### § 38. Judgment.

Arrest of, see JUDGMENT, § 263.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forci. E. & D. §§ 163-165; 30 CENT. DIG. Judgm. § 44.

See, also, 19 Cyc. pp. 1173-1175.

### § 42. Review.

Appellate jurisdiction as between particular courts, see COURTS, § 220 (1).

Appellate jurisdiction as dependent on whether title to real property is involved, see COURTS, § 220 (13).

Decisions reviewable, see APPEAL AND ERROR, § 38.

Review of decisions of intermediate courts, see APPEAL AND ERROR, § 32.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forci. E. & D. §§ 102, 169-187.

See, also, 19 Cyc. pp. 1176-1185.

### § 43. — Appeal and trial de novo.

[a] The verdict in the circuit court for the plaintiff on appeal, in a case of forcible entry and detainer, must as in the trial before the justices, be signed by all the jurors.—(Sup. 1827) *Test v. Devers*, 2 Blackf. 80; (1834) *Ward v. Crane*, 3 Blackf. 393.

[b] (Sup. 1865)

Where plaintiff sued before a justice to recover possession of real estate, and the com-

plaint, as it stood, was in ejectment, and upon its face was without the jurisdiction of the justice, on appeal by plaintiff from a judgment for defendant an application by plaintiff to make the complaint one in forcible detainer was properly denied, as, the justice not having jurisdiction in ejectment, the entire proceedings were void.—*Kiphart v. Brennemen*, 25 Ind. 152.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forci. E. & D. §§ 169-182.

See, also, 19 Cyc. pp. 1176-1180.

## II. CRIMINAL RESPONSIBILITY.

### § 51. Nature and elements of forcible entry.

[a] No question of title is involved in a prosecution for forcible detainer.—(Sup. 1856) *Higgins v. State*, 7 Ind. 549; (1884) *Vess v. State*, 93 Ind. 211.

[b] (Sup. 1886)

Where a charge is for both forcible entry and forcible detainer, under the criminal laws, the accused may be found guilty of one and acquitted of the other.—*Strong v. State*, 105 Ind. 1, 4 N. E. 293.

Conviction of the crime of forcible entry and detainer may be had under Rev. St. 1881, § 1972, by proof of menaces and show of force sufficient to overawe the injured party.—Id.

[c] (App. 1894)

To warrant a conviction for forcible entry under Rev. St. 1894, § 2055 (Rev. St. 1881, § 1972), the taking of possession must have been either by force or with menaces, and without authority of law.—*Brazee v. State*, 9 Ind. App. 618, 37 N. E. 279.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forci. E. & D. §§ 192, 193.

See, also, 19 Cyc. pp. 1114-1117.

### § 52. Nature and elements of forcible or other unlawful detainer.

[a] (Sup. 1884)

A prosecution, under Rev. St. 1881, § 1972, for forcible detainer, cannot be maintained against one who forcibly holds possession of lands under a writ regular on its face, based on a judgment of a court having jurisdiction, although such writ was unlawfully issued.—*Vess v. State*, 93 Ind. 211.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forci. E. & D. §§ 14, 194.

See, also, 19 Cyc. pp. 1114-1117.

### § 53. Defenses.

[a] (Sup. 1884)

On a prosecution for forcible entry and detainer, defendant can neither go into the evi-

dence to disprove the title of the complainant nor to establish his own, as the question is not one of civil right, but of public concern, affecting the public peace.—*Vess v. State*, 93 Ind. 211.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forci. E. & D. § 195.

### § 55. Persons who may prosecute.

[a] (Sup. 1903)

In a prosecution under Burns' Rev. St. 1901, § 2055, for forcible entry, it is not incumbent on the state to prove that the tenant dispossessed was in "rightful" possession of the premises, it being sufficient to show a "peaceable" possession.—*Peelle v. State*, 68 N. E. 682, 161 Ind. 378.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forci. E. & D. § 197.

### § 56. Inquisition or other summary proceeding.

[a] (Sup. 1886)

An affidavit charging defendant with having, on a designated day, violently and forcibly entered into certain premises, to wit, a certain storeroom situate on Main street, in the town of A., in a certain county, and forcibly expelled the person then in possession, sufficiently describes the premises, in a prosecution for unlawful detainer, where restitution is not demanded nor contemplated.—*Strong v. State*, 4 N. E. 293, 105 Ind. 1.

[b] (Sup. 1903)

In a prosecution under Burns' Rev. St. 1901, § 2055, for forcible entry on certain premises, an affidavit charging that accused unlawfully took possession of a certain dwelling house and land in a certain county, in the possession of a named owner, is sufficiently certain in the description of the premises.—*Peelle v. State*, 68 N. E. 682, 161 Ind. 378.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forci. E. & D. § 198.

See, also, 19 Cyc. p. 1118.

### § 57. Prosecution by indictment or information.

[a] (Sup. 1856)

Under an indictment for forcible entry and detainer, evidence is admissible that the defendant in forcibly entering, etc., assaulted and beat the party in possession.—*Higgins v. State*, 7 Ind. 549.

[b] (Sup. 1866)

In a prosecution by information for a forcible entry and detainer, any variance between the description of the premises as laid in the information and the evidence will be fatal.—*Ball v. State*, 26 Ind. 155.

[c] (Sup. 1881)

The words "dwelling house," in an information for forcible detainer, are equivalent to the

word "land," as used in 2 Rev. St. 1876, p. 462, § 12, defining the offense.—Endsley v. State, 76 Ind. 467.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forc. E. & D. §§ 190-204.

See, also, 19 Cyc. pp. 1118-1123.

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## FOREIGN ADMINISTRATION.

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## FOREIGN ASSIGNMENTS.

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## FOREIGN ATTACHMENT.

See GARNISHMENT.

## FOREIGN BILLS OF EXCHANGE.

See BILLS AND NOTES, § 13.

## FOREIGN CORPORATIONS.

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## FOREIGNERS.

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## FOREIGN EXECUTORS AND ADMINISTRATORS.

See EXECUTORS AND ADMINISTRATORS, §§ 517-525.

## FOREIGN GOVERNMENTS.

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## FOREIGN GUARDIANSHIP.

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**FOREMAN.***See—*

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Of injuries from defects in roadbed. RAILROADS, § 362.

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Of negligence of another. NEGLIGENCE, § 68.

**FORESTS.**

See WOODS AND FORESTS.

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# FORFEITURES.

## *Scope-Note.*

[INCLUDES loss of specific property, real or personal, as punishment for violation of law; nature and scope of such punishment in general; constitutional and statutory provisions relating thereto; in what cases, and as to what persons and property, and for what offenses forfeiture is imposed in general; jurisdiction over and proceedings for condemnation of property as forfeited; judgments or decrees therein, and enforcement thereof; review of proceedings; costs and proceedings for condemnation; effect of forfeiture; rights of informers; waiver or remission of forfeiture; and disposition of property forfeited.

[EXCLUDES pecuniary punishments (see *Penalties; Fines*); forfeiture of property or estates therein or rights under contracts for breaches of private duties or obligations (see *Estates; Landlord and Tenant; Deeds; Contracts; Insurance*; and other specific heads); forfeiture of franchises, corporate charters, stock, etc. (see *Franchises; Corporations*); particular offenses as grounds of forfeiture (see *Food; Intoxicating Liquors; Customs Duties; Internal Revenue*; and other specific heads); seizures for enforcement of forfeitures (see *Searches and Seizures*); and forfeiture of bail bonds, recognizances, etc. (see *Bail; Recognizances*). For complete list of matters excluded, see cross-references, post.]

## *Analysis.*

- § 2. Constitutional and statutory provisions.
- § 5. Proceedings for enforcement.
- § 9. Remission.
- § 10. Disposition of property or proceeds.

## *Cross-References.*

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Limitation of actions to enforce. LIMITATION OF ACTIONS, § 35.  
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## § 2. Constitutional and statutory provisions.

Time of taking effect of statute, see STATUTES, § 250.

### FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. Forfeit. § 1.

See, also, 19 Cyc. pp. 1358, 1359.

## § 5. Proceedings for enforcement.

Seizures, see SEARCHES AND SEIZURES.

### FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. Forfeit. §§ 4-8.

See, also, 19 Cyc. pp. 1359-1362; note, 4

L. R. A. (N. S.) 358; note, 8 Am. St. Rep. 466.

## § 9. Remission.

Time of taking effect of statute as to remission of forfeitures, see STATUTES, § 250.

### FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. Forfeit. § 11.

See, also, 19 Cyc. p. 1365.

## § 10. Disposition of property or proceeds.

Property or proceeds as part of common school fund, see SCHOOLS AND SCHOOL DISTRICTS, § 17.

### FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. Forfeit. § 12.

See, also, 19 Cyc. p. 1362.

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# FORGERY.

## Scope-Note.

[INCLUDES falsely and fraudulently making or materially altering instruments in writing, other than circulating notes issued as money or other government obligations or securities, and uttering such forged instruments; nature and elements of the crimes of forgery, uttering and publishing forged instruments, etc., and degrees thereof; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.

[EXCLUDES effect of alterations of instruments in writing in general (see *Alteration of Instruments*), rights and liabilities of banks paying, discounting, etc., forged or altered paper (see *Banks and Banking*), and of parties to and holders of forged or altered promissory notes, bills of exchange, checks, etc. (see *Bills and Notes*), bonds (see *Bonds*), and other particular classes of instruments (see specific heads); and offenses of making, passing, etc., counterfeit coin or other money or government securities (see *Counterfeiting*). For complete list of matters excluded, see cross-references, post.]

## Analysis.

1. Nature of offense in general.
2. Statutory provisions.
3. Elements of offenses.
4. — In general.
5. — Intent.
7. — Nature of instrument.
10. — Alteration of instrument.
11. — Similitude of false instrument or signature to genuine.
12. — Apparent legal efficacy or operation of instrument.
15. False entries or records, and alteration of entries or records.
20. Defenses.
25. Indictment or information.
26. — Requisites and sufficiency in general.
27. — Intent.
28. — Description of or setting forth instrument.
29. — Facts extrinsic to instrument in general.
30. — Making or alteration of instrument.
31. — Falsification of entries or records.
32. — Uttering or publishing forged instrument.
34. — Issues, proof, and variance.
35. Presumptions and burden of proof.
36. Admissibility of evidence.
45. Trial.
47. — Questions for jury.
50. Appeal and Error.

## Cross-References.

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### ALTERATION OF INSTRUMENTS.

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### COUNTERFEITING.

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Signature of one obligor as affecting liability of co-obligor as surety. **PRINCIPAL AND SURETY, § 41.**

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Of forged note in payment for goods sold. **SALES, § 43.**

Validity of mortgage. **MORTGAGES, § 11.**

Words imputing crime of as constituting libel or slander. **LIBEL AND SLANDER, §§ 7, 122.**

## § 1. Nature of offense in general.

[a] (*Sup.* 1888)

An affidavit and information for forgery, under Rev. St. 1881, § 2206, providing that whoever forges or counterfeits any order for the payment of money or property, or any other instrument of writing, with intent to defraud any person, shall be imprisoned, the value of the property thus sought to be obtained is not of the essence of the offense, and need not be stated, under section 1756, providing that no indictment or information shall be invalid for failure to state the value, where the same is not "of the essence of the offense."—*Stewart v. State*, 113 Ind. 505, 16 N. E. 186.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forg. §§ 1, 4-7.

See, also, 19 Cyc. p. 1370; notes, 22 Am. Dec. 306, 78 Am. Dec. 252.

## § 2. Statutory provisions.

[a] (*Sup.* 1907)

Where an affidavit filed August 20, 1906, charged forgery in January, 1905, it based the prosecution on section 2354, Burns' Ann. St. 1901, because the public offense statute of 1905, defining and punishing forgery, but providing against interference with prosecution of acts committed, was passed after January of that year.—*State v. Hazzard*, 168 Ind. 163, 80 N. E. 149.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forg. §§ 2, 3.

See, also, 19 Cyc. pp. 1370, 1371.

## § 3. Elements of offenses.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forg. §§ 1-49.

See, also, 19 Cyc. pp. 1373-1387; note, 61 L. R. A. 819; note, 55 Am. Rep. 651.

## § 4. — In general.

[a] (*Sup.* 1907)

Forgery is the false making or materially altering of any writing which, if genuine, is of legal efficacy, or is the foundation of a legal liability, and, if the writing is manifestly void, it is not the subject of forgery.—*State v. Floyd*, 169 Ind. 136, 81 N. E. 1153.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forg. §§ 1-3.

See, also, 19 Cyc. p. 1373.

## § 5. — Intent.

Allegations in indictment, see post, § 27.

Presumptions, see post, § 35.

[a] (*Sup.* 1882)

An indictment for uttering a forged instrument must allege that defendant uttered the same, knowing it to be false, forged, and counterfeit.—*Powers v. State*, 87 Ind. 97.

[b] (*Sup.* 1886)

Where a forgery is committed after the death of the man whose name purports to be signed to the instrument, it is proper to charge that the intent was to defraud his estate, as the estate of a decedent is in law regarded as a person.—*Billings v. State*, 107 Ind. 54, 6 N. E. 914, 7 N. E. 763, 57 Am. Rep. 77.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forg. §§ 4-6.

See, also, 19 Cyc. pp. 1376-1378.

## § 7. — Nature of instrument.

Description in indictment, see post, § 28.

[a] (*Sup.* 1886)

An instrument reading thus: "La Grange, June 19, 1881. Mr. Allen: Please let A. Garmire have team to go to Mongo, and charge same to me. T. Hudson,"—is a writing obligatory promising to pay money, within the meaning of the Indiana statute defining the crime of forgery.—*Garmire v. State*, 104 Ind. 444, 4 N. E. 54.

[b] (*Sup.* 1888)

Forgery may be predicated on an order reading: "Halls and Davisons: Please let this boy have a suit of cloth. [Signed] Mrs. Wilson. And let him have a cap too."—*Stewart v. State*, 113 Ind. 505, 16 N. E. 186.

[c] (*Sup.* 1902)

Burns' Rev. St. 1901, § 2016, makes it an offense to alter any record made by law pertaining to any court of record or any paper or writing, etc., filed in such court. By Burns' Rev. St. 1901, § 980, an attorney at law, acting under employment, may enter satisfaction of a judgment; and by section 590 every indorsement of payment on the record of any judgment, signed by plaintiff's attorney, operates as satisfaction. *Held*, that an indorsement of payment and satisfaction on the record of a judgment by one authorized to make it is a record, within the meaning of section 2016.—*State v. Henning*, 63 N. E. 207, 158 Ind. 196.

[d] (*Sup.* 1907)

Where a subscription paper is headed with merely the title, character, authorship, and price of a book, followed by the word "subscribers," a name written under "subscribers" clearly imports a promise to take a copy of the book

and pay the price indicated, and constitutes a "writing obligatory" or "instrument in writing" within the meaning of Burns' Ann. St. 1901, § 2354, defining forgery.—*State v. Hazzard*, 168 Ind. 163, 80 N. E. 149.

Forgery may be based on any writing which, if genuine, would operate as a foundation of a person's liability or the evidence of his right.—*Id.*

[c] (Sup. 1907)

A school teacher's receipt, purporting to be executed by a teacher actually employed in the township, for salary received, is a subject of forgery.—*State v. Floyd*, 169 Ind. 136, 81 N. E. 1153.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forg. §§ 2, 3, 8-15.

See, also, 19 Cyc. pp. 1380-1387; notes, 24

L. R. A. 33, 54 L. R. A. 794, 1 L. R.

A. (N. S.) 730, 4 L. R. A. (N. S.) 1126.

§ 10. — Alteration of instrument.

Allegations in indictment, see post, § 30.

[a] (Sup. 1877)

An indictment cannot be predicated upon the uttering of an instrument altered in an immaterial part.—*Bittings v. State*, 56 Ind. 101.

[b] (Sup. 1879)

On a trial for forgery of a promissory note, the payee's penciling in its margin, after its delivery, the words, "May pay Oct. 20th, '78," is immaterial.—*Robinson v. State*, 66 Ind. 331.

[c] (Sup. 1901)

Defendant sold wheat to P., by whose direction he delivered it at a railroad grain warehouse, and took a receipt stating the name of the seller and buyer, and the quantity of wheat delivered, on the back of which was written, "No. 3 red," for the purpose of informing the buyer of the warehouseman's judgment as to the grade of the wheat, and enabling him thereby to fix the price. Defendant altered this memorandum on the back of the receipt by changing the figure "3" to "2." *Held* not sufficient to support an indictment for forgery, under Burns' Rev. St. 1894, § 2354 (*Horner's Rev. St. 1897*, § 2206), declaring that whoever falsely alters any "receipt" for money with intent to defraud shall be guilty of forgery, since the change in the memorandum on the back in no way varied the legal effect of the receipt.—*State v. Hendry*, 59 N. E. 1041, 156 Ind. 392, 54 L. R. A. 794.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forg. §§ 21-25.

See, also, 19 Cyc. pp. 1374, 1375; note,

22 L. R. A. 686.

§ 11. — Similitude of false instrument or signature to genuine.

[a] (Sup. 1877)

Uttering, as an order of Ezra Loutzenheiser, an order signed, "Elirere Lowthreiser," *held* not to be a forgery.—*Abbott v. State*, 59 Ind. 70.

[b] (Sup. 1886)

A charge of forgery may be based upon an instrument which bears such a resemblance to the genuine instrument it is intended to represent as is calculated to deceive, and the person forging an instrument cannot escape punishment, where there is such a resemblance, upon the ground that the forgery was such as would have deceived only stupid and careless persons.—*Garmire v. State*, 104 Ind. 444, 4 N. E. 54.

[c] (Sup. 1887)

The defendant wrote, in a promissory note, the signature, "Bill Stevens," and offered the instrument for sale as the promissory note of William R. Stephens, falsely representing that the latter had executed it. *Held*, that the note as signed, "Bill Stevens," did not indicate on its face that it was not intended as the note of William R. Stephens; and that defendant was guilty of forgery.—*Rudicel v. State*, 111 Ind. 595, 13 N. E. 114.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forg. § 27.

§ 12. — Apparent legal efficacy or operation of instrument.

[a] (Sup. 1850)

As a note payable to bearer may be transferred by indorsement as well as by mere delivery, and as such an indorsement operates to charge the indorser, the writing of an indorsement on the back of such a note without authority, and with intent to defraud, constitutes forgery.—*State v. Crawford*, 2 Ind. 23.

[b] (Sup. 1867)

An indictment for forging a certificate which purported to be signed by a mustering officer of the United States, and certified that a certain person had been mustered into the military service of the United States and credited to Allen county, and that said soldier was entitled to a bounty which had been voted by the county board, was *held* to be bad, because, at the time of the alleged forgery, the appropriation of money for bounties was illegal and void.—*Reed v. State*, 28 Ind. 396.

[c] (Sup. 1876)

An indictment for forgery of a promissory note may be sustained, notwithstanding the instrument did not contain the name of a payee.—*Harding v. State*, 54 Ind. 359.

[d] (Sup. 1882)

An indictment can be maintained for the forgery of a written order to pay money, though the order contain the name of no drawee; the

omission being filled in by proof.—Powers v. State, 87 Ind. 97.

[e] (Sup. 1884)

A note signed "John <sup>per</sup> Jones," though the <sup>mark</sup> place for the mark was blank, will support an indictment for forgery.—Lemasters v. State, 95 Ind. 367.

[f] (Sup. 1885)

An indictment charging the forgery of an order for goods and chattels is not bad because of the misspelling of the word "groceries," where the order as set out is for "\$3.00 of grociers."—Myers v. State, 101 Ind. 379.

[g] (Sup. 1886)

The instrument upon which the charge of forgery is based must be one having some legal effect, but it is not necessary that it should be a perfect instrument.—Garmire v. State, 104 Ind. 444, 4 N. E. 54.

[h] (Sup. 1907)

Where a written instrument appears on its face to be void as a matter of law, a charge of forgery thereof cannot be maintained.—State v. Hazzard, 168 Ind. 163, 80 N. E. 149.

The unauthorized signing of another's name to a writing which shows on its face that it has some apparent legal effect, though it does not appear to be perfect, constitutes forgery.—Id.

[i] (Sup. 1907)

A written instrument imperfect on its face, but which by the aid of extrinsic facts may be used to defraud another, is a proper subject of forgery.—State v. Floyd, 169 Ind. 136, 81 N. E. 1153.

A written instrument which is manifestly void is not the subject of forgery.—Id.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forg. §§ 28-47.

See, also, 19 Cyc. p. 1379.

**§ 15. False entries or records, and alteration of entries or records.**

Allegations in indictment, see post, § 31.

[a] (Sup. 1838)

Under Rev. Laws 1831, § 9, providing that "every person who shall falsely make, forge, etc., any deed, record, certificate of a justice of the peace, or other public officer, or any other instrument in writing whatever, with intent to defraud any person or persons, shall be guilty of forgery," a deposition taken to be used as evidence in an action is not a subject of forgery.—Atkinson v. Reding, 5 Blackf. 39.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forg. § 50.

See, also, 19 Cyc. p. 1375; note, 75 Am. Dec. 571.

**§ 20. Defenses.**

[a] (Sup. 1886)

Where, in a prosecution for forgery, the forged instrument bears a date which would indicate that a prosecution for forgery was barred by limitation, but the indictment explicitly charges that it was forged and uttered upon another date which is within the limitation of the statute, defendant cannot escape punishment because of the error in the date.—Garmire v. State, 4 N. E. 54, 104 Ind. 444.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forg. § 56.

See, also, 19 Cyc. p. 1411.

**§ 25. Indictment or information.**

Disjunctive or alternative allegations, see INDICTMENT AND INFORMATION, § 72.

Repugnancy, see INDICTMENT AND INFORMATION, § 73.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forg. §§ 61-102.

See, also, 19 Cyc. pp. 1392-1411.

**§ 26. — Requisites and sufficiency in general.**

[a] (Sup. 1847)

A statute enacted "that every person who shall falsely make, deface, destroy, etc., any record, etc., shall be deemed guilty of forgery." Held, that an indictment on that statute, charging that the defendant did unlawfully and feloniously destroy, etc., was not objectionable for omitting the word "falsely."—State v. Dark, 8 Blackf. 526.

[b] (Sup. 1876)

An indictment for forgery charged that the defendant, at a certain time and place, "did unlawfully, feloniously, and falsely forge and counterfeit a certain promissory note for the payment of money," the note being set out in full, "with intent to defraud" the bank at which it was made payable. Held, that the indictment was good.—Sharley v. State, 54 Ind. 168.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forg. § 61.

See, also, 19 Cyc. p. 1392.

**§ 27. — Intent.**

[a] (Sup. 1877)

Whether an indictment for forgery is for committing the original forgery, or for uttering the forged paper as true, the intent may be laid to be to defraud the person whose name has been forged.—Shinn v. State, 57 Ind. 144.

[b] (Sup. 1894)

An indictment alleging that defendant knowingly uttered a forged note is sufficient to charge defendant with uttering a note know-

ing it to be forged.—*State v. Williams*, 139 Ind. 43, 38 N. E. 330, 47 Am. St. Rep. 255.

**FOR CASES FROM OTHER STATES.**

SEE 23 CENT. DIG. Forg. § 62.

See, also, 19 Cyc. p. 1395.

**§ 28. — Description of or setting forth instrument.**

[a] (Sup. 1869)

Under 2 Gav. & H. St. p. 446, § 30, providing that every person who shall falsely make or alter any promissory note for the payment of money or property shall be guilty of forgery, an indictment for altering a promissory note should set it forth in substance and effect, and allege that it was given for either money or property, though it is alleged in the indictment that the note was destroyed by the defendant.—*Birdg v. State*, 31 Ind. 88.

[b] (Sup. 1876)

An indictment for forging or for knowingly uttering a counterfeited instrument of writing must set forth an exact copy of the instrument.—*State v. Cook*, 52 Ind. 574.

[c] Where the instrument alleged to have been forged is set out in the indictment, the mere misnomer of the instrument is not ground for quashing the indictment.—(Sup. 1876) *Harding v. State*, 54 Ind. 359; (1882) *Powers v. Same*, 87 Ind. 97; (1886) *Garmire v. Same*, 104 Ind. 444, 4 N. E. 54.

[d] (Sup. 1877)

An indictment for forgery charged that defendant did utter and publish as true a certain forged note, which was set out, payable to defendant, and purporting to be executed by one "S. B. S. Kiner," with intent to defraud one "Solomon B. S. Kinner," etc. Held that the indictment was fatally defective.—*Shinn v. State*, 57 Ind. 144.

[e] (Sup. 1878)

An indictment predicated upon the forging and uttering of a certificate of acknowledgment of the execution of a deed of land, with intent to defraud the owner or his heirs, assumes the validity of the conveyance itself as between the grantor and grantee, and is sufficient.—*State v. Dufour*, 63 Ind. 567.

[f] (Sup. 1878)

An indictment charged the defendant with the forgery of a promissory note, "with intent to defraud one Emily J. Schweitzer," while such note appeared, by copies thereof and of the indorsement thereon set out in the indictment, to have been payable to, and indorsed by, one "E. J. Schweitzer." Held, that the indictment was insufficient.—*Yount v. State*, 64 Ind. 443.

[g] (Sup. 1881)

A description in the indictment of a note alleged to have been forged, and which is lost, that it was signed by "one Henry Wintrobe or Henry R. Wintrobe," is not uncertain or equivocal.—*Hess v. State*, 73 Ind. 537.

[h] (Sup. 1881)

In an indictment for forgery, where the forged paper has been partly burned and blotted while in defendants' possession, the substance only thereof need be stated in the indictment, although parol evidence could supply the missing part.—*Munson v. State*, 79 Ind. 541.

[i] (Sup. 1885)

In an indictment for forgery of "a certain order purporting to have been made and executed by one Vincent T. West," followed by the instrument set out *ipsisimis verbis*, showing that it was signed "Dr. West," held, that the purporting clause would be rejected as surplusage.—*Myers v. State*, 101 Ind. 379.

[j] (Sup. 1890)

An indictment for forgery, which states that the note alleged to be forged "has been destroyed, or is in the possession of one to the grand jury unknown," is sufficient when the note is described, and its substance set out.—*State v. Callahan*, 124 Ind. 364, 24 N. E. 732.

**FOR CASES FROM OTHER STATES.**

SEE 23 CENT. DIG. Forg. §§ 66-76.

See, also, 19 Cyc. pp. 1397-1403.

**§ 29. — Facts extrinsic to instrument in general.**

[a] (Sup. 1861)

In a prosecution for forgery, the indictment alleged that on, etc., at, etc., the defendant did unlawfully, etc., give, barter, sell, utter, publish, and put away to one B. 16 false, forged, and counterfeit bank notes the genuine of which bank notes were current at the time in the state of Indiana, and which purported to be the genuine, and were for, etc., each, and issued by the Winstend Bank of Connecticut, payable to "E. Seymour, or bearer." Held, that it was not necessary to the full description of the offense charged to allege that the genuine notes were current, and that such an averment was mere surplusage.—*Porter v. State*, 17 Ind. 415.

[b] An indictment for forgery must show that the instrument of which the forgery is predicated is such, on its face, as is naturally calculated to have some effect; or, if it be not sufficient for that purpose, extrinsic matter must be averred, so that the court may judicially see its fraudulent tendency.—(Sup. 1867) *Reed v. State*, 28 Ind. 396; (1876) *State v. Cook*, 52 Ind. 574; (1887) *Shannon v. State*, 109 Ind. 407, 10 N. E. 87.

[c] (Sup. 1886)

The estate of a decedent is a person in legal contemplation so that an information for forgery with intent to defraud "the estate of" M. sufficiently charges an intent to defraud a "person."—*Billings v. State*, 6 N. E. 914, 7 N. E. 763, 107 Ind. 54, 57 Am. Rep. 77.

[d] (Sup. 1895)

An indictment for forging a deed purporting to have been executed by one Hannah McCormick—the copy of such deed set out in the

indictment being signed "Hannah McGormick,"—is insufficient without an express allegation that the forged signature was intended for "Hannah McCormick."—*State v. McCormick*, 141 Ind. 685, 40 N. E. 1089.

[e] (Sup. 1897)

An affidavit and information for forgery of a note which aver that the forged name was signed in German characters, and added a like statement after the signature itself, is sufficient, though the name is not set forth exactly as it appears on the note.—*Beyerline v. State*, 45 N. E. 772, 147 Ind. 125.

[f] (Sup. 1907)

The indictment for forgery of an apparently void instrument must allege such intrinsic facts as will show the writing to have a legal effect.—*State v. Hazzard*, 168 Ind. 163, 80 N. E. 149.

[g] (Sup. 1907)

Where a forged paper is such that without the existence of extrinsic facts no apparent legal liability is created thereby, the indictment must aver such facts as will disclose its capacity to defraud.—*State v. Floyd*, 169 Ind. 136, 81 N. E. 1153.

Under *Burns' Ann. St. 1901*, §§ 5989a, 5989b, requiring contracts between teachers and school corporations to be kept in a public record, and section 8085h, requiring every township trustee to present to the advisory board receipts and expenditures, etc., a township advisory board knows who the teachers of its township were during the year, and an indictment on a forged receipt for the expenditure of tuition funds, signed in the name of one as teacher, must allege that a person of the name signed was under contract to teach before the commission of the alleged forgery.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forg. §§ 77-81.  
See, also, 19 Cyc. pp. 1405-1408.

**§ 30. — Making or alteration of instrument.**

[a] (Sup. 1876)

An allegation in an indictment that the defendant forged a certain instrument is inconsistent with a subsequent allegation that he then and there knew said instrument was then and there, false, forged, etc.—*State v. Cook*, 52 Ind. 574.

[b] (Sup. 1877)

An indictment for uttering an "altered" instrument must clearly set out the alteration alleged, with the proper averments showing an alteration of a material part thereof.—*Bittings v. State*, 56 Ind. 101; *Kahn v. Same*, 58 Ind. 168.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forg. §§ 82-84.  
See, also, 19 Cyc. pp. 1394, 1395.

**§ 31. — Falsification of entries or records.**

[a] (Sup. 1902)

On a prosecution under section 2016, *Burns' Ann. St. 1901*, the indictment alleged an alteration of an indorsement of payment on the record of a judgment, against a township, which indorsement recited: "Received payment in full on the within from the clerk. H. & H., Attorneys for Plaintiff. Received of L., trustee, \$140. J. H., Clerk." *Held*, that the indictment was insufficient, inasmuch as it did not show that the entry of payment was made by the attorneys, or that they acted as attorneys for plaintiff, and the affixing of the word "clerk" to the name J. H. did not show him to be clerk of court, or to have authority to execute the writing appearing above his name.—*State v. Henning*, 63 N. E. 207, 158 Ind. 190.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forg. § 63.  
See, also, 19 Cyc. p. 1395.

**§ 32. — Uttering or publishing forged instrument.**

Allegations as to intent, see ante, § 7.

[a] (Sup. 1877)

The offense of uttering an altered instrument may be charged in the indictment as the uttering of either a "forged" or an "altered" instrument.—*Bittings v. State*, 56 Ind. 101.

An indictment which charges the defendant with having uttered "as true a certain false, forged, altered, and counterfeit" written instrument, "knowing the same to be false," etc., "with intent to defraud," etc., is one which charges the uttering of a once genuine, but altered, instrument.—*Id.*

[b] (Sup. 1881)

An indictment for uttering a forged note, alleging that the note cannot be particularly described for the reason that it is lost "and the state, by her officers and agents duly authorized in that behalf, after diligent search therefor cannot find the same," alleged sufficient diligence on the part of the state in connection with the loss of the forged note without further alleging a search for the note by the persons to whom it was uttered.—*Hess v. State*, 73 Ind. 537.

[c] (Sup. 1882)

An information for uttering a forged instrument is insufficient where it fails to allege that the accused uttered the instrument knowing it to be false, forged, and counterfeit.—*Powers v. State*, 87 Ind. 97.

[d] (Sup. 1904)

An information for uttering a forged instrument, which alleges that defendant passed it to M., is sufficient without showing how it

was passed.—*Selby v. State*, 69 N. E. 463, 161 Ind. 667.

FOR CASES FROM OTHER STATES,  
SEE 23 CENT. DIG. Forg. § 64.  
See, also, 19 Cyc. p. 1409.

### § 34. — Issues, proof, and variance.

[a] (Sup. 1856)

Where an indictment for forgery alleged the passing to A. B. Robinson of a forged bank note with intent to defraud said A. B. Robinson, while the proof showed that Robinson's name was "Alexander B. Robinson," but that he was often called "A. B. Robinson," the indictment was bad on motion in arrest.—*Zellers v. State*, 7 Ind. 659.

An indictment for forgery purported to set out the instrument forged in *hæc verba*. The name of the president of the bank on which the note was alleged to be forged was stated to be "Sedbetter." On proof at the trial that the name was "Ledbetter," the variance was *held* fatal.—*Id.*

In an indictment for forgery the forged note was alleged to have been passed to "A. B. R." Proof at the trial that R.'s name was "Alexander B. R.," but that he was often called "A. B. R." *Held*, there being no allegation that R.'s Christian name was unknown, that the variance was fatal.—*Id.*

[b] (Sup. 1858)

An indictment for uttering with intent to defraud A. is not made out by showing an uttering to A. as security for a pre-existing debt, and with no intent of procuring credit for a further amount. *Aliter*, perhaps, if it had charged an intent to defraud generally.—*Colvin v. State*, 11 Ind. 361.

[c] (Sup. 1860)

In an indictment for forgery in uttering and putting away counterfeit bank notes, the notes were described as payable to "E. lymour or bearer," while those offered in evidence were payable to "E. Seymour, or bearer." *Held*, that the variance was fatal.—*Porter v. State*, 15 Ind. 433.

[d] (Sup. 1876)

An indictment for forgery set out a copy of the instrument alleged to have been forged, as follows: "Trueblood & Allen, Salem, Ind.: Please let Jim Cook [the defendant] have two dollars worth on my credit. Fred L. Prow, Salem." *Held*, that this instrument, with the allegation that the drawees were in the grocery trade, did not support an averment in the indictment that it was "for the payment of money and delivery of grocery goods."—*State v. Cook*, 52 Ind. 574.

[e] (Sup. 1876)

The note offered in evidence on trial of an indictment for forgery contained a clause that

the indorsers severally "waive presentment, protest, and notice of protest and nonpayment;" but the copy given in the indictment omitted the words here italicized. *Held*, that the variance was fatal.—*Sharley v. State*, 54 Ind. 168.

[f] (Sup. 1878)

Where, in a prosecution for forging an indorsement to a note, the note is set out in the indictment, it thereby becomes matter of description, and must be proved as alleged.—*Rooker v. State*, 65 Ind. 86.

At the trial of an indictment for the forgery of an indorsement to a note the original was found to be exactly like the copy set out in the indictment, except that the date had been erased, and one of a day earlier than that named in the indictment written in instead. *Held*, that this was a fatal variance.—*Id.*

[g] (Sup. 1881)

In a prosecution for forging a national bank note, the copy thereof set out in the indictment contained the name "L. W. Chittenden, Register of the Treasury," while the note presented in evidence showed that the name was "L. E. Chittenden," etc. *Held*, that the variance was material and fatal, and the note inadmissible.—*State v. Pease*, 74 Ind. 263.

[h] (Sup. 1881)

In a prosecution for a forgery, charging the alteration of a note, it was clearly shown that at the time of its execution and delivery to defendant it did not contain the figures " $\frac{95}{100}$ ," and it was also well established that at the time it was presented and paid it did contain these figures. *Held*, that the note was therefore admissible under a count in the indictment charging simply a felonious alteration after its delivery to defendant.—*Munson v. State*, 79 Ind. 541.

[i] (Sup. 1908)

In a prosecution for uttering a forged note, the fact that defendant forged the instrument need not be established, but the charge is sustained by proof of an uttering.—*State v. Fisk*, 170 Ind. 166, 83 N. E. 995.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forg. §§ 85-102.

### § 35. Presumptions and burden of proof.

[a] (Sup. 1874)

In a prosecution for forgery the intent to defraud may be inferred from the facts and circumstances proved in the cause, and need not be established by direct proof.—*Fletcher v. State*, 49 Ind. 124, 19 Am. Rep. 673.

[b] (Sup. 1875)

Proof that a defendant had in his possession, and uttered and published as true, a commercial instrument with the forged indorsement of the name of the payee thereon, does not raise the presumption that the defendant

made the forged indorsement.—*Miller v. State*, 51 Ind. 405.

**FOR CASES FROM OTHER STATES.**

SEE 23 CENT. DIG. Forg. §§ 103, 104.

See, also, 19 Cyc. pp. 1411, 1412.

**§ 36. Admissibility of evidence.**

Acts showing intent, see CRIMINAL LAW, § 371.

Application of rule as to confidential communications, see WITNESSES, § 188.

Evidence of acts showing knowledge, see CRIMINAL LAW, § 370.

Evidence to sustain plea of former jeopardy, see CRIMINAL LAW, § 295.

Res gestæ, see CRIMINAL LAW, §§ 364, 365.

**FOR CASES FROM OTHER STATES.**

SEE 23 CENT. DIG. Forg. §§ 105-116.

See, also, 19 Cyc. pp. 1413-1420.

**§ 45. Trial.**

**FOR CASES FROM OTHER STATES.**

SEE 23 CENT. DIG. Forg. §§ 122-129.

See, also, 19 Cyc. pp. 1426-1429.

**§ 47. — Questions for jury.**

[a] (Sup. 1360)

Whether the signature in question is a forgery is a question for the jury, and therefore it may go to them without previously being proved to be such.—*Mosher v. State*, 14 Ind. 261.

**FOR CASES FROM OTHER STATES.**

SEE 23 CENT. DIG. Forg. § 123.

See, also, 19 Cyc. p. 1426.

**§ 50. Appeal and error.**

Questions presented for review by record, see CRIMINAL LAW, § 1120.

**FOR CASES FROM OTHER STATES.**

SEE 23 CENT. DIG. Forg. § 130.

See, also, 19 Cyc. p. 1430.

**FORGIVENESS.**

Debt as constituting gift to debtor, see GIFTS, § 33.

**FORMA PAUPERIS.**

See—

Action or defense—

COSTS, §§ 127-133.

WILLS, § 407.

Proceedings on appeal—

APPEAL AND ERROR, § 389.

CRIMINAL LAW, § 1077.

**FORMER ADJUDICATION.**

See—

Defense to action by owner for appropriation of property for public use. EMINENT DOMAIN, § 283.

Operation and effect in general. JUDGMENT, §§ 540-749.

**FORMER JEOPARDY.**

See—

Bar to prosecution. CRIMINAL LAW, §§ 161-204.

Ground for discharge on habeas corpus. HABEAS CORPUS, § 31.

Plea of. CRIMINAL LAW, §§ 289-297.

**FORMER RECOVERY.**

Defense to action for causing death, see DEATH, § 27.

**FORMS OF ACTION.**

See—

ACTION, §§ 21-35, 41.

ACTION ON THE CASE.

ASSUMPSIT, ACTION OF.

Change by amendment. PLEADING, § 249.

COVENANT, ACTION OF.

DEBT, ACTION OF.

DETINUE.

EJECTMENT.

FORCIBLE ENTRY AND DETAINER, §§ 1-43.

Justices' courts. JUSTICES OF THE PEACE, § 67.

REPLEVIN.

TRESPASS, §§ 16-74.

TROVER AND CONVERSION.

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# FORNICATION.

## Scope-Note.

[INCLUDES sexual intercourse by unmarried persons, not constituting or not regarded as an element in any other distinct offense; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.

[EXCLUDES offenses in which fornication is an element merely (see *Adultery*; *Lewdness*; *Seduction*; and other specific heads). For complete list of matters excluded, see cross-references, post.]

## Analysis.

- § 1. Nature and elements of offenses.
- § 3. Indictment or information.
- § 4. — Requisites and sufficiency in general.

## Cross-References.

See—

ADULTERY.

Concealment as suspending running of limitations. CRIMINAL LAW, § 154.

Criminal conversation. HUSBAND AND WIFE, §§ 340-350.

INCEST.

LEWDNESS.

PROSTITUTION.

SEDUCTION.

Words imputing fornication as constituting libel or slander. LIBEL AND SLANDER, § 7.

### § 1. Nature and elements of offenses.

[a] (Sup. 1830)

Intercourse between persons, only one of whom is unmarried, is adultery and not fornication in the person unmarried.—*State v. Pearce*, 2 Blackf. 318.

[b] (Sup. 1849)

Living in open and notorious fornication or adultery is an indictable offense; but the mere act of fornication or adultery is not indictable.—*Lumpkins v. Justice*, 1 Ind. 557, *Smith*, 322.

[c] (Sup. 1855)

Any single act of sexual intercourse between a married female and a male person not her husband, or between an unmarried female and a male person, is whoredom.—*Rodebaugh v. Hollingsworth*, 6 Ind. 339.

[d] (Sup. 1877)

Fornication includes sexual intercourse between a man, married or unmarried, and an unmarried woman. Only when the woman is married is the term "adultery" applicable.—*Hood v. State*, 56 Ind. 263, 26 Am. Rep. 21.

[e] (Sup. 1909)

"Fornication" at common law was unlawful sexual intercourse between a man, either married or single, and an unmarried woman, and was not punishable unless accompanied by such circumstances as per se constituted a misdemeanor.—*Richey v. State*, 172 Ind. 134, 87 N. E. 1032.

The criminal statutes have adopted substantially the common-law doctrine, which regarded clandestine acts of adultery and fornication as a gross violation of personal rights, for which redress might be had in a civil action by the injured person, and make such acts public offenses only when they tend to affect public morals.—Id.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forn. § 1.

See, also, 19 Cyc. pp. 1434-1436.

### § 3. Indictment or information.

Variance between indictment or information and preliminary affidavit, see INDICTMENT AND INFORMATION, § 122.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forn. §§ 2-4.

See, also, 19 Cyc. pp. 1436, 1437.

### § 4. — Requisites and sufficiency in general.

[a] (Sup. 1861)

Information charged that defendant lived in fornication from September 20, 1858, to October 25, 1859. The affidavit charged the offense only from October 20, 1858, to September 25, 1859. Further, the information covered time that had not expired when the court sat and proceedings were had. *Held* that the information was nevertheless good.—*State v. Record*, 16 Ind. 111.

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[5 Ind. Dig.—Page 107]

[b] (Sup. 1878)

An indictment, under 2 Rev. St. p. 466, § 21, for fornication, need not, if this word be used, allege that the parties were not married to each other.—State v. Stephens, 63 Ind. 542.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Forn. §§ 2, 3.

See, also, 19 Cyc. p. 1436.

### FORTHCOMING BONDS.

See—

ATTACHMENT, §§ 101, 261-263, 332, 341-354.

Execution—

EXECUTION, §§ 151-155.

JUSTICES OF THE PEACE, § 135.

### FOUNDRIES.

Maintenance of as private nuisance, see NUISANCE, § 14.

### FOURTEENTH AMENDMENT.

See CONSTITUTIONAL LAW, §§ 206, 209-249, 251-320.

### FOURTH OF JULY.

Regulating sale of intoxicating liquors on, see INTOXICATING LIQUORS, § 120.

### FRACTIONAL.

Definition of word as used in describing section of land, see WATERS AND WATER COURSES, § 111.

### FRAMING.

Issues for jury on trial by court, see TRIAL, § 371.

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# FRANCHISES.

## Scope-Note.

[INCLUDES nature and incidents of special rights, privileges, and powers which can be exercised legally only under a grant from the government, and exercise and protection of franchises in general.

[EXCLUDES validity of grants of exclusive privileges (see *Monopolies*); corporate franchises (see *Corporations*); and franchises necessary or incident to particular kinds of business or occupations (see *specific heads*). For complete list of matters excluded, see cross-references, post.]

## Analysis.

- § 1. Nature of right.
- § 2. Grants in general.
- § 4. Exclusiveness and conflicting grants.
- § 12. Forfeiture.
- § 16. — Operation and effect.

## Cross-References.

### See—

Appellate jurisdiction of cases involving.  
COURTS, § 220 (12).

Compensation for franchise taken for public use. EMINENT DOMAIN, § 86.

### Corporate franchises—

BANKS AND BANKING, §§ 87-100.

CANALS, § 9.

CORPORATIONS, §§ 32-42, 592-621.

GAS, § 6.

INSURANCE, §§ 36, 57.

RAILROADS, §§ 18, 32, 118-144.

STREET RAILROADS, §§ 17, 18, 48, 61.

TELEGRAPHS AND TELEPHONES, § 16.

TURNPIKES AND TOLL ROADS, §§ 9, 29, 31.

WATERS AND WATER COURSES, §§ 183, 188.

Injunctions involving. INJUNCTION, §§ 66, 67.

Place of taxation. TAXATION, § 276.

Quo warranto to determine right to exercise. QUO WARRANTO, §§ 15-19.

Ferry franchises. FERRIES, §§ 9-20.

Grant and regulation by special or local law. STATUTES, § 79.

Of exclusive franchises as monopolies. MONOPOLIES, § 6.

Grants by municipal corporations. MUNICIPAL CORPORATIONS, § 309.

Right to use street for purposes other than highway. MUNICIPAL CORPORATIONS, §§ 679-690.

Interference with as ground for compensation under laws of eminent domain. EMINENT DOMAIN, § 108.

Laws affecting as impairing obligation of contracts. CONSTITUTIONAL LAW, § 132.

LOTTERIES, § 9.

Property subject to execution. EXECUTION, § 28.

Subjects and titles of acts relating to. STATUTES, § 112.

Supply of water for domestic and municipal purposes. WATERS AND WATER COURSES, § 188.

Vested rights. CONSTITUTIONAL LAW, § 101.

### § 1. Nature of right.

[a] (Sup. 1887)

The right of a person to practice his profession under a license issued pursuant to a statute enacted under the police power of the state is not a franchise.—State ex rel. Walker v. Green, 14 N. E. 352, 112 Ind. 462.

### FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. Franch. § 1.

See, also, 19 Cyc. pp. 1451, 1455-1459.

### § 2. Grants in general.

[a] (Sup. 1891)

A grant made by the commonwealth, or by a municipal corporation under authority from the commonwealth, is to be taken most strong-

ly against the grantee, and nothing is to be taken by implication against the public except what necessarily flows from the nature of the terms of the grant.—Indianapolis Cable St. R. Co. v. Citizens' St. R. Co., 24 N. E. 1054, 26 N. E. 893, 127 Ind. 369, 8 L. R. A. 539.

### FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. Franch. § 2.

See, also, 19 Cyc. pp. 1459, 1460.

### § 4. Exclusiveness and conflicting grants.

[a] (Sup. 1883)

Where the sovereign has granted a special charter to a corporation to conduct a particu-

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lar business, without granting any exclusive privileges over that business, the same sovereign may in like manner grant special charters to other corporations to carry on the same business, and, where there is a conflict of profits between them, the first is remediless.—*Crawfordsville & E. Turnpike Co. v. Smith*, 89 Ind. 290.

[b] (*Sup.* 1891)

Grants of franchises by public corporations to individuals or private corporations are to be strictly construed, and no exclusive privilege passes unless it be plainly conferred by express words or necessary implication.—*Indianapolis Cable St. R. Co. v. Citizens' St. R. Co.*, 24 N. E. 1054, 26 N. E. 893, 127 Ind. 369, 8 L. R. A. 539.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Franch. § 5.

See, also, 19 Cyc. p. 1463; note, 26 Am. Rep. 293.

#### § 12. Forfeiture.

Corporate franchises, see CORPORATIONS, §§ 592-621.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Franch. § 6.

See, also, note, 8 Am. St. Rep. 179.

#### § 16. — Operation and effect.

[a] (*Sup.* 1823)

Though a corporation is dissolved by a legal seizure or forfeiture of its franchises, those franchises are not thereby destroyed. They exist in the custody of the state, and may be afterwards granted to the same or to other individuals.—*President, etc., of Bank of Vincennes v. State*, 1 Blackf. 267, 12 Am. Dec. 234.

[b] (*Sup.* 1870)

A party who, by nonuser, has lost his franchise, cannot transfer any right by conveyance or assignment.—*The John Shallcross*, 35 Ind. 19.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Franch. § 6.

### FRATERNAL ASSOCIATIONS.

See—

BENEFICIAL ASSOCIATIONS.

INSURANCE, §§ 692-710.

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# FRAUD.

## Scope-Note.

[INCLUDES deception or perversion of the truth by statements, acts, or omissions intended or operating to injure another by depriving him of any property or right or obtaining any promise or unlawful or unfair advantage, not constituting or not regarded as a tort or offense of any distinct class; evidence relating thereto; nature and extent of liability for such fraud in general; actions for deceit and like actions for damages for fraud; and criminal responsibility for fraud in general, and prosecution and punishment thereof as a public offense.

[EXCLUDES fraud in transactions between persons in particular personal relations (see *Husband and Wife*; *Attorney and Client*; *Principal and Agent*; and other specific heads); effect of fraud on conveyances, contracts, and other transactions (see *Deeds*; *Mortgages*; *Contracts*; *Bonds*; *Bills and Notes*; *Insurance*; and other specific heads); fraud as ground for cancellation, surrender, rescission, or reformation of instruments in writing (see *Cancellation of Instruments*; *Reformation of Instruments*); conveyances fraudulent as to creditors, purchasers, etc. (see *Fraudulent Conveyances*); requirements and operation of statute of frauds (see *Frauds, Statute of*); suspension of statutes of limitations on ground of fraud (see *Limitation of Actions*); fraud as ground for particular remedies in actions (see *Arrest*; *Attachment*; *Execution*; *Discovery*); conspiracies to defraud (see *Conspiracy*); and particular classes of offenses involving fraud (see *False Personation*; *False Pretenses*; *Forgery*; *Embezzlement*). For complete list of matters excluded, see cross-references, post.]

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- § 2. Elements of actual fraud.
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- § 10. — Matters of fact or of law.
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## **I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.**

Fraud as affecting estoppel of tenant to deny title of landlord, see LANDLORD AND TENANT, § 62.

### **§ 1. Nature of fraud.**

[a] (Sup. 1875)

Fraud must not be induced by the person who complains of it, nor must he suffer himself to become an indolent victim.—Stedman v. Boone, 49 Ind. 469.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fraud, §§ 1-7.

See, also, 20 Cyc. pp. 8-10.

### **§ 2. Elements of actual fraud.**

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fraud, §§ 1, 2.

See, also, 20 Cyc. pp. 8, 12-43.

### **§ 3. — In general.**

[a] (Sup. 1855)

Where a party designedly produces a false impression in order to mislead, entrap, or obtain undue advantage over another, in every such case there is fraud,—an evil act, with an evil intent.—Peter v. Wright, 6 Ind. 183.

[b] (Sup. 1884)

One who, assuming to know the laws of another state, induces another to act on his representations in regard thereto, and misleads such party, is guilty of fraud, though he did not know that his statements in regard to

the law were false.—*Bethell v. Bethell*, 92 Ind. 318.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Fraud, § 1.

See, also, 20 Cyc. pp. 8, 12, 15.

**§ 4. — Intent.**

Fraud procuring execution of deed, see **DEEDS**, § 70.

Pleading, see post, § 42.

**[a] (Sup. 1885)**

A complaint for fraud, alleging mere false representations, is insufficient, since, in the absence of either recklessness or carelessness, there can be no fraud which does not involve moral turpitude.—*Furnas v. Friday*, 1 N. E. 206, 102 Ind. 129.

**[b] (App. 1891)**

Fraud cannot be predicated upon acts which the party charged has a right by law to do nor upon the nonperformance of acts which by law he is not bound to do, whatever may be his motive, design, or purpose either in doing or not doing the acts complained of.—*Reiter v. Cumback*, 27 N. E. 443, 1 Ind. App. 41.

**[c] (App. 1907)**

An action for deceit is founded on defendant's moral delinquency and requires proof of evil intent and knowledge of the falsity of representations made plaintiff.—*Hartford Life Ins. Co. v. Hope*, 40 Ind. App. 354, 81 N. E. 505, 1088.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Fraud, § 2.

See, also, 20 Cyc. p. 35.

**§ 5. Elements of constructive fraud.**

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Fraud, § 7.

See, also, 20 Cyc. p. 9.

**§ 7. — Fiduciary or confidential relations.**

**[a] (Sup. 1896)**

False representations made by an attorney to an inexperienced client, as a basis for an extravagant overcharge for services in securing certain property for the client, that the other claimant to such property had employed all the attorneys in the place, will support a suit for fraud.—*Manley v. Felty*, 146 Ind. 194, 45 N. E. 74.

**FOR CASES FROM OTHER STATES,**

See, also, 20 Cyc. p. 60.

**§ 8. Fraudulent representations.**

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Fraud, §§ 3-5, 8, 11-14.

See, also, 20 Cyc. pp. 14-22; note, 15 L. R. A. 795.

**§ 9. — Nature in general.**

[a] To sustain an action for deceit, it must be established that the representations complained of were false; that they were relative to matters material to the transaction, and not solely to promises as to matters in futuro; that the defendant, in making the representations, knew them to be false; and that the plaintiff, exercising ordinary prudence, relied on them as true, to his injury.—(Sup. 1851) *State Bank v. Hamilton*, 2 Ind. 457; (1875) *Jagers v. Jagers*, 49 Ind. 428.

**[b] (Sup. 1880)**

In a suit on a note, defendant answered that it was given for the right to sell a patented machine, which the original payee falsely represented would clean wheat rapidly and effectually. *Held*, that the words "rapidly" and "effectually" were merely descriptive, and not actionable as fraudulent representations.—*Neidefer v. Chastain*, 71 Ind. 363, 36 Am. Rep. 198.

**[c] (Sup. 1883)**

Fraudulent representations as to the condition of a mine, its drainage, quantity of coal near the shaft, amount worked, etc., whereby plaintiff, who could not examine it, was induced to take a lease thereof, are actionable.—*Arbuckle v. Biederman*, 94 Ind. 168.

**[d] (App. 1901)**

One who denies that which he has previously affirmed may be held to have committed a fraud in law.—*Pritchett v. Ahrens*, 59 N. E. 42, 26 Ind. App. 56, 84 Am. St. Rep. 274.

**[e] (App. 1908)**

Defendants sold plaintiff a tract of land by a deed representing the tract to contain 35.70 acres. The evidence showed that both of defendants represented it to contain about 36 acres; that defendants, who were occupying and farming the whole tract within the indicated lines, pointed out fences as line fences which were not such; and that, by a subsequent survey, the acreage thus indicated was reduced nearly one-fifth. *Held*, that plaintiff was entitled to recover damages resulting from the shortage.—*Petrie v. Ludwig*, 41 Ind. App. 310, 83 N. E. 770.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Fraud, § 8.

See, also, 20 Cyc. p. 14.

**§ 10. — Matters of fact or of law.**

[a] False representations as to matters of law are not actionable.—(Sup. 1846) *Russell v. Branham*, 8 Blackf. 277; (1879) *Burt v. Bowles*, 69 Ind. 1; (1880) *Clodfelter v. Hullett*, 72 Ind. 137.

**[b] (Sup. 1885)**

Where defendant, a skilled attorney, induced plaintiff to pay him money to remove alleged liens on property conveyed by plaintiff to defendant, *held* that, though the mistake

was one of law, plaintiff could recover.—Kinney v. Dodge, 101 Ind. 373.

[c] (App. 1908)

The rule that a party who has been induced to execute an agreement by the fraudulent representations of the other party may set up such representations in bar of an action on the agreement does not apply where the representations, though false, relate to the legal effect of the instrument.—Gipe v. Pittsburgh, C. & St. L. R. Co., 41 Ind. App. 156, 82 N. E. 471.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fraud, § 11.

§ 11. — **Matters of fact or of opinion.**

[a] Representations of value, however false they may be, are not actionable.—(Sup. 1881) Cagney v. Cuson, 77 Ind. 494; (1881) Hartman v. Flaherty, 80 Ind. 472; (1883) Shale v. Creviston, 93 Ind. 591.

[b] (Sup. 1836)

A representation that promissory notes are good and made by solvent parties is not a mere commendation of quality, but is the statement of a fact.—Olvey v. Jackson, 4 N. E. 149, 106 Ind. 286.

[c] (Sup. 1839)

Representations of the sellers of machinery as to what the machinery would do in the future are mere expressions of opinion, unless facts are averred which give them a different effect.—Conant v. National State Bank of Terre Haute, 22 N. E. 250, 121 Ind. 323.

[d] (App. 1894)

A complaint in an action for fraud in the exchange of real estate that alleges that plaintiff, relying on the integrity of defendant, was induced to accept in trade a farm a thousand miles distant, which he had never seen, that was represented by defendant as within a mile of a flourishing town of 500 people, and well-improved, arable land, worth \$25 per acre, —the price at which plaintiff accepted it,—when in fact it was unimproved land situated 4 miles from the town, which only had 150 inhabitants, and was worth only \$5 per acre, is not demurrable.—Bolds v. Woods, 9 Ind. App. 657, 36 N. E. 933.

[e] (App. 1899)

Where defendant, when selling certain land incumbered by a mortgage held by a building association, falsely represented to plaintiff that the association had informed him at the time of making the loan that it would be fully paid in 72 monthly installments, of which only 36 still remain to be paid, while as a matter of fact the association had informed defendant that it would require 84 monthly installments to pay the loan, and more than 36 remained to be paid, such false statement was not an opinion, but the statement of a fact on which plaintiff had a right to rely.—Loucks v. Taylor, 55 N. E. 238, 23 Ind. App. 245.

[f] (Sup. 1903)

Fraudulent representations by defendant that patent rights which were valueless were of great value; that they were worth \$25,000 but could be secured for \$12,500; that, in his judgment as a business man, stock in a corporation proposed to be organized to purchase such rights would be more valuable than bank stock; and that dividends therefrom would soon pay for the stock—were not statements of opinion, but of facts.—Coulter v. Clark, 66 N. E. 739, 160 Ind. 311.

[g] (Sup. 1905)

The proposition that no man is liable for the expression of his opinion or judgment is true only when the opinion stands by itself and is intended to be taken only as an opinion.—Culley v. Jones, 164 Ind. 168, 73 N. E. 94.

Mere representations as to value are not sufficient to support a charge of fraud ordinarily, the representations of value may be, under such circumstances, averments of fact.—Id.

[h] (App. 1910)

As a rule, on the question of fraud representations as to value are not held to be statements of facts but are considered expressions of opinion.—Boltz v. O'Conner, 90 N. E. 496.

"Rich" as applied to land is defined as fertile, fruitful, producing or yielding abundantly; of great price or money value; abounding in desirable or effective qualities or elements; of superior quality; opposed to poor—and representations that the soil of land is rich, fertile, and very productive is a statement of a fact, unless qualified in some manner that would indicate that only an opinion or estimate was intended.—Id.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fraud, §§ 12, 13.

See, also, 20 Cyc. pp. 17–20; note, 35 L. R. A. 417.

§ 12. — **Existing facts or expectations or promises.**

[a] (Sup. 1860)

A citizen of a certain town made an unconditional subscription to the stock of a railroad company, the company promising that the branch of the road should be made to the town in which the subscriber resided. *Held*, that such subscriber could not recover the money paid on the ground of fraud in failing to build the road to the town, the promise being no more than expression of an existing intent to make such branch.—McAllister v. Indianapolis & C. R. Co., 15 Ind. 11.

[b] (Sup. 1870)

A promise is not in itself a false and deceitful representation.—Fouty v. Fouty, 34 Ind. 433.

[c] (Sup. 1870)

A false representation upon which fraud may be predicated must be of an existing fact, or a fact alleged to exist at the time, and can-

not consist of a promise to be performed in the future or of a false statement as to the legal construction or effect of a written contract executed by the person to whom the representation is made at the time of the making of the representation.—*Hartsville University v. Hamilton*, 34 Ind. 506.

[d] (Sup. 1878)

A representation by the lessor, at the time a lease was executed, that he had contracted for improvements on the leased premises, is not sufficient basis for an action of fraud, since it is in the nature of a promise.—*Welsh-billing v. Dienhart*, 65 Ind. 94.

[e] (Sup. 1881)

Representations by a lessor to the lessee, who has never seen the land, that it was not subject to overflow, and never had been overflowed, related to existing facts, which, if untrue, were fraudulent.—*Jones v. Hathaway*, 77 Ind. 14.

[f] Representations which were promissory in character, and related merely to what should be in the future, are not actionable, though shown to have failed of verification.—(Sup. 1884) *Vogel v. Demorest*, 97 Ind. 440; (1889) *Bennett v. McIntire*, 23 N. E. 78, 121 Ind. 231, 6 L. R. A. 736; (App. 1891) *Kain v. Rinker*, 27 N. E. 328, 1 Ind. App. 86; (Sup. 1894) *Robinson v. Reinhart*, 137 Ind. 674, 36 N. E. 519; (1897) *Smith v. Parker*, 148 Ind. 127, 45 N. E. 770; (App. 1899) *State ex rel. Creighton v. Carlisle*, 21 Ind. App. 438, 52 N. E. 711.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fraud, § 14.

See, also, 20 Cyc. pp. 20-22.

§ 13. — Falsity and knowledge thereof. Pleading, see post, § 45.

[a] A false representation is not actionable, unless it is made with knowledge of its falsity.—(Sup. 1847) *Humphreys v. Comline*, 8 Blackf. 516; (1848) *Hopper v. Sisk*, 1 Ind. 176, *Smith*, 102; (1851) *State Bank v. Hamilton*, 2 Ind. 457; (1857) *Gatling v. Newell*, 9 Ind. 572.

[b] (Sup. 1884)

Representations recklessly made as of one's own knowledge, without in fact knowing whether they are true or not, are actionable as fraudulent.—*West v. Wright*, 98 Ind. 335.

[c] (Sup. 1889)

Where one, for the fraudulent purpose of inducing another to part with money or property, makes a statement of fact which is untrue, and thereby obtains money which he had no right to receive, and which it would be unconscionable for him to retain, he is guilty of fraud even though he may not have known at the time that the statement was false.—*Loxalls v. Miller*, 22 N. E. 995, 121 Ind. 188.

[d] (App. 1897)

Where plaintiff relied upon defendant's positive statement in a letter of credit that a person was worth \$3,000 above his liabilities, defendant is liable if the statement is false, though he believed it was true when he made it.—*Mendenhall v. Stewart*, 47 N. E. 943, 18 Ind. App. 262.

[e] (App. 1907)

In an action for damages for deceit, there must be proof of false representations made knowingly or without belief in their truth or recklessly.—*Hartford Life Ins. Co. v. Hope*, 40 Ind. App. 354.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fraud, §§ 3-5.

See, also, 20 Cyc. pp. 23-31.

§ 15. Fraudulent concealment.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fraud, § 15.

See, also, 20 Cyc. pp. 15, 63-65; note, 15 Am. Dec. 106.

§ 16. — Nature in general.

[a] (Sup. 1889)

An heir conveyed to another heir by quitclaim deed without warranty a one-third interest in land. The grantor fraudulently concealed from the grantee the fact that the grantor had been advanced by the ancestor a sum equal to his share in the ancestor's estate, and he represented that he and a third person were entitled to one full third of the estate. Held such a fraud on the grantee as gave him a right of action.—*Craig v. Hamilton*, 21 N. E. 315, 118 Ind. 565.

[b] (App. 1899)

Where plaintiff, at the time of purchasing of defendant certain real estate incumbered by a mortgage, could not read, by reason of defective eyesight, was inexperienced in business, and had confidence in defendant, and defendant, on reading the deed to him, failed to read a clause therein whereby plaintiff assumed the payment of the balance of the mortgage, which was an obligation greater than it was his purpose, as known to defendant, to assume, such failure was a fraud on plaintiff.—*Loucks v. Taylor*, 55 N. E. 238, 23 Ind. App. 245.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fraud, § 15.

See, also, 20 Cyc. p. 15.

§ 17. — Duty to disclose facts.

[a] (App. 1891)

Plaintiff, desiring to purchase chattels, and mistakenly understanding the vendor's name to be "Warner," instead of "Werner," examined the records in the recorder's office, where he found a mortgage executed by a man by the name of "Werner," and the vendor remained silent when the prospective purchaser stated that such mortgage could not have been given by the vendor, and afterwards on the same day

the vendor positively stated that he had nothing to do with the mortgage. *Held*, that the purchaser who was compelled to pay the mortgage on the property sold was entitled to recover damages from the vendor.—*Firestone v. Werner*, 27 N. E. 623, 1 Ind. App. 293.

FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. FRAUD, § 15.

### § 18. Materiality of matter represented or concealed.

[a] (Sup. 1861)

In the sale of a newspaper, representations as to the number of subscribers and the amount of business and profits are material facts.—*Harvey v. Smith*, 17 Ind. 272.

[b] (Sup. 1880)

Representations, by the seller of the right to sell a patented machine, that such machines could be bought at a certain place for \$5, which statement was false, are not actionable, where no allegation of damage was based on that fact, since it had evidently been treated as an immaterial fact.—*Neidefer v. Chastain*, 71 Ind. 363, 36 Am. Rep. 198.

[c] (Sup. 1881)

The representation, by the vendor of a patent for certain improvements in fence posts, consisting of a hollow iron point and bolts, to the vendee, that the vendor had a contract with R. by which he, or any one to whom he might sell, was entitled to purchase in any quantity such points and bolts at 1¼ cents per pound, is of a material fact.—*Peffley v. Noland*, 80 Ind. 164.

FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. FRAUD, § 16.

See, also, 20 Cyc. p. 23.

### § 19. Reliance on representations and inducement to act.

Admissibility of evidence, see post, § 56.

Pleading, see post, § 46.

FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. FRAUD, §§ 9, 10, 17–23.

See, also, 20 Cyc. pp. 39–41; note, 37 L. R. A. 593.

### § 20. — In general.

[a] Recovery cannot be had for fraud unless plaintiff relied on the fraudulent inducements or representations of defendant.—(Sup. 1855) *Port v. Williams*, 6 Ind. 219; (1869) *Hagee v. Grossman*, 31 Ind. 223; (1872) *Bowman v. Carithers*, 40 Ind. 90; (1889) *Craig v. Hamilton*, 118 Ind. 565, 21 N. E. 315.

[b] (Sup. 1866)

Where a seller has made false representations as to the quality of the goods, but the buyer, in making the purchase, relies on a test of their quality made by his own agent, who is not prevented by any act, or word of the seller from testing the goods, the seller is not

liable for deceit.—*Hagee v. Grossman*, 31 Ind. 223.

[c] False representations are actionable only when relied and acted on.—(Sup. 1872) *Bowman v. Carithers*, 40 Ind. 90; (App. 1891) *Kain v. Rinker*, 27 N. E. 328, 1 Ind. App. 86.

[d] (Sup. 1872)

Where a party believes that a claim upon which an action has been commenced has already been paid, but because he is afraid he cannot prove the payment, and, to avoid trouble and litigation, he pays a part of it, he cannot recover back the amount so paid on the ground of fraud based upon statements of the claimant that the debt had not been paid.—*Bowman v. Carithers*, 40 Ind. 90.

[e] (App. 1897)

Where a school warrant is void on its face, the trustee issuing it is not personally liable to a purchaser of it, who buys on the representation of the trustee that it "is all right"; the trustee knowing that it is void.—*First Nat. Bank of Elkhart v. Osborne*, 48 N. E. 256, 18 Ind. App. 442.

[f] (App. 1898)

Testimony of plaintiffs that they traded for a horse that they understood to be "11," an American bred coach stallion; that, at the time of the purchase, defendants gave them a warranted pedigree of him as such; and that they took him home, and advertised him as such horse, and with the pedigree as warranted,—shows that they relied and acted on defendant's representations as to his being such horse, with such pedigree.—*Crouch v. Chamness*, 51 N. E. 941, 21 Ind. App. 492.

[g] (App. 1899)

A father, without misrepresenting any facts, induced a daughter to believe that lands of her maternal grandfather had descended to him instead of to her, because her mother had died before the grandfather. The father assumed control of the lands, and several years thereafter prepared a quitclaim deed for her to execute, which she did, without reading or having its contents explained; the father, however, not misstating the contents, or preventing the daughter from reading it. Afterwards he paid her a certain sum, stating it was all she was entitled to as a consideration, but not making any representation as to what consideration was received. The deed was thereafter sent to a distant place for record, but it did not appear to whom, or that it was without the daughter's consent. Subsequently, by an investigation of the records,—just what kind not being shown,—the daughter discovered that her father had received a much larger amount than he gave her, but it did not appear that such amount was different from that expressed in the deed. *Held*, that the daughter was chargeable with notice of the consideration expressed in the deed, and had no cause of action for fraud.—*Pence v. Young*, 53 N. E. 1060, 22 Ind. App. 427.

[h] (*Sup.* 1905)

A contracting party may rely on the express statement of an existing fact, the truth of which is unknown to him, but which is asserted by the other contracting party as a basis for an agreement.—*Culley v. Jones*, 164 Ind. 168, 73 N. E. 94.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fraud, §§ 17, 18.

See, also, 20 Cyc. p. 39; note, 32 Am. St. Rep. 384.

**§ 21. — Persons who may rely on representations.**

[a] (*Sup.* 1884)

A principal may, without inquiry, rely on the statements of his agent or confidential advisor as to the contents of a written instrument presented for signature by a third person to whom the agent or confidential adviser should, if faithful to his trust, occupy an adverse relation, and, in case of fraud, the principal may obtain relief.—*Robinson v. Glass*, 94 Ind. 211.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fraud, §§ 9, 10, 23.

**§ 22. — Duty to investigate.**

[a] (*Sup.* 1872)

The purchaser of a patent right has a right to rely on the representations of the seller as to what is covered by the patent.—*Rose v. Hurley*, 39 Ind. 77.

[b] (*Sup.* 1879)

A grantee has a right to rely on representations made by the grantor as to the location of the land conveyed, and, therefore, in an action for fraudulent representations by the grantor, in falsely pointing out to the grantee, as the land conveyed, other and more valuable lands, it was proper to refuse to submit to the jury an interrogatory as to whether plaintiff did not have ample opportunity to ascertain the true location of the land.—*Campbell v. Frankem*, 65 Ind. 591.

[c] (*Sup.* 1890)

To excuse a want of care, and diligence to guard against fraud and imposition, on the ground of the existence of a known trust and confidence, the facts must show not only that there was such trust and confidence, but that its existence was justified by the relationship of the parties.—*Clodfelter v. Hulett*, 72 Ind. 137.

[d] (*Sup.* 1881)

One taking a lease of a farm has the right to rely, without further inquiry, on representations of the lessor that the farm has never been overflowed.—*Jones v. Hathaway*, 77 Ind. 14.

[e] (*Sup.* 1881)

Where a plaintiff purchased property which he had an opportunity to examine, but was prevented from doing so by defendant's

statement that he did not want to sell, and subsequent false representations that the land embraced 130 acres and was worth \$30 per acre, an action for deceit will not lie, since plaintiff should have examined the property.—*Cagney v. Cuson*, 77 Ind. 494.

A purchaser who has an opportunity to examine the property has no right to rely on representations of the vendor as to its quality.—*Id.*

[f] (*Sup.* 1884)

One is guilty of fraud who knowingly procures an agent to falsely represent the contents of a writing to his principal, and thus prevent its being read by the principal. The fraud not only excuses the reading of the instrument by the principal, but condemns the whole transaction as fraudulent, enabling the principal to obtain relief.—*Robinson v. Glass*, 94 Ind. 211.

[g] (*Sup.* 1889)

In an action for false and fraudulent representations regarding the quantity of land in a certain tract, the plaintiff's right of recovery cannot be defeated on the ground that he might have ascertained the truth by measuring the tract himself.—*Ledbetter v. Davis*, 121 Ind. 119, 22 N. E. 744.

[h] (*Sup.* 1892)

A false and fraudulent representation may be relied on by a person having no actual knowledge, although the fact in question is a matter of public record.—*Backer v. Pyne*, 130 Ind. 288, 30 N. E. 21, 30 Am. St. Rep. 231.

[i] (*Sup.* 1894)

Where a party by false representations procures another to convey real estate, he cannot defeat a recovery by urging that the owners were at fault for not better informing themselves before executing the deed. The law does not allow a shrewd and designing person to thus hide his evil-mindedness behind the ignorance of his victim.—*Robinson v. Reinhart*, 36 N. E. 519, 137 Ind. 674.

[j] (*App.* 1894)

Where defendant falsely represented that certain land was well adapted to farming purposes, and was good, productive, fertile soil, with 50 acres thereof in the highest state of cultivation, and that the whole was securely fenced and timbered, with valuable timber, and that such land was worth \$30 per acre, he is liable in fraud, since plaintiff was not bound to investigate and verify the statements.—*Armstrong v. White*, 9 Ind. App. 588, 37 N. E. 28.

[k] (*App.* 1896)

Where the plaintiff in an action for false representations had opportunity to determine for himself whether or not a machine bought by him was new as represented to be, such representations are not sufficient to sustain a charge of fraud.—*Anderson Foundry & Ma-*

chine Works v. Myers, 44 N. E. 193, 15 Ind. App. 385.

In an action which proceeded to trial on the theory of fraudulent representations, the complaint alleged the purchase of a brick-making machine; that defendant warranted it to have a certain capacity; that it was agreed that the machine should be tested on plaintiff's grounds, and after successful operation plaintiff was to pay one-half the purchase money, cash; that the machine was shipped to plaintiff, and was tested by defendant's agent in the absence of plaintiff; that on his return plaintiff was assured by the agent that the machine worked perfectly; that plaintiff did not make payment at the time, but afterwards wrote defendant that he had not yet operated the machine, and asked for a further warranty; that defendant assured him that everything would be made satisfactory, and the payment was thereupon made, and a note delivered; that the machine, when put in operation, failed to satisfy the warranty; that defendant knew of the imperfections of the machine, and fraudulently concealed them from plaintiff, with intent to cheat and defraud him. *Held*, that the complaint was insufficient on the issue of fraud, plaintiff having had full opportunity to make the test before parting with his money.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fraud, §§ 19-23.

See, also, 20 Cyc. pp. 32-34, 49-62.

### § 23. — Relations and means of knowledge of parties.

[a] (Sup. 1838)

Misrepresentations by one contracting party to the other as to the value or quantity of a commodity in market, where correct information on the subject is equally within the power of both parties, with equal diligence, do not, in contemplation of law, constitute fraud.—*Foley v. Cowgill*, 5 Blackf. 18, 32 Am. Dec. 49.

[b] (Sup. 1844)

At law an action may be maintained for false representations, made by a vendor to a purchaser, of matters within the peculiar knowledge of the vendor, whereby the purchaser is injured.—*Shaeffer v. Sleade*, 7 Blackf. 178.

[c] (Sup. 1855)

The vendee of land cannot maintain an action against the vendor for a misrepresentation of the quantity of cleared ground on the premises, where he has himself had opportunity to judge, and ample means within his reach to form a correct estimate, and appears to have relied on his own judgment.—*Port v. Williams*, 6 Ind. 219.

[d] (Sup. 1861)

In the sale of a newspaper, the number of subscribers and the amount of business and profits are facts so peculiarly within the knowledge of the vendor that the vendee has a right

to rely on his representations concerning them.—*Harvey v. Smith*, 17 Ind. 272.

[e] (Sup. 1877)

Where a party to a contract relies upon his own judgment, with means of knowing the facts equal to those of the other party and he does not make use of them, he cannot complain.—*Hess v. Young*, 59 Ind. 379.

[f] (Sup. 1887)

In an action to recover damages for false representations, by means of which the defendant induced the plaintiffs to transfer to him certain property, and to accept in part payment certain worthless notes of a third person, the evidence showed that one of the plaintiffs, an inexperienced married woman, owning part of the property conveyed, made such transfer, relying upon the statement of the defendant that the notes were well secured, and "good as government bonds," which was not true. *Held* that, as to her, the evidence failed to support a verdict for the defendant, and the motion for a new trial should have been granted.—*Bish v. Beatty*, 111 Ind. 403, 12 N. E. 523.

[g] (App. 1892)

Where an heir, who has undertaken to settle up the estate, induces a co-heir to sell to him her interest in the real estate at less than its value by falsely representing that there is a claim against the estate, to pay which the real estate must be sold, and that it cannot be sold for more than a certain amount, such co-heir may recover against him for deceit and false representations, having a right to rely on the representations, owing to the confidential relations of the parties.—*Hulett v. Kennedy*, 4 Ind. App. 33, 30 N. E. 310.

[h] (App. 1894)

A complaint alleging that defendant's intestate, to defraud plaintiff, falsely represented that his mill was worth as much as certain land of plaintiff's; that the mill had valuable machinery, in good repair, and was valuable on account of its extensive trade; and that such trade was worth more than five dollars per day in excess of expenses,—and that plaintiff, relying thereon, exchanged his land for the mill, sufficiently shows that such representations were of matters peculiarly within intestate's knowledge, so that plaintiff had a right to rely on them.—*Bloomer v. Gray*, 10 Ind. App. 326, 37 N. E. 819.

[i] (Sup. 1903)

A purchaser of territorial rights under patents may rely on the representations of his vendor as to their value, and is not obliged to prosecute an inquiry, demanding peculiar skill and knowledge, into their character.—*Coulter v. Clark*, 66 N. E. 739, 160 Ind. 311.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fraud, §§ 20, 23.

See, also, 20 Cyc. pp. 55-60; note, 37 L. R. A. 613.

**§ 25. Injury from fraud.****[a] (Sup. 1881)**

In suit against the executor, after the final settlement, to recover money advanced to enable him to settle the estate without delay, the complaint alleged that the executor charged himself with the sum so obtained, and applied it in settling the estate. *Held*, that an additional allegation that he procured the money from plaintiff by false representations was insufficient to show actionable fraud on defendant's part; the application to the use of the estate being equivalent to an application to plaintiff's use, she being the sole legatee.—*Peacocke v. Leffler*, 74 Ind. 327.

**[b] (Sup. 1898)**

Injury or damage to plaintiff as a result of fraudulent representations is a necessary prerequisite of recovery in an action for deceit.—*Strader v. Strader*, 51 N. E. 479, 151 Ind. 339.

**[c] (Sup. 1905)**

To constitute actionable fraud, it must appear that the complaining party has been damaged or prejudiced in some way.—*Board of Commissioners of Howard County v. Garrigus*, 164 Ind. 589, 73 N. E. 82, 74 N. E. 249.

**[d] (App. 1906)**

The fact that the agreement of the purchaser of the tax liens with plaintiff was within the statute of frauds was immaterial, in an action against defendant for the fraud, in which it was not sought to enforce such agreement.—*Lindley v. Kemp*, 76 N. E. 798, 38 Ind. App. 355.

**FOR CASES FROM OTHER STATES.**

SEE 23 CENT. DIG. Fraud, § 24.

See, also, 20 Cyc. pp. 42, 43.

**§ 27. Fraudulent representations or concealment as to particular facts.****[a] (Sup. 1896)**

False representations by an attorney to an inexperienced client, as to the value of certain land which the attorney undertakes to recover for his client, whereby the latter is induced to execute a note for an exorbitant fee for the attorney's services, constitute positive fraud.—*Manley v. Felty*, 45 N. E. 74, 146 Ind. 104.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Fraud, § 8.

See, also, 20 Cyc. pp. 44-80.

**§ 28. Fraud in particular transactions or for particular purposes.****[a] (Super. 1872)**

Fraud may be shown by reason of false representations made by a seller to induce a purchaser to buy shares of stock.—*Smock v. Henderson*, Wils. 241.

**[b] (App. 1906)**

Plaintiff was an aged, infirm, and ignorant woman. Defendant was plaintiff's brother, a successful business man and a minister, in whom she reposed confidence and to whom she looked for advice in her business. Defendant, in conspiracy with others, consumed plaintiff's property by appropriating the crops and proceeds of her lands, so that she was unable to pay the taxes and lost the property under tax liens. The purchaser of the property at sheriff's sale orally agreed to convey the same to plaintiff, if she and certain of her children would execute a mortgage for the amount of the tax liens and enough more to compensate him for his trouble and expense. Defendant and his co-conspirators intercepted the mortgage which the purchaser sent to plaintiffs to sign, and, fraudulently representing to the purchaser that he would take care of plaintiff, defendant induced the purchaser, who had no knowledge of the interception of the mortgage and of its concealment from plaintiff, to convey the land to defendant for a grossly inadequate consideration. Defendant subsequently conveyed the lands to his co-conspirators, who committed repeated acts of trespass thereon, to plaintiff's great damage. *Held*, that defendant's conduct constituted an actionable fraud against plaintiff.—*Lindley v. Kemp*, 76 N. E. 798, 38 Ind. App. 355.

**[c] (Sup. 1907)**

Creditors defrauded by misrepresentations as to a corporation's capital stock may recover damages in tort against persons making the representations.—*Marion Trust Co. v. Bennett*, 169 Ind. 346, 82 N. E. 782, 124 Am. St. Rep. 228.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Fraud, §§ 8, 26.

See, also, 20 Cyc. pp. 44-80.

**§ 30. Persons liable.**

Corporations, see CORPORATIONS, § 497.

**[a] (Sup. 1867)**

It is not essential that the fraudulent representations, in order to form a basis on an action of deceit, should be made by defendant, but it is sufficient if they were made by a third person upon the procurement of defendant.—*Maggart v. Freeman*, 27 Ind. 531.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Fraud, § 35.

See, also, 20 Cyc. pp. 84-86.

**II. ACTIONS.****(A) RIGHTS OF ACTION AND DEFENSES**

Right of action by husband or wife, or both, see HUSBAND AND WIFE, §§ 209, 210.

**§ 31. Nature and form of remedy.**

Action sounding in contract or tort, see ACTION, § 27.

Joinder of causes of action, see ACTION, § 50.

[a] (Sup. 1890)

A party may retain property received in exchange for other property and sue for damages caused by fraudulent representations in obtaining the exchange.—*Nysewander v. Lowman*, 24 N. E. 355, 124 Ind. 584.

[b] (Sup. 1892)

A company fraudulently induced to lend money on land in excess of its value may retain and enforce its security against the land, and at the same time maintain an action against the borrower to recover damages for the fraudulent representations.—*Union Cent. Life Ins. Co. v. Schidler*, 130 Ind. 214, 29 N. E. 1071, 15 L. R. A. 89.

FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. Fraud, § 27.

See, also, 20 Cyc. p. 86.

**§ 32. Effect of existence of remedy by action on contract.**

[a] (Sup. 1862)

Where A. and B. agree to exchange lands, and the contract is fully executed by A., but B. by reason of his own acts done in fraud of the rights of A. is in such situation that it is impossible for him to execute the contract, or for A. to rescind it, and be placed in statu quo, A. may disregard his right to have specific performance and sue for the damages he sustained by B.'s nonperformance.—*Lingerman v. Todd*, 18 Ind. 488.

[b] (App. 1910)

One may either sue for damages caused by fraudulent representations inducing him to execute a contract, or rescind the contract, but cannot do both.—*Church v. Baumgardner*, 92 N. E. 7.

FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. Fraud, § 28.

See, also, 20 Cyc. p. 87.

**§ 34. Conditions precedent.**

[a] (Sup. 1890)

In an action for deceit in the sale of property, it is not necessary for plaintiff to prove an offer to return the property.—*Nysewander v. Lowman*, 124 Ind. 584, 24 N. E. 355.

[b] (App. 1893)

An action for fraudulent representations by an insurance company, inducing a settlement for a death claim, may be maintained without returning the sum received on such settlement, since the defrauded party has the right to affirm the settlement, and recover the damages sustained by the fraud.—*Wabash Valley Protective Union v. James*, 8 Ind. App. 449, 35 N. E. 919.

[c] (App. 1904)

A vendee need not rescind the contract in order to recover damages sustained by fraudulent representations as to the number of acres conveyed.—*Ludwig v. Petrie*, 70 N. E. 280, 32 Ind. App. 550.

FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. Fraud, § 29.

See, also, 20 Cyc. pp. 90, 91.

**§ 35. Waiver of right of action.**

[a] In order to constitute a waiver by an express affirmance of a right to damages for loss resulting from false and fraudulent representations, it is essential that the party should possess full knowledge of the fraud and intend to confirm the contract.—(Sup. 1882) *St. John v. Hendrickson*, 81 Ind. 350; (1888) *Johnson v. Culver*, 19 N. E. 129, 116 Ind. 278.

[b] (Sup. 1882)

There may by an express affirmance be a waiver of a right to recover damages for loss resulting from false and fraudulent representations.—*St. John v. Hendrickson*, 81 Ind. 350.

Where plaintiff was induced by fraudulent representations to invest money in a partnership and to become a member, and thereafter, with full knowledge of the fraud, declined to repudiate the transaction, but expressly ratified it, he could not subsequently recover damages.—*Id.*

[c] (Sup. 1903)

Where plaintiff, relying on the business judgment and representations of defendant, purchased worthless patent rights, giving his notes therefor, and paid the notes before discovering that defendant's representations were fraudulent and were made pursuant to a conspiracy with the vendors of the patent rights, whereby defendant was to induce others to purchase them by pretending to enter into the purchase with them, and receive from the vendors \$1,000 for his services, such payment was not a ratification of the fraudulent transaction.—*Coulter v. Clark*, 66 N. E. 739, 160 Ind. 311.

FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. Fraud, § 30.

See, also, 20 Cyc. pp. 92-94.

**§ 36. Defenses.**

Pleading matters of defense, see post, § 48.

[a] (Sup. 1883)

Where a vendor fraudulently procures a confederate to point out better land than that proposed to be conveyed and thereby induces the vendees to take the proposed land under the belief that it is the land pointed out, the vendees are entitled to damages, though by delay they had lost their right to rescission.—*Hunt v. Blanton*, 89 Ind. 38.

[b] (App. 1894)

The doctrine of public policy is to be invoked to prevent, and not to perpetuate fraud.—*Kingan & Co. v. Silvers*, 37 N. E. 413, 13 Ind. App. 80.

### § 38. Time to sue and limitations.

Concealment of cause of action as affecting limitations, see **LIMITATION OF ACTIONS**, § 104. Limitation of actions for equitable relief on ground of fraud, see **LIMITATION OF ACTIONS**, § 37.

Pleading limitation of actions, see **LIMITATION OF ACTIONS**, § 180.

[a] (Sup. 1858)

Upon a sale on fraudulent representations, and a note given, the vendee may affirm the contract, and sue for his damages for the fraud before the note is due.—*Gray v. Rich*, 10 Ind. 430.

FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. Fraud, § 34.

See, also, 20 Cyc. pp. 90-94.

## (B) PARTIES AND PLEADING.

### § 40. Pleading.

Argumentative pleading, see **PLEADING**, § 17. Departure, see **PLEADING**, § 180.

In action against corporation, see **CORPORATIONS**, § 513.

In action by municipal tax payer, see **MUNICIPAL CORPORATIONS**, § 1000.

In action for breach of warranty, see **SALES**, § 434.

In action for price of goods, see **SALES**, § 354.

In action to enforce assessment for public improvements, see **MUNICIPAL CORPORATIONS**, § 567.

In suit to quiet title, see **QUIETING TITLE**, § 34.

Joinder of plea of fraud with other defenses, see **PLEADING**, § 93.

Pleading conclusions of law, see **PLEADING**, § 8.

Requiring separate statement and numbering of causes of action, see **PLEADING**, § 368.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fraud, §§ 36-45.

See, also, 20 Cyc. pp. 95-108.

### § 41. — Allegations of fraud in general.

[a] (Sup. 1864)

A complaint is good on demurrer which alleges that the plaintiff purchased of the defendant 27 head of hogs for a price equal to the full value of sound hogs; that the defendant represented them to be sound and healthy; that the plaintiff relied upon said representations having no opportunity by reasonable diligence to discover that the same were not true; that in fact they were diseased and unhealthy, being then affected with hog cholera, and known to be so by the defendant; and that

afterwards 25 of them died of that disease, etc.—*Baker v. McGinniss*, 22 Ind. 257.

[b] (Sup. 1870)

A complaint by A. against B. alleged that on, etc., there was a litigation anticipated between the plaintiff and one C., arising out of an alleged case of bastardy, and the defendant, having knowledge of said fact, reported to the plaintiff that for \$250 he could and would compromise and settle it, and procure a release; that afterwards the defendant informed the plaintiff that he had compromised it for \$200, and had taken a bond in the sum of \$1,000 from C., D., and E. not to institute suit against the plaintiff for said bastardy; that thereupon plaintiff executed to defendant two notes, one for \$100, and the other for \$150, the first of which was paid at maturity, but the other remained unpaid, and was still in the possession of defendant; that after the payment of the said first note plaintiff was arrested on account of said alleged bastardy, and then first learned, and it was true, that he had been deceived and imposed on by defendant, who had never compromised the anticipated litigation, or attempted to do so; that said notes were executed in consideration of the false and fraudulent pretense and representation aforesaid, and for no other consideration; that in consequence of said false and fraudulent representation and pretense, by which his signature to the notes was obtained, "and the failure of defendant to comply with his said agreement," the plaintiff had been damaged in, etc. *Held*, that this was a complaint for deceit, and not on contract.—*Watts v. McAllister*, 33 Ind. 204.

[c] (Sup. 1872)

A paragraph of a complaint, alleging the sale by defendant to plaintiff of certain cattle, which the defendant represented as sound and merchantable, whereby plaintiff was induced to purchase them, and alleging that one of the cattle was diseased and unfit for market, which fact was known by defendant and fraudulently concealed by him from plaintiff, to the latter's damage, etc., states a good cause of action for the tort.—*Hardwick v. Wilson*, 40 Ind. 321.

[d] (Sup. 1882)

Fraud is never presumed, and a party relying upon fraud as a cause of action or ground of defense must charge it in his pleadings.—*Wolford v. Powers*, 85 Ind. 294, 44 Am. Rep. 16.

[e] (Sup. 1884)

Though it is not sufficient, in an action against an executor for fraudulent representations in the sale of the decedent's land simply to characterize the transaction as fraudulent, it is sufficient to use the word "fraudulently" as an adverb to characterize defendant's action in making the alleged representation as mala fide.—*West v. Wright*, 98 Ind. 335.

[f] (Sup. 1885)

Although a complaint seeking a recovery for injuries arising from misrepresentation need not allege that the defendant knew that his representations were false, it is necessary that it should state facts showing that they were fraudulent.—*Furnas v. Friday*, 102 Ind. 129, 1 N. E. 296.

[g] (Sup. 1888)

A petition in an action for false representation which alleges that plaintiff and defendant arranged to rent certain premises, defendant to ascertain the lowest cash rent for the premises; that defendant reported they could be secured for \$100 per month; that plaintiff, relying on such statement, agreed with defendant to rent the premises, each to pay half the rent; that they occupied said premises, plaintiff paying as she supposed one-half the rent; that defendant, with intent to defraud, took from her said sum, when in fact the whole rent, as paid by defendant, was but \$65 per month; that plaintiff, relying on defendant's representations, paid more than her just due, which she refuses to refund to plaintiff,—is sufficient; the objection being raised for the first time in the appellate court.—*Du Souchet v. Dutcher*, 113 Ind. 249, 15 N. E. 459.

[h] (App. 1891)

A complaint for false representations by defendants' agent alleged that M., "as agent of said defendants, \* \* \* and acting for and on behalf of said defendants, proposed \* \* \*, and, to induce said plaintiff to make said trade, the said M., as the agent and representative of said defendants, \* \* \* represented to her \* \* \*; and relying on the false and fraudulent representations of said defendants, as made by their agent, said M., and believing them to be true, she made" said trade; and that "by reason of \* \* \* the false and fraudulent representations of said defendants, through their agent, said M., she has sustained damages. \* \* \*" *Held*, that the allegations of fraudulent representations by defendants, through their agent, were sufficiently distinct.—*Beem v. Lockhart*, 1 Ind. App. 202, 27 N. E. 239.

[i] (Sup. 1892)

In an action for fraudulent representations, made in pursuance of a conspiracy to procure a loan on land in excess of its value, the complaint alleged that the land on which the mortgage was executed was of little value, but did not state the exact value. *Held*, in the absence of a motion to make the complaint more specific, that the same was sufficient.—*Union Cent. Life Ins. Co. v. Schidler*, 130 Ind. 214, 29 N. E. 1071, 15 L. R. A. 89.

[j] (App. 1892)

A complaint alleged that defendant extorted money from plaintiff by falsely representing to him that he had employed the county attorney to bring a civil and a criminal suit against him for taking manure from the land

of defendant, and threatening, if plaintiff did not pay \$100 for the manure and \$25 for fees which he had paid to the attorney, to send plaintiff to the state prison for larceny, but promising, if plaintiff would pay the money, to have both suits dismissed. The complaint did not allege that plaintiff did not take the manure without right. *Held*, that it did not state a cause of action on the ground of false representations.—*Darling v. Hines*, 5 Ind. App. 319, 32 N. E. 109.

[k] (App. 1895)

An allegation, in an action for deceit, that defendant, in exchange for a stock of goods, conveyed to plaintiff certain lots which were not the lots bargained for, does not show that the lots bargained for were not conveyed to plaintiff.—*Smith v. Roseboom*, 41 N. E. 552, 13 Ind. App. 284.

In an action for fraudulently conveying lots other than those agreed to be conveyed in exchange for other property, an allegation that "plaintiff relied entirely on the representation which was made by defendant, that the lots described in the deed were the lots pointed out," is not a sufficient showing of fraud; nor was it aided by an averment that defendant, "for the purpose of inducing plaintiff to make the exchange," caused the lots to be shown to plaintiff, and represented that they were the property of defendant.—*Id.*

[l] (App. 1897)

A complaint alleging that defendants, two of whom owned certain patent rights, conspired to cheat plaintiff; that they sold to him the patent rights, which were worthless, on the false representation that other parties, whom one of the defendants pretended to represent, were willing to take the same at an agreed price, if he purchased the same; and that defendants knew that plaintiff was purchasing for the sole purpose of so reselling,—is not demurrable.—*Hay v. Landis*, 17 Ind. App. 91, 44 N. E. 1013, 46 N. E. 154.

[m] (App. 1903)

A complaint alleging that defendant, without the knowledge or consent of plaintiff, induced plaintiff's husband to execute to him a paper, which "he represents was a bill of sale," and which conveyed to defendant all the husband's personal property, representing to the husband that defendant was surety for him on certain obligations, and promising to apply the proceeds of the property to the payment of the debts; that her husband was unfit, by reason of illness, to transact any business at the time; that he died a few days later; that thereupon defendant demanded of plaintiff the possession of the property; that she, ignorant of her rights, and in a mentally distressed condition, delivered possession on condition that defendant should pay her husband's debts; and that defendant has not paid the debts, but has wrongfully converted the property to his own use—contains no sufficient allegation of fraud.

—Warner v. Warner, 66 N. E. 760, 30 Ind. App. 578.

[a] (Sup. 1905)

While it is well settled that a party who seeks to predicate a cause of action or of defense on fraud must allege the facts constituting the fraud, it is not necessary that the pleading should minutely state all the facts and circumstances tending to establish the charge of fraud, and a general allegation that a party defrauded relied on the fraudulent representations or acts alleged is generally sufficient.—Ray v. Baker, 165 Ind. 74, 74 N. E. 619.

[c] (App. 1905)

Where fraud is the basis of an action, or a ground of defense, it must be shown by special plea containing facts directly averred, constituting fraud, before evidence will be admitted tending to prove the ultimate facts.—McAfee v. Bending, 36 Ind. App. 628, 76 N. E. 412.

[d] (App. 1906)

Fraud, either actual or constructive, is sufficiently pleaded by an averment of facts showing it, without any direct averment of fraud.—Holliday v. Perry, 38 Ind. App. 588, 78 N. E. 877.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fraud, §§ 36, 37.

See, also, 20 Cyc. pp. 95-97.

#### § 42. — Intent.

[a] (Sup. 1875)

When it is intended to found a pleading upon fraud perpetrated by means of false representations made by a vendor to his vendee concerning the thing sold, the pleading must allege that the representations were fraudulently made.—Langsdale v. Girton, 51 Ind. 99.

[b] (Sup. 1897)

A complaint for damages by reason of fraud in failing to furnish money to carry on a business according to promise is defective where it fails either to allege that when defendant made the promises he did not intend to fulfill them, or to state facts from which such intention can be inferred.—Smith v. Parker, 148 Ind. 127, 45 N. E. 770.

[c] (App. 1907)

An action for damages for fraud is based on a fraudulent intent, and the intent with which the fraudulent acts were performed must be averred and proved.—Hartford Life Ins. Co. v. Hope, 40 Ind. App. 354, 81 N. E. 595, 1088.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fraud, § 39.

See, also, 20 Cyc. p. 100.

#### § 43. — Statements, acts or conduct constituting fraud.

[a] (App. 1906)

A complaint for damages for misrepresentations of matters of law and fact is good if

it contains enough misrepresentations of fact to constitute a cause of action.—Lindley v. Kemp, 38 Ind. App. 355, 76 N. E. 798.

[b] (App. 1907)

A complaint in an action for fraud in procuring an application and a note for the first year's premium for a life policy, which alleges that agents of the insurer represented that it was issuing a certain policy to many persons, and would issue the same to plaintiff for a specified consideration; that the policy would insure plaintiff's life for \$1,000, and would provide that, if he lived to pay premiums for 20 years, it would mature, and the insurer would pay him the amount of the face of the policy, and a part of the surplus earnings, which would be a specified sum or thereabouts; that the representations were false and known to be false when made, etc.—shows that the representations were made with regard to existing facts and states a cause of action as against a demurrer.—Hartford Life Ins. Co. v. Hope, 40 Ind. App. 354, 81 N. E. 595, 1088.

In an action against an insurance company and its agents for deceit, the complaint, alleging that the agents represented to plaintiff that said insurance company was issuing a certain policy to many persons and would issue the same to plaintiff for a stated consideration, which was the premium on a policy for one year, and that said policy would insure plaintiff's life and mature at the end of a specified time, sufficiently charges that the representations were of existing facts.—Id.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fraud, § 37.

See, also, 20 Cyc. pp. 98, 99.

#### § 44. — Contract, transaction, or circumstances connected with fraud.

[a] (App. 1895)

An allegation, in an action for deceit, that plaintiff agreed to exchange a stock of goods for certain lots shown to him by defendant, does not show that defendant was bound by the transaction.—Smith v. Roseboom, 13 Ind. App. 284, 41 N. E. 552.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fraud, § 38.

See, also, 20 Cyc. p. 103.

#### § 45. — Falsity of representations and knowledge thereof.

[a] (Sup. 1881)

A pleading setting up fraud as a defense in an action cannot be good without averring that the representations stated as the ground of defense are false.—White v. Butler University, 78 Ind. 585.

[b] (Sup. 1884)

A complaint for false representations sufficiently alleges defendant's knowledge of their falsity, where it states that they were made

by him knowingly, falsely, and fraudulently.—*West v. Wright*, 98 Ind. 335.

[c] (App. 1907)

An allegation that defendant falsely and fraudulently made certain representations in order to procure a conveyance of real estate to him was not sufficient to charge fraud, where it was not averred that any of the representations were untrue.—*Bonham v. Doyle*, 77 N. E. 859, 79 N. E. 458, 39 Ind. App. 438.

An allegation that defendant falsely and fraudulently made certain representations in order to procure a conveyance of real estate to him was not sufficient to charge fraud, where it was not averred that any of the representations were untrue.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fraud, § 40.

See, also, 20 Cyc. p. 99.

**§ 46. — Reliance and inducement and action thereon.**

[a] (Sup. 1870)

A complaint for damages for false representations by the vendor in the sale of land should contain an averment that the plaintiff relied upon such representations. The want of such averment cannot be supplied by a recital of evidence which might justify a presumption that the representations were relied upon, unless such evidence be conclusive of that fact.—*Goings v. White*, 33 Ind. 125.

[b] (Sup. 1870)

Where the buyer of an article seeks to recover damages of the seller for fraudulent representations made by him concerning the article, he must allege that he relied on such representations in making the purchase.—*Hoffa v. Hoffman*, 33 Ind. 172.

[c] (Sup. 1884)

A complaint for deceit in an exchange of lands, simply alleging that defendant knew of the falseness of his representations, and that "by the fraudulent means aforesaid defendant had perpetrated a great fraud upon" plaintiff, is defective in not showing plaintiff's ignorance, or that he acted upon the representations to his damage.—*Bish v. Van Cannon*, 94 Ind. 203.

[d] (Sup. 1884)

In an action by husband and wife for fraudulent representations, whereby the wife was induced to sell her property at less than its value, it was not necessary to allege that the husband was deceived.—*Roller v. Blair*, 96 Ind. 203.

[e] (App. 1894)

A complaint for fraudulent representations made in the course of a sale, with intent to deceive, is insufficient, where it does not allege that plaintiff was ignorant of the falsity thereof, whereby he was misled.—*Lincoln v. Itagsdale*, 9 Ind. App. 555, 37 N. E. 25.

[f] (App. 1895)

A complaint based upon fraudulent representations must aver that plaintiff relied on the representations.—*Burden v. Burden*, 141 Ind. 471, 40 N. E. 1067.

[g] (App. 1902)

The complaint in an action for damages for false representations in a settlement must allege that plaintiff relied on the representations and believed them to be true, and that defendant intended to deceive.—*Oliver v. Hubbard*, 64 N. E. 927, 29 Ind. App. 639.

[h] (App. 1906)

A complaint, in an action for deceit, which does not show that defendant practiced any deceit on plaintiff, but shows that the deceit charged was practiced on another, does not state a cause of action.—*Whitesell v. Study*, 37 Ind. App. 429, 76 N. E. 1010.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fraud, § 41.

See, also, 20 Cyc. pp. 101, 102.

**§ 48. — Matters of defense.**

[a] (Sup. 1853)

A count in case charged that A. in an exchange of horses with B. falsely represented his, A.'s, horse to be sound, when in truth he was not sound, but, at the time of the exchange, was and still is unsound, having a disease called glanders, which A. then knew, and that A., though requested, refused to deliver to B. the horse received of him. Plea that B. never delivered or tendered to A. the horse received in exchange, though A. tendered back the horse which he got of B.; but he refused to receive the horse. *Held*, that the plea was properly rejected on motion.—*Hull v. Kirkpatrick*, 4 Ind. 637.

[b] (Sup. 1871)

A complaint alleged that defendant, as agent of S., sold plaintiff certain real estate, on one acre of which stood a school house; that at the time of the sale the defendant fraudulently and falsely represented that the school house and the land on which it stood had been abandoned and vacated by the school trustees, and that the trustees had erected another school house in the district, which was used for school purposes; that these representations were false, and were known by the defendant to be false; that the plaintiff relied upon them, etc. The defendant answered that the plaintiff was on the land at the time of the purchase; that he fully examined the same, and was fully apprised of the condition of the land and the said school house, and knew that the principals held the land, including the school house, by a general warranty deed duly recorded. *Held*, that the answer was bad.—*Porter v. Wilson*, 35 Ind. 348.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fraud, § 43.

See, also, 20 Cyc. p. 103.

**§ 49. — Issues, proof, and variance.**

[a] (Sup. 1863)

Evidence of fraud can be introduced only under a sufficient charge of fraud in the pleadings.—*Fankboner v. Fankboner*, 20 Ind. 62.

[b] (Sup. 1877)

In an action for deceit and misrepresentations as to the value of land, evidence must be given as to the value of the land conveyed by plaintiff as consideration for the conveyance by defendant.—*Newhouse v. Clark*, 60 Ind. 172.

[c] (Sup. 1883)

The defense of fraud cannot be made available under the plea of want of consideration.—*Wilson v. Town of Monticello*, 85 Ind. 10.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Fraud, §§ 44, 45.

See, also, 20 Cyc. pp. 104–108.

**(C) EVIDENCE.**

Fraud in obtaining contract for construction of public improvements, see **MUNICIPAL CORPORATIONS**, § 374.

**§ 50. Presumptions and burden of proof.**

[a] (Sup. 1871)

To make a good charge of fraud, it must be shown in what the fraud consisted.—*Kerr v. State ex rel. Wray*, 35 Ind. 288.

[b] Fraud is never presumed, but must be proved.—(Sup. 1881) *Morris v. Stern*, 80 Ind. 227; (1888) *Phelps v. Smith*, 17 N. E. 602, 19 N. E. 156, 116 Ind. 387; (1888) *Neisler v. Harris*, 18 N. E. 39, 115 Ind. 560; (1894) *Fulp v. Beaver*, 36 N. E. 250, 136 Ind. 319; (App. 1895) *Smith v. Roseboom*, 41 N. E. 552, 13 Ind. App. 284; (Sup. 1896) *Adams v. Laugel*, 144 Ind. 608, 42 N. E. 1017; (App. 1908) *Gipe v. Pittsburgh, C. & St. L. R. Co.*, 41 Ind. App. 156, 82 N. E. 471.

[c] (App. 1891)

Fraud is a question of fact, and will not be presumed, but must be proved; but it is not necessary that there be direct or positive evidence, but it is sufficient if facts and circumstances be proved from which it can be fairly inferred.—*Levi v. Kraminer*, 2 Ind. App. 594, 28 N. E. 1028.

[d] (App. 1896)

Fraud or mistake need not be established beyond any doubt, but the party having the burden is required to prove the issues devolving upon him by a preponderance of the evidence.—*Baltimore, O. & C. R. Co. v. Scholes*, 43 N. E. 156, 14 Ind. App. 524, 56 Am. St. Rep. 307.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Fraud, §§ 46, 47.

See, also, 20 Cyc. p. 108.

**§ 51. Admissibility.**Res gestæ, see **EVIDENCE**, § 122.Self-serving declarations, see **EVIDENCE**, § 271.**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Fraud, §§ 48–54.

See, also, 20 Cyc. pp. 110–118.

**§ 52. — In general.**

[a] (Sup. 1876)

Where the issue in a cause was as to the fraudulency of representations made by the defendant to the plaintiff as to the solvency of a certain corporation on the sale by the former to the latter of certain shares of the capital stock of such corporation, there was no error in striking out evidence of a statement of the defendant that he "had no confidence in the concern," where it appears from the other evidence in the cause that such statements only referred to a want of confidence, not in the solvency, but in the board of directors, of such corporation.—*Cones v. Binford*, 54 Ind. 516.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Fraud, § 48.

See, also, 20 Cyc. p. 110.

**§ 56. — Reliance on representations and inducement to act.**

[a] (App. 1894)

In an action for damages, against the administratrix of one who fraudulently induced plaintiff to exchange land for certain other property, evidence that, at the time of the exchange, plaintiff was of weak mind, is competent, in order to show a susceptibility to intestate's representations.—*Bloomer v. Gray*, 10 Ind. App. 326, 37 N. E. 819.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Fraud, § 53.

See, also, 20 Cyc. p. 117.

**§ 57. — Damages.**

[a] (App. 1894)

In an action for fraudulent representations inducing plaintiff to exchange land for a mill property, it is proper to permit the plaintiff to prove the value of the property conveyed by him.—*Bloomer v. Gray*, 37 N. E. 819, 10 Ind. App. 326.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Fraud, § 54.

See, also, 20 Cyc. p. 118.

**§ 58. Weight and sufficiency.**

[a] (Sup. 1855)

Fraud may be deduced, not only from deceptive or false representations, but from facts, incidents, and circumstances which may be trivial in themselves, but decisive in the given case of a fraudulent design.—*Peter v. Wright*, 6 Ind. 183.

## [b] (Sup. 1871)

Fraud is not presumed, but may be proved by circumstantial evidence.—*Rhodes v. Green*, 36 Ind. 7.

## [c] (Sup. 1881)

Inadequacy of consideration alone is no ground for inferring fraud, unless the inadequacy is so great as to impress every person with its grossness.—*Cagney v. Cuson*, 77 Ind. 404.

## [d] (Sup. 1883)

A finding that defendant by the acts of himself and his agent employed as a guide induced the plaintiffs to believe that the land exhibited was the land to be sold is not sustained by proof that the defendant paid a stranger 50 cents, and followed him to the land he pointed out.—*Hunt v. Blanton*, 89 Ind. 38.

## [e] (App. 1892)

Where the owner of a horse represents him to be perfectly sound, that a tumor which had been removed from him was due solely to the bursting of a blood vessel, and that he has since entirely recovered, whereas, in fact, the tumor was the result of a constitutional disease, which rendered him practically worthless, and the owner knew this, and expressed himself as satisfied to have gotten rid of a horse which had begun to fail, the purchaser is entitled to recover as for deceit.—*Timmis v. Wade*, 5 Ind. App. 139, 31 N. E. 827.

## [f] (Sup. 1898)

In this state fraud is a question of fact, and, when essential to a cause of action or defense thereto, must be found as a fact, and not left to be inferred as a matter of law.—*Hawkins v. Fourth Nat. Bank*, 49 N. E. 957, 150 Ind. 117.

## [g] (App. 1905)

Fraud is a question of fact to be proven by direct or circumstantial evidence, and the determination of which is within the province of the court or jury trying the case.—*Tyler v. Davis*, 37 Ind. App. 557, 75 N. E. 3.

## FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fraud, §§ 55-59.

See, also, 20 Cyc. pp. 120-122; note, 65 Am. Dec. 157.

## (D) DAMAGES.

Evidence, see ante, § 57.

## § 59. Measure in general.

Contingent consequences of fraudulent representations, see DAMAGES, § 24.

Proximate or remote consequences of fraudulent representation, see DAMAGES, § 18.

## [a] (Sup. 1858)

The measure of damages for misrepresenting the location of a mill and privileges and land described in a deed, the vendee electing

to keep what did pass, is what it would cost to obtain under a writ *ad quod damnum*, or by some equally cheap and expeditious way, the land falsely represented to be covered by the deed.—*Reynolds v. Cox*, 11 Ind. 262.

[b] In an action for deceit in the transfer of property, the measure of damage is the difference between the actual and represented value.—(Sup. 1859) *Gatling v. Newell*, 12 Ind. 118; (1892) *Williamson v. Brandenburg*, 133 Ind. 594, 32 N. E. 834.

## [c] (Sup. 1870)

In a sale of an undivided one-half of a tract of land, the vendor falsely and fraudulently represented to the purchaser that there was then on the land a house of a particular size and description. *Held*, that the measure of damages for the lack of such house, in a suit by the purchaser against the vendor for such fraudulent representation, was one-half the amount of the increase there would have been in the value of the land if there had been such a house on it at the time of the sale, and not merely one-half the amount of money it would then have taken to put such a house on the land.—*Sangster v. Prather*, 34 Ind. 504.

## [d] (Sup. 1882)

A verdict giving plaintiff damages in the amount paid by him for property which he was induced to purchase by false representations, and also leaving the property his is clearly erroneous, and should be set aside.—*Greenwald v. Rathfon*, 81 Ind. 547.

## [e] (Sup. 1883)

A. sold to B. a stock of goods and other tangible property, representing that sales had been made each year to a certain amount, when in fact they had been made to only one-half of that amount. *Held*, that the measure of B.'s damages was not the profit on the difference, but the difference between the rent of a store required for the sale of the amount actually sold and the rent of a store required for sales to the amount represented by A. to have been sold.—*Rawson v. Pratt*, 91 Ind. 9.

## [f] (Sup. 1888)

The measure of damages in an action for deceit is the difference between the value of the property and the price paid.—*Johnson v. Culver*, 116 Ind. 278, 19 N. E. 129.

## [g] (Sup. 1890)

In an action for fraudulent representations as to the value of corporate stock, whereby plaintiff was induced to exchange land for the stock, the measure of damages is the difference between the actual value of the stock and its value had the facts been as represented by defendant, and not the value of the land conveyed.—*Nysewander v. Lowman*, 124 Ind. 584, 24 N. E. 355.

## [h] (App. 1907)

The measure of damages for fraud in procuring an application and a note for the first

year's premium for a life policy is the amount plaintiff was compelled to pay on account of the giving of the note, together with such other damages as proximately resulted from the fraud.—*Hartford Life Ins. Co. v. Hope*, 40 Ind. App. 354, 81 N. E. 595, 1088.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Fraud, §§ 60-62, 64.  
See, also, 20 Cyc. pp. 130-137.

**§ 61. Exemplary.**

[a] (Sup. 1861)

In a suit for damages by a vendee of cattle for the vendor's false and fraudulent representation that they were gentle, exemplary or smart damages might be assessed.—*Millison v. Hoch*, 17 Ind. 227.

In an action for deceit, exemplary damages may be given.—*Id.*

[b] (App. 1907)

In an action for fraud in procuring an application and a note for the first year's premium for a life policy, it appeared that the agents soliciting the insurance represented that the insurer had a certain contract to sell; that it contained certain provisions that, if plaintiff would give his note for a certain amount, this contract would be delivered to him. The representations constituted false pretenses, as defined by *Burns' Am. St.* 1901, § 2352. *Held*, that in an action for the fraud, punitive damages could not be awarded as against the agents.—*Hartford Life Ins. Co. v. Hope*, 40 Ind. App. 354, 81 N. E. 595, 1088.

Where soliciting agents of an insurer were not liable for punitive damages for fraudulent representations in procuring an application for a life policy, the insurer was not liable for such damages.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Fraud, § 63.  
See, also, 20 Cyc. p. 142.

**§ 62. Amount awarded.**

[a] (App. 1907)

Where in an action for fraudulent representations in procuring an application and a note for the first year's premium for a life policy, the uncontradicted evidence showed that plaintiff suffered damage to the amount of the note, which he was compelled to pay, but did not suffer any other damage, a verdict awarding damages in a sum in excess of the amount of the note was excessive.—*Hartford Life Ins. Co. v. Hope*, 40 Ind. App. 354, 81 N. E. 595, 1088.

**(E) TRIAL, JUDGMENT, AND REVIEW.**

Failure of court to find on question of fraud, see TRIAL, § 397.

**§ 63. Mode and conduct of trial in general.**

View and inspection by jury, see TRIAL, § 28.

**§ 64. Questions for jury.**

[a] (Sup. 1889)

Where money was obtained from plaintiff, a weak-minded, illiterate old man, by the false representations of defendants that they had a good cause of action against him, which they intended to prosecute, it was for the jury to say whether the representations were such as plaintiff had a right to rely on.—*Ingalls v. Miller*, 121 Ind. 188, 22 N. E. 995.

[b] (Sup. 1905)

Whether representations as to value are merely the expressions of opinion or averments of fact to be relied upon is a question for the jury.—*Culley v. Jones*, 164 Ind. 168, 73 N. E. 94.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Fraud, §§ 65½. 67-71.  
See, also, 20 Cyc. pp. 123-126, 143; note, 37 L. R. A. 613.

**§ 65. Instructions.**

Applicability of instructions to pleadings and evidence in general, see TRIAL, § 251.

Instructions as to evidence and matters of fact in general, see TRIAL, § 234.

Instructions excluding or ignoring issues, defenses or evidence, see TRIAL, § 253.

[a] (Sup. 1889)

A charge that "fraud is never presumed, but the burden rests upon one claiming fraud to make it out by clear and convincing" proof, is not misleading, as conveying the impression that fraud must be proved beyond a reasonable doubt.—*Wallace v. Mattice*, 118 Ind. 59, 20 N. E. 497.

[b] (App. 1907)

Where, in an action for fraudulent representations in procuring an application and a note for the first year's premium for a life policy, it was shown that the agents soliciting the insurance knew that plaintiff had not been vaccinated; that the agents undertook to explain the provisions of the policy plaintiff would receive, and stated that on his death his beneficiary would receive \$1,000 and an additional sum, but did not intimate that there were any exceptions to these provisions, an instruction authorizing a verdict for plaintiff if the soliciting agents failed to explain that, in case of his death from smallpox, he not having been vaccinated, the beneficiaries could only receive the amount paid in premiums, was proper; the agents, having undertaken to explain the provisions of the policy, being bound to fully describe the same.—*Hartford Life Ins. Co. v. Hope*, 40 Ind. App. 354, 81 N. E. 595, 1088.

## FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fraud, §§ 72-74.

See, also, 20 Cyc. pp. 127-129.

## § 66. Verdict and findings.

Sufficiency of findings in general, see TRIAL, § 355.

Sufficiency of findings by court, see TRIAL, § 395.

Surplusage in verdict, see TRIAL, § 336.

## [a] (Sup. 1888)

Where fraud is essential to the existence of a cause of action, it must be found as a fact, and not left to be inferred as a matter of law.—Phelps v. Smith, 17 N. E. 602, 19 N. E. 156, 116 Ind. 387.

[b] Where fraud is essential to a recovery and there is a special finding, it must be found as an ultimate or inferential fact to sustain a judgment based on the special finding in favor of the party asserting fraud.—(Sup. 1889) Wilson v. Campbell, 21 N. E. 893, 119 Ind. 286; (1892) Parks v. Satterthwaite, 32 N. E. 82, 132 Ind. 411.

## [c] (Sup. 1891)

A judgment on the ground of fraud cannot be entered on a finding which does not find fraud as an ultimate fact, but merely states evidence of fraud.—Farmers' Loan & Trust Co. v. Canada & St. L. R. Co., 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740.

## [d] (App. 1891)

In an action for deceit, in that defendants falsely represented a mare sold plaintiffs to be a quiet and suitable family mare, the jury rendered a verdict for plaintiffs, with a special finding that such representation was false and fraudulent, but with an additional finding that before the purchase one of the plaintiffs obtained the mare from defendants, and tried her, and that during the trial she conducted herself badly. Held, that judgment was properly rendered for defendants on the special findings, since they showed that plaintiffs did not rely on the false representations.—Denny v. Woods, 2 Ind. App. 301, 28 N. E. 443.

## [e] (App. 1896)

Fraud is made a question of fact by the statute (Rev. St. 1881, § 4924; Burns' Ann. St. 1894, § 6649), and must be found as a fact in the special finding, and not left to inference.—Johnson v. Bedwell, 43 N. E. 246, 15 Ind. App. 236.

## FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fraud, § 75.

See, also, 20 Cyc. p. 146.

## § 67. Judgment.

Discharge of judgment by debtor's discharge in bankruptcy, see BANKRUPTCY, § 423.  
Res judicata, see JUDGMENT, §§ 540-749.

## [a] (Sup. 1861)

In an action for damages for false representations made upon the sale of a newspaper, with its good will, etc., it was proper for the court in virtue of its chancery powers to direct that the amount of the judgment in favor of the vendee should be credited on notes given by him to the vendor for the purchase money.—Harvey v. Smith, 17 Ind. 272.

## III. CRIMINAL RESPONSIBILITY.

See—

ALTERATION OF INSTRUMENTS.

COUNTERFEITING.

Counterfeiting or imitating trade-marks or labels. TRADE-MARKS AND TRADE-NAMES, § 48.

EMBEZZLEMENT.

FALSE PRETENSES.

FORGERY.

FRAUDULENT CONVEYANCES.

Making false tax list. TAXATION, § 335½.

Receiving deposits after insolvency of bank. BANKS AND BANKING, §§ 83-85.

## § 68. Offenses.

## [a] (Sup. 1908)

Laws 1907, p. 100, c. 73, provides that whoever shall offer for sale any horse, knowing it to be broken-winded, etc., and shall conceal the existence of such disease from the person to whom he is offering the animal for sale, or who shall employ any trick, artifice, drug, etc., to conceal the existence of such disease or defect, and shall thereby effect the sale of such animal to one ignorant of the disease or defect, shall be fined, etc. Held, that the statute could be properly divided into two parts, and that under the provisions of the first part the offense is complete upon the offering to sell a horse known to be so affected and concealing the defect, whether a sale is completed or not.—Boyer v. State, 169 Ind. 691, 83 N. E. 350.

The first purpose of the statute is to make it a crime for one to offer such an animal for sale, if the person so doing has knowledge of the defect, and conceals its existence from the one to whom it is offered for sale by failing to disclose the facts, while the second is to prohibit the employment of any artifice, etc., to conceal an infirmity, and thereby effect a sale to one ignorant thereof.—Id.

The word "conceal," as employed in the first part of the statute, is not used in its primary sense, meaning to hide, to cover up, to withhold from observation, but is used in its secondary sense or meaning, which is to withhold from utterance or declaration, to keep secret, to fail to disclose—citing Words and Phrases, vol. 2, p. 1377.—Id.

## FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fraud, § 76; 24 CENT. DIG. Fraud. Conv. §§ 1017, 1020.

**§ 69. Prosecution and punishment.**

Act of conspirator as evidence, see **CRIMINAL LAW**, § 423.

[a] (Sup. 1906)

An indictment alleging that defendant, by means of a fraudulent trick and by his fraudulent manner, induced one to lose \$5,000, is bad, since the facts constituting the fraud are not shown.—*Clark v. State*, 166 Ind. 288, 77 N. E. 52.

[b] (Sup. 1908)

An indictment charged that accused unlawfully offered for sale a broken-winded horse, with knowledge of its diseased condition, and concealed the existence of the disease from K., the prospective purchaser named, and did there-

by effect the sale of the horse to K., who was ignorant of the existence of the disease, etc. *Held*, that the indictment was sufficient, since it was unnecessary to set out any facts constituting concealment to charge the offense of offering the horse for sale and concealing its diseased condition, and the allegation regarding the sale could be treated as surplusage.—*Boyer v. State*, 169 Ind. 691, 83 N. E. 350.

In a prosecution for offering to sell a wind-broken horse, with knowledge of the infirmity and concealment thereof, evidence *held* to sustain a conviction.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Fraud, § 78.

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

# FRAUDS, STATUTE OF.

## *Scope-Note.*

[INCLUDES statutory provisions making a writing necessary to the creation, assignment or surrender of estates in land, the bringing of actions on promises, agreements, or representations, or the validity of contracts, and the operation and effect of such provisions in general; requisites and sufficiency of the instrument, agreement, memorandum, or note in writing required by statute, or of the acceptance and receipt of goods or giving of earnest or part payment therefor required on contracts for sales, etc.; effect of part performance in general; and pleading the statute and evidence relating thereto.

[EXCLUDES necessity of writing to create trusts (see *Trusts*), or to bar statutes of limitations (see *Limitation of Actions*); and part performance of a contract on one part as ground for compelling performance on the other part (see *Specific Performance*). For complete list of matters excluded, see cross-references, post.]

## *Analysis.*

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### **V. Agreements Not to be Performed Within One Year.**

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Validity of oral trusts. **TRUSTS**, §§ 17, 18.

**I. AGREEMENTS IN CONSIDERATION OF MARRIAGE.****§ 2. Nature and subject of agreement in general.**

[a] (Sup. 1860)

A parol agreement by which an intended husband and wife contract that neither shall have any interest in the property of the other

is valid.—*Houghton v. Houghton*, 14 Ind. 505, 77 Am. Dec. 69.

An antenuptial purchase by the husband of the wife's personal property, and of her right to the husband's personal property, is not within the statute of frauds.—*Id.*

[b] A promise by a woman to her former husband that if he would remarry her she would

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release her judgment against him for alimony is void if not in writing, though the parties remarried.—(Sup. 1868) *Flenner v. Flenner*, 29 Ind. 564; (1874) *Brenner v. Brenner*, 48 Ind. 262.

[c] (Sup. 1877)

An agreement between two persons, each owning real property, and about to intermarry, that upon the death of either the survivor will not claim any of the property of the other, is not within that provision of the statute of frauds which requires any agreement or promise made in consideration of marriage to be in writing.—*Rainbolt v. East*, 56 Ind. 538, 26 Am. Rep. 40.

[d] (Sup. 1886)

An agreement whereby a husband promises his wife that he will renounce his interest in her estate after her death if she will give him in her will a life interest in the homestead, is good, though founded on an equitable consideration, and a will according to such agreement and acceptance of its provisions by the husband after the wife's death, is a family settlement, and is not invalidated by the statute of frauds.—*Wright v. Jones*, 105 Ind. 17, 4 N. E. 281.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, § 2.

### § 3. Mutual promises to marry.

[a] (Sup. 1877)

Engagements to marry are not among the contracts which, by the statute of frauds, must be reduced to writing.—*Short v. Stotts*, 58 Ind. 29.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, § 3.

See, also, 20 Cyc. p. 157.

### § 5. Marriage as consideration.

[a] (Sup. 1884)

A verbal contract to marry on condition that an antenuptial contract be prepared and executed is an indivisible conditional contract, and therefore within the statute of frauds.—*Caylor v. Roe*, 99 Ind. 1.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, § 5.

See, also, 20 Cyc. p. 157.

### § 6. Marriage as acceptance of promise.

[a] A parol agreement that in consideration of marriage a woman will release a judgment she has recovered against a man is within the statute of frauds and void; and the celebration of the marriage is not such a part performance of the contract as takes it out of the statute.—(Sup. 1868) *Flenner v. Flenner*, 29 Ind. 564; (1874) *Brenner v. Brenner*, 48 Ind. 262.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, § 6.

## II. PROMISES BY EXECUTORS OR ADMINISTRATORS.

Contracts not to be performed within one year, see post, § 49.

Necessity of pleading writing or other compliance with statute, see post, § 148.

### § 9. Promise to answer in general.

[a] (Sup. 1837)

If a third person be induced to purchase the assignment of a note due from an intestate's estate by the promise of the administrator that it shall be paid, the promise is not within the statute of frauds, and the administrator is personally liable to the assignee.—*Hackleman v. Miller*, 4 Blackf. 322.

[b] (Sup. 1831)

An agreement by an administrator to submit to arbitration a suit brought by him in his representative capacity, each party to pay one-half the costs if the award is satisfactory, otherwise the party refusing to accept the award to pay all costs to date, is the individual contract of the administrator, and not within the statute.—*Holderbaugh v. Turpin*, 75 Ind. 84, 39 Am. Rep. 124.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, § 9.

See, also, 20 Cyc. p. 159.

### § 12. Effect of discharge of decedent's estate.

[a] (Sup. 1884)

A promise by an administrator to pay plaintiff for sawing certain lumber for decedent in consideration of the delivery of it to the administrator, the plaintiff having a lien on it for the bill, is not within the statute.—*Bott v. Barr*, 95 Ind. 243.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, § 12.

See, also, 20 Cyc. p. 159.

## III. PROMISES TO ANSWER FOR DEBT, DEFAULT OR MISARRIAGE OF ANOTHER.

Agreements not to be performed within one year, see post, § 45.

Contracts as ground of defense, see post, § 141.

Instructions, see post, § 160.

Necessity of pleading writing or other compliance with statute, see post, § 148.

Promise by administrator, see ante, §§ 9, 12.

Requisites and sufficiency of memorandum, see post, §§ 105-113.

### § 14. Nature of debt, default, or miscarriage.

[a] (Sup. 1862)

A verbal contemporaneous agreement, made by the sellers of a contract to deliver hogs, to the effect that they will perform its stipula-

tions, if the original contracting party fails so to do, can be enforced.—*Beaty v. Grim*, 18 Ind. 131.

[b] (Sup. 1875)

The parol promise of A. to C. to sign a certain bond to C. as surety of B., for the return of certain United States bonds if C. would loan them to B., upon which promise C. has relied, and accordingly loaned the bonds, is a contract for the payment of the debt of another, within the statute of frauds.—*Hayes v. Burkam*, 51 Ind. 130.

[c] (Sup. 1878)

A promise by one person to pay another's church subscription is within the statute of frauds, and unenforceable if not in writing.—*Catlett v. Trustees of M. E. Church of Sweetser Station*, 62 Ind. 365, 30 Am. Rep. 197.

[d] (App. 1896)

Defendant sold certain school warrants held by him, and verbally guaranteed that, if they were not paid when due, he would pay them. The warrants were known by defendant to be fraudulent, and he received the sole benefit of the transaction. *Held*, that the guaranty was not within the statute of frauds, on the ground that it was a promise to answer for the debt of another.—*Voris v. Star City Bldg. & Loan Ass'n*, 50 N. E. 779, 20 Ind. App. 630.

[e] (App. 1909)

A promise by a railroad company to pay for a physician's services rendered an injured employé is the debt of the company, and not within the statute of frauds, where the agreement was part of the contract of settlement between the company and the employé for the injuries received by him.—*Southern R. Co. v. Hazlewood*, 88 N. E. 636.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, § 14.

See, also, 20 Cyc. pp. 160, 161.

**§ 15. Liability of original or principal debtor.**

[a] (Sup. 1865)

In order to make a promise collateral, so as to bring it within that provision of the statute of frauds which requires a promise to answer for the debt, default, or miscarriage of another to be in writing, the party for whom the promise is made must be liable to the party to whom it is made.—*Downey v. Hinchman*, 25 Ind. 453.

[b] (Sup. 1881)

An oral promise to pay the debt of a minor is not within the statute of frauds, since the minor is not liable.—*King v. Summitt*, 73 Ind. 312, 38 Am. Rep. 145.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 15, 16.

See, also, 20 Cyc. p. 162; note, 33 L. R. A. 359.

**§ 16. Pre-existing liability of promisor.**

[a] (Sup. 1834)

Where a partner has given a note signed in the firm name for his individual debt, a subsequent oral promise by another member of the firm to pay the note is not binding.—*Taylor v. Hillyer*, 3 Blackf. 433, 26 Am. Dec. 430.

[b] (Sup. 1868)

A partnership liability may become an individual debt against one member of the firm by contract, not in writing, between the partners, with the consent of the creditor.—*Hopkins v. Carr*, 31 Ind. 260.

[c] (Sup. 1877)

An agreement by a grantor of land by quitclaim deed, at the time of the sale, to pay all delinquent taxes due thereon, is not within the statute of frauds.—*Hedrick v. Wisheart*, 57 Ind. 129.

[d] (Sup. 1881)

A promise by a debtor to pay the debt to a person other than the creditor is not within the statute of frauds.—*Indiana Mfg. Co. v. Porter*, 75 Ind. 428.

[e] (Sup. 1885)

A promise by a guardian to a county treasurer to pay the taxes on the ward's land if the treasurer would receipt them as paid is not a promise to pay the debt of another, which is void because not in writing.—*Elson v. Spraker*, 100 Ind. 374.

[f] (Sup. 1890)

A husband purchased land, giving his notes for the price, and had the deed made in the name of his son, and delivered to his wife. The son also gave his notes for the purchase money, and gave a mortgage on the land to secure them. Before the notes were due, the husband had the vendor convey part of the land to his wife; and it was agreed that he should surrender one of the notes, that the wife should pay the other, and the vendor should resume possession of the balance of the land. *Held*, that the promise of the wife to pay the note, as part of the price of the land conveyed to her, was not within the statute of frauds, since it was virtually a promise to pay her own debt.—*Bateman v. Butler*, 124 Ind. 223, 24 N. E. 989.

[g] (Sup. 1891)

A promise by an owner to one furnishing materials to a contractor to pay for such materials cannot be upheld as a promise in a sense to pay the owner's own debt on account of the materialman's lien where such materialman was not in a situation to enforce such a lien.—*Parker v. Dillingham*, 129 Ind. 542, 29 N. E. 23.

[h] (App. 1892)

Where a mother, who is guardian of her son, engages board for him, the contract is an

original undertaking.—*McNabb v. Clipp*, 5 Ind. App. 204, 31 N. E. 858.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 22-26.  
See, also, 20 Cyc. pp. 167-172; note, 98 C. C. A. 236.

#### § 17. Promise to answer in general.

[a] (Sup. 1843)

Where a widow has possession of goods of her deceased husband's estate, her parol promise to pay the debt due from the estate is not obligatory on her personally.—*Chandler v. Davidson*, 6 Blackf. 367.

[b] A promise to pay the debt of a third person is void, unless in writing.—(Sup. 1846) *Murphy v. Merry*, 8 Blackf. 295; (1852) *Smith v. Stevens*, 3 Ind. 332.

[c] (Sup. 1867)

The verbal promise, "You may charge it to me, and I will pay," spoken to a creditor of the mother of the speaker in reference to the mother's debt, in the absence of and without the knowledge or consent of the mother, is within the statute of frauds and unenforceable against the promisor, though the promise was made in consideration of forbearance to sue on the debt.—*Ellison v. Wisheart*, 29 Ind. 32.

[d] (App. 1896)

Plaintiff purchased land for defendant, the latter furnishing part of the purchase price, and plaintiff executing a mortgage for the balance, upon defendant's oral agreement to pay the same. Afterwards the land was conveyed in trust for defendant to another at defendant's request. Upon foreclosure of the mortgage, plaintiff was compelled to pay the deficiency remaining after sale of the land. Held, in an action to recover the amount thereof, that defendant's promise to pay the remainder of the purchase price was not a promise to answer for the debt of another.—*Bedford Belt R. Co. v. Winstandley*, 16 Ind. App. 143, 44 N. E. 556.

[e] (App. 1897)

A parol agreement between plaintiff and defendant, who held the note of an insolvent secured by mortgage, that if defendant would indorse said note to plaintiff without recourse, and pay a certain sum, and cause the insolvent to convey to plaintiff the interest covered by the mortgage, plaintiff would deliver certain property to defendant, is not a promise by defendant to answer for the debt or default of the insolvent.—*Boos v. Hinkle*, 48 N. E. 383, 18 Ind. App. 509.

[f] (App. 1908)

A promise to pay the debt of another, if made directly to the creditor, must be both in writing and based on a valuable consideration.—*Southern Indiana Loan & Savings Inst. v. Roberts*, 42 Ind. App. 653, 86 N. E. 490.

[g] (App. 1909)

A parol contract between creditors of the same debtor to sue the debtor, and obtain judgments for the amount due each, and to set aside a conveyance by the debtor as fraudulent, and to pay the expenses of the litigation equally, and divide the amount recovered equally, is not within the statute of frauds as a promise to pay the debt of another, but is a joint agreement between the creditors to share equally, at their equal expense, in the proceeds of a suit realized through their joint efforts.—*Hotmire v. O'Brien*, 90 N. E. 33.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 13, 16, 17.

See, also, 20 Cyc. pp. 162, 163; note, 126 Am. St. Rep. 487.

#### § 18. Promise to debtor to discharge debt.

[a] The payee of a promissory note may maintain an action against one who promises the maker to pay all his debts in consideration of a transfer to himself of all the maker's property, such promise not being within the statute.—(Sup. 1856) *Nelson v. Hardy*, 7 Ind. 364; (1879) *Carter v. Zenblin*, 68 Ind. 436; (1879) *Fisher v. Wilmoth*, Id. 449.

[b] The parol agreement of a purchaser of mortgaged land to pay off the mortgage as a part of the consideration of the purchase is not within the statute as a promise to pay the debt of another.—(Sup. 1872) *Helms v. Kearns*, 40 Ind. 124; (1873) *McDill v. Gunn*, 43 Ind. 315; (1892) *Lowe v. Hamilton*, 132 Ind. 406, 31 N. E. 1117.

[c] (Sup. 1874)

A verbal promise of the purchaser of an equity of redemption to pay the mortgage debt, made after his purchase, and not connected with the consideration to be paid therefor, cannot be enforced by the mortgagee, although a valuable consideration may have been given for the promise; such an undertaking being void by the statute of frauds.—*Berkshire v. Young*, 45 Ind. 461.

[d] (Sup. 1874)

A parol agreement by a purchaser of a partner's interest in the firm property to pay as a part of the consideration therefor one-half of the firm debts is not within the statute of frauds.—*Haggerty v. Johnston*, 48 Ind. 41.

[e] (Sup. 1876)

A verbal contract between A. and B. for the payment by the former of an indebtedness of the latter to C. is not within the statute of frauds, and where B. has afterwards been compelled to pay said indebtedness he may maintain an action on said contract against A.—*Crim v. Fitch*, 53 Ind. 214.

[f] (Sup. 1876)

A verbal promise by a mortgagee of lands to his mortgagor to pay a prior vendor's lien thereon in the event of a foreclosure of his mortgage without redemption is within the statute.—*Brake v. King*, 54 Ind. 294.

[g] (Sup. 1877)

C., at sheriff's sale, bought land belonging to B., and it was afterwards sold to F. at sheriff's sale under an execution against C. B. brought an action against C. to redeem from the first sale, when F.'s assignee orally agreed with C. that, in consideration that C. would resist and defeat such action, such assignee would pay off a certain judgment held by a third party against C. *Held*, that such agreement was not within the statute of frauds.—*Whitesell v. Heiney*, 58 Ind. 108.

[h] (Sup. 1878)

On the dissolution of a partnership one of the partners sold and delivered to the others all his interest in the partnership property, in consideration of the payment by them to him of a sum of money, and an agreement on their part to pay all the indebtedness of the firm. Afterwards such partner was compelled to pay a part of such indebtedness, and brought suit against the others to recover the amount so paid. *Held*, that the agreement was not within the statute of frauds.—*Vanness v. Dubois*, 64 Ind. 338.

[i] (Sup. 1885)

A contract with a third person for the benefit of the creditor of such person is not within the statute of frauds, where it is founded upon a new and independent consideration.—*Wolke v. Fleming*, 103 Ind. 105, 2 N. E. 325, 53 Am. Rep. 495.

[j] (App. 1895)

Where a purchaser of property agrees by parol in consideration thereof to pay certain debts of his vendor due to a third person, the promise is original, and not within the statute.—*William Deering & Co. v. Armstrong*, 14 Ind. App. 44, 42 N. E. 372.

[k] (Sup. 1897)

Certain findings stated that a debtor caused certain land to be conveyed to defendant by one who held the same to indemnify himself against his liability as surety on the debtor's note, and that defendant agreed with said debtor and said surety to pay said note. *Held*, that defendant's agreement was a contract to loan money to pay said note, and that on failure of defendant to pay said note the surety could not recover the amount thereof, as defendant's undertaking, being by parol, was within the statute of frauds.—*Lowe v. Turpie*, 147 Ind. 652, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233.

[l] (Sup. 1897)

A promise by the purchaser of a partner's interest in a firm, as a part of the consideration, to pay an indebtedness of the firm, is not

within the statute.—*Dickson v. Conde*, 148 Ind. 279, 46 N. E. 998.

[m] (App. 1899)

In consideration of a transfer of goods, the vendee, by an agreement which referred to the bill of sale, assumed to pay certain debts of the vendor, the total of the debts assumed by the agreement exceeding by one item the sum named in the bill of sale as a consideration. *Held*, that the agreement to assume the item in excess of the sum named in the bill of sale was not without consideration.—*Tibbet v. Zurbuch*, 52 N. E. 815, 22 Ind. App. 354.

[n] (App. 1908)

In order to establish a personal liability for a mortgage debt against the grantees of the mortgagor, facts must be averred and proved sufficient to take the case out of the statute of frauds, and make the debt that of the grantees.—*Southern Indiana Loan & Savings Inst. v. Roberts*, 42 Ind. App. 653, 86 N. E. 490.

Where a grantee of land assumes as a part of the consideration for the conveyance a mortgage debt of the grantor, such debt is not the "debt of another" within the statute of frauds, but becomes the grantee's debt, who becomes personally liable therefor on his contract, whether it be in writing or by parol.—*Id.*

[o] (App. 1909)

A promise made to a debtor to pay his debt to a third person, made on a sufficient consideration passing between a debtor and the promisor, is not within the statute of frauds, and an action may be maintained by the third person without a discharge of the original debtor.—*Southern R. Co. v. Hazlewood*, 88 N. E. 636.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 27-31.

See, also, 20 Cyc. pp. 174-176.

### § 19. Promise to indemnify.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 32-34.

See, also, 20 Cyc. pp. 176-178; note, 42 Am. St. Rep. 186.

### § 20. — In general.

[a] (Sup. 1882)

An express warranty of solvency of a third person which, though a part of a contract and made for the purpose of obtaining the property of the other party to the contract, is not within the statute of frauds.—*Hassinger v. Newman*, 83 Ind. 124, 43 Am. Rep. 64.

[b] (Sup. 1885)

A., holding land as a tenant for life, sold growing timber to B. C. sued A. and B. jointly for cutting the timber, and A. orally promised B. that she would pay all costs that might be caused by the action. *Held*, that A.'s promise was not within the statute of frauds, it not being a promise to answer for the debt of an-

other.—*Windell v. Hudson*, 102 Ind. 521, 2 N. E. 303.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., St. of, § 32.

See, also, 20 Cyc. p. 176.

**§ 21. — Coexisting liability of another.**

[a] (Sup. 1854)

An oral promise by one to another to indemnify him if he will become replevin bail for a third party is void under the statute of frauds.—*Brush v. Carpenter*, 6 Ind. 78.

[b] If a surety in an obligation, by making a promise of indemnity, procures another person to become surety with him in the instrument, this promise is not void under the statute of frauds because not in writing, for the indemnity is promised against the promisor's own default.—(Sup. 1875) *Horn v. Bray*, 51 Ind. 555, 19 Am. Rep. 742.

[c] An oral promise to indemnify another for becoming bail for a third, indicted for felony, is not within the statute of frauds, and is enforceable.—(Sup. 1880) *Anderson v. Spence*, 72 Ind. 315, 37 Am. Rep. 162; (1889) *Keesling v. Frazier*, 110 Ind. 185, 21 N. E. 552.

[d] (Sup. 1890)

A surety verbally agreed that, if one of the two principals would borrow the money and pay the indebtedness, and accept from his fellow-principal, as security for one-half the amount so paid, a second mortgage on his farm in which his wife refused to join, he, the surety, would indemnify him, and make good any loss he might sustain by being unable to make the amount out of the mortgaged property. *Held*, that the contract was an undertaking to become liable for the debt of another, within the statute of frauds (Rev. St. § 4904), and void.—*Cheesman v. Wiggin*, 122 Ind. 352, 23 N. E. 945.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., St. of, § 33.

See, also, 20 Cyc. p. 178.

**§ 23. Original or collateral promise in general.**

[a] (Sup. 1876)

An oral promise by a third person to a seller of goods, who has refused to deliver without security for the price, that, if he will make delivery, the promisor will see that he gets his pay, is within the statute of frauds, and must be in writing, even though the delivery was made on the faith of the promise.—*Pettit v. Braden*, 55 Ind. 201.

[b] (Sup. 1882)

Where defendant promised, in consideration of the adjustment and disposition of certain actions involving the title to lands claimed by his wife, to pay to plaintiff a certain sum of money, the promise was an original and inde-

pendent one, and not merely a collateral promise to answer for the debt of another, and was not within the statute of frauds.—*Shaffer v. Ryan*, 84 Ind. 140.

[c] (Sup. 1885)

A contract wherein the assignee of a lease agrees as part of the consideration of the sale and transfer of that interest to him to pay rent to the owner of the fee is not a promise to answer for the default of another within the statute of frauds.—*Wolke v. Fleming*, 2 N. E. 325, 103 Ind. 105, 53 Am. Rep. 495.

[d] (Sup. 1903)

A complaint seeking recovery from defendant for taxes paid by plaintiffs on realty owned by defendant's husband alleged that immediately after the husband's death plaintiffs were about to enforce their claim to taxes, when defendant requested them to desist, and promised that if they would do so she would pay the taxes, and plaintiffs, relying on them, did so refrain. *Held*, that such promise was subject to objection as a collateral, rather than an original, promise.—*Blumenthal v. Tibbits*, 66 N. E. 159, 160 Ind. 70.

[e] (App. 1906)

Where relators furnished supplies, labor, and materials to a subcontractor for the construction of a highway, and treated the latter as their debtor until after he absconded, the undertaking of the contractors, if any, to liquidate such indebtedness, was not an original undertaking, but a contract to answer for the default of another, within the statute of frauds.—*Miller v. State ex rel. Prather*, 74 N. E. 260, 35 Ind. App. 379.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., St. of, §§ 18, 19.

See, also, 20 Cyc. pp. 163-166.

**§ 25. Obligation of promisor independent of liability of principal.**

[a] (Sup. 1882)

A promise by a husband to pay a certain sum for the settlement of suits involving his wife's title to real estate *held* to be an original promise, and not to answer for the debt of another.—*Shaffer v. Ryan*, 84 Ind. 140.

[b] (Sup. 1891)

Plaintiff contracted with defendant's principal contractor to furnish a steam-heating apparatus for a court house, the plans agreed upon differing from the original specifications. Defendant, being unwilling to advance pay therefor to its principal contractor, paid an amount due thereon to plaintiff, who executed a bond for the completion of the work which was verbally assented to by defendant, and completed the same. Defendant took possession of the building, and continued to use the heating apparatus. Plaintiff sued for an unpaid balance. *Held*, that the contract was not a collateral one, and there was a consideration moving to defendant that took the promise out

of the operation of the statute of frauds.—Board of Com'rs of Gibson County v. Cincinnati Steam-Heating Co., 128 Ind. 240, 27 N. E. 612, 12 L. R. A. 502.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., St. of, § 21.

See, also, 20 Cyc. p. 167.

§ 26. Credit given to promisor.

[a] (Sup. 1858)

A. verbally agreed that, if B. would let C. have a horse, he would make good any agreement about it. *Held*, that it was for the jury to say whether credit was given primarily to C., and, they having so found, A.'s agreement was held collateral and void.—Billingsley v. Dempewolf, 11 Ind. 414.

[b] (Sup. 1874)

A. executed to B. his written agreement, which, after reciting that B. was about to appoint C. his agent for the purchase of grain, and to furnish him money for that purpose, contained this provision: "I hereby become responsible to said" B., "and agree to pay him all money that he may so advance to said" C., "and that may be due him from" C. "from time to time, by reason of such advances." *Held*, that the liability assumed by A. was primary and absolute, and not collateral.—Dickinson v. Colter, 45 Ind. 445.

[c] (Sup. 1874)

A father is liable for the board of his adult daughter, if furnished at his request, though no promise be made in writing.—Kernodle v. Caldwell, 46 Ind. 153.

[d] (Sup. 1875)

A parol promise by one to be responsible and stand good for the payment by another of wages that may accrue from the latter to the person to whom the promise is made is within the statute of frauds.—Miller v. Neihaus, 51 Ind. 401.

[e] (Sup. 1878)

In an action by M. against L. to recover for labor and materials, there was evidence that H. had contracted with L. to furnish the same for a building L. was erecting; that L. told M. to let H. have whatever he called for, and he (L.) would pay for it; and that M. had accordingly delivered the materials to H. and performed the labor at H.'s request, charging the same to his own separate account. *Held* not to establish any liability of L., nor to raise any question under the statute of frauds.—Lomax v. McKinney, 61 Ind. 374.

[f] (Sup. 1878)

A verbal agreement by a salesman, employed to sell goods for cash only, to be personally responsible to his employer for all uncollectible accounts of all sales made by him on credit, is within the statute of frauds; and hence no action is maintainable by the salesman against one to whom he has thus made

sales on credit.—Smock v. Brush, 62 Ind. 156, 176.

[g] A direct and unconditional promise by one to pay for goods furnished to a third party, made prior to the delivery of the goods, and upon the faith of which the goods were delivered to such third party, is an original undertaking, which is not within the statute of frauds.—(Sup. 1880) Johnson v. Hoover, 72 Ind. 395; (1881) Wills v. Ross, 77 Ind. 1, 40 Am. Rep. 279.

[h] (Sup. 1883)

If A. and B. agree by parol, jointly, to pay for goods for A., the goods to be charged to both, B.'s promise is not within the statute of frauds, being original, and not collateral.—Boyce v. Murphy, 91 Ind. 1, 46 Am. Rep. 567.

[i] (Sup. 1884)

A person who employs another on his own credit to perform work for a third person is liable for its payment, and such contract is not within the statute of frauds.—Aughie v. Landis, 95 Ind. 419.

[j] (Sup. 1885)

The mere fact that a seller of goods at the buyer's request charges them to a third person does not make the buyer's promise to pay for them a promise to pay the debt of another.—Lance v. Pearce, 101 Ind. 595, 1 N. E. 184.

[k] (App. 1889)

Where plaintiff, under promise of reimbursement by defendants, secured a third party to perform services for defendants, agreeing to answer to such third party for the value of the services in case he was not paid by defendants, the plaintiff's agreement is not within the statute of frauds, as an agreement to answer for the debt of another, and he can recover from defendants the amount paid.—Week v. Widgeon, 55 N. E. 487, 23 Ind. App. 405.

[l] (Sup. 1902)

In an action on an undertaker's bill against the employer of decedent's husband, a complaint alleging that a coffin was furnished and services rendered at the special instance and request of the employer, without specifically alleging that credit was extended to him, is not objectionable as setting forth a case falling within the statute of frauds; as, where goods are furnished to a third person on the order of another, the person giving the order is regarded as the purchaser.—Cox v. Peltier, 65 N. E. 6, 159 Ind. 355.

[m] (Sup. 1903)

A wholesale liquor dealer refused to furnish more goods to a retailer, who had become largely indebted to him, unless the retailer's wife would become personally responsible for the goods. She said that she was running the business and would be responsible, and thereafter all goods were shipped in her name, but were sold by the husband, who continued to run the saloon in his own name, renewing the

license in his name. *Held*, that the wife was not the purchaser of the liquors, but that her agreement to pay for them was merely an oral promise to answer for the debt of her husband, void under the statute of frauds.—*Indiana Trust Co. v. Finitzer*, 67 N. E. 520, 160 Ind. 647.

[n] (App. 1909)

*Burns' Ann. St.* 1908, § 7462, providing that all contracts must be in writing in order to charge any person on promise to answer for the debt of another, applies to coal furnished a contractor drilling an oil well for a defendant sought to be charged therewith on a promise to pay for the same.—*Mossburg v. United Oil & Gas Co.*, 43 Ind. App. 465, 87 N. E. 992.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 35-42½.

See, also, 20 Cyc. pp. 180-186; note, 51 Am. Dec. 144.

#### § 27. Promise to make, accept, or indorse bill or note.

[a] (Sup. 1884)

A parol acceptance of a bill is not within the statute, if the acceptor owes the drawer.—*Louisville, E. & St. L. R. Co. v. Caldwell*, 98 Ind. 245.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 43, 44.  
See, also, 20 Cyc. p. 169.

#### § 28. Promise on transfer of bill or note and mortgage.

[a] (Sup. 1871)

Where one owned a note and mortgage against the holder of a certain promissory note, and it was agreed by him with a third party that he would surrender the note and mortgage to his debtor, and take an assignment of the note held by the latter, which he accordingly did, and the third party agreed by parol to pay the note so taken, *held* that this was a contract within the statute of frauds, which requires a special promise to pay the debt of another to be in writing.—*Crosby v. Jeroloman*, 37 Ind. 264.

[b] (Sup. 1877)

Where the payee of a note transfers it by delivery only in exchange for goods, a verbal warranty by him, as a part of such exchange, that the note is valid, is not within the statute of frauds.—*White v. Webster*, 58 Ind. 233.

[c] (Sup. 1881)

An oral guaranty of the genuineness of a note and the liability of the maker to pay it, made by the holder upon a transfer of it for value, is not a promise to pay the debt of another, within the statute of frauds.—*King v. Summitt*, 73 Ind. 312, 38 Am. Rep. 145.

[d] (Sup. 1882)

An oral guaranty of the solvency of the maker of a note, made by the holder to induce another to take it in payment for property, is not within the statute of frauds; but his agreement to pay any amount the transferee should fail to collect is within the statute.—*Hassinger v. Newman*, 83 Ind. 124, 43 Am. Rep. 64.

[e] (Sup. 1883)

Where a party to whom a receiver's certificate of indebtedness is issued indorses the same to another, his parol promise to guaranty its payment is within the statute of frauds.—*McCurdy v. Bowes*, 88 Ind. 583.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, § 45.

See, also, 20 Cyc. p. 185.

#### § 30. Discharge of original debtor.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 47-49.

See, also, 20 Cyc. pp. 186-188.

#### § 31. — In general.

[a] (Sup. 1876)

A promise, to the holder of a judgment against the promisor's son, that, if he will satisfy an execution issued on it, the promisor will deliver certain personal property and pay a certain sum of money to the judgment plaintiff, is not a promise to pay the debt to another, and within the statute of frauds, but is a valid contract, supported by sufficient consideration, for breach of which the judgment creditor may maintain an action for damages on satisfying such execution.—*Palmer v. Blain*, 55 Ind. 11.

[b] (Sup. 1877)

A promise, not shown to have been in writing, by a mother to a creditor to pay a debt of her deceased son, in consideration of receiving certain assets of his estate and the proceeds of a policy of insurance on his life, is within the statute of frauds; it not appearing that the creditor surrendered any right against the estate.—*Langford v. Freeman*, 60 Ind. 46.

[c] (App. 1898)

In the case of a promise made to a debtor to pay his debt to a third person upon a sufficient consideration passing between the debtor and the promisor, an action may be maintained upon the promise without the discharge of the original debtor.—*Hyatt v. Bonham*, 49 N. E. 361, 19 Ind. App. 256.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 47, 48.

See, also, 20 Cyc. p. 186.

#### § 32. — Novation.

[a] (Sup. 1851)

Where A. owes B., and B. owes C., in order to render A. liable to C. for B.'s debt without a promise in writing, a mutual agreement

of the parties must be proved that B. was to be released and A. was to pay B.'s debt to C.—*Decker v. Shaffer*, 3 Ind. 187.

[b] (Sup. 1867)

E., without the knowledge of his mother, verbally promised her creditor, in consideration of forbearance to sue her, to pay her debt. Three of the six witnesses who heard the interview testified that there was an effectual novation, and the other three testified that the creditor "agreed to let her alone, and wait with the son till Christmas." *Held*, that the son's promise was within the statute of frauds; the mother's ignorance of the transaction excluding the idea of novation.—*Ellison v. Wisehart*, 29 Ind. 32.

[c] (App. 1898)

A lessor of an opera house agreed to pay the lessee \$20 and a balance owing by the lessee for chairs placed in said house, and the lessee agreed to surrender the lease. They went together to the creditor, and stated the agreement; and the latter accepted the lessor as its debtor. *Held*, that there was a complete novation, so that the statute of frauds did not apply.—*Hyatt v. Bonham*, 49 N. E. 361, 19 Ind. App. 256.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., St. of, § 49.

See, also, 20 Cyc. p. 188.

### § 33. New consideration beneficial to promisor.

[a] (Sup. 1843)

A promise to pay the debt of another must be in writing, by the statute of frauds, to be the foundation of a suit, unless the consideration be sufficient to give to the promise the character of a original undertaking.—*Chandler v. Davidson*, 6 Blackf. 367.

[b] (Sup. 1875)

A parol promise to pay the debt of another if not paid by himself is within the statute of frauds, notwithstanding the purchaser is thereby induced to suffer the debtor to leave the state without paying the debt, taking his property with him.—*Gillfillan v. Snow*, 51 Ind. 305.

[c] (Sup. 1876)

In an action by the payee of a promissory note against the widow of the deceased surety thereon to recover of her the amount of such note, the allegations of the complaint therein were execution of such note by decedent as surety of another, who executed it as principal. the decease of such surety, leaving an estate entirely sufficient to pay all his debts, and the legal appointment and qualification of an administrator to settle the same; the presentation of such note to such administrator as a claim against such estate, and his acceptance of the same and proceeding to pay it as a valid claim; the verbal promise, at the time of such acceptance, to payee, by such widow, to pay the same herself, on condition that payee

would not require or demand payment of such claim out of the assets of such estate, nor file the same as a claim against it, provided, further, that the principal thereon should fail to pay it; the acceptance of such verbal promise by payee, and that, relying thereon, he did not file such claim against such estate, or demand or receive payment thereof from such administrator; the receiving by such widow, in addition to the amount allowed her by law as widow of decedent, of a sum exceeding the amount of plaintiff's claim out of the assets of such estate, the settlement in full of such estate by such administrator, and his discharge from such trust; the entire insolvency of such principal ever since the maturity of such note, and his failure to pay the same; and that such note is due and unpaid. *Held*, on demurrer for want of sufficient facts, that the complaint sets out a good cause of action against the defendant; such verbal promise not being within the statute of frauds.—*Crawford v. King*, 54 Ind. 6.

[d] (Sup. 1876)

A verbal agreement, made on a valuable consideration to answer for the debt of another, may nevertheless be void by the statute of frauds because it is not in writing.—*Krutz v. Stewart*, 54 Ind. 178.

A promise by the payee and holder of a note, to the maker, that, if the latter will forbear issuing execution on a judgment he holds against a third person, the promisor will pay the judgment by allowing the amount as a credit on the note, is within the statute of frauds, and void if not in writing.—*Id.*

[e] (Sup. 1877)

A parol promise, by the payee to the maker of a promissory note, that, if the latter will forbear to attach property in the hands of the former, and in which he is interested, belonging to an absconding debtor of such maker, he will credit the amount of such indebtedness on such note, is not within the statute of frauds.—*Mitchell v. Griffin*, 58 Ind. 559.

[f] (Sup. 1879)

An agreement by a creditor of a manufacturing company, made with the president upon being notified by him that the company must cease operations for want of funds, to furnish the necessary means, including the wages of operatives, in consideration of his receiving the proceeds of the business, is a contract for the benefit of such operatives, and not within the statute of frauds; and such creditor is liable for the wages of employes who perform services on the faith of the agreement.—*Rhodes v. Matthews*, 67 Ind. 131.

[g] (Sup. 1881)

The mere passing of a new and independent consideration from the promisee to the promisor does not take a promise to pay the debt of another out of the operation of the statute of frauds.—*Holderbaugh v. Turpin*, 75 Ind. 84, 30 Am. Rep. 124.

[h] (*Sup.* 1891)

A verbal promise by the owner of buildings to pay the materialmen for material furnished the contractor if the materialmen would give him time, where he owes the contractor nothing, is within the statute of frauds (*Rev. St.* 1881, p. 4904), though the materials are furnished in reliance on such promise, if it appears that the materialmen did not agree not to file a lien nor to release the contractor, though in fact they did fail to take the steps requisite to entitle them to a lien.—*Parker v. Dillingham*, 129 Ind. 542, 29 N. E. 23.

[i] (*App.* 1892)

A promise by the widow of a deceased debtor that, if the creditors would forbear taking letters of administration on deceased's estate, she would pay their claims, is a promise to pay the debt of another, and is within the statute of frauds.—*Keadle v. Siddens*, 5 Ind. App. 8, 31 N. E. 539.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 50-53, 56.

See, also, 20 Cyc. pp. 188-195.

### § 34. Promise to apply or pay from property of debtor.

[a] (*Sup.* 1856)

A promise by A. to B., with C.'s consent, that if B. would extend the time of payment of a debt due B. from C., and furnish goods to C. on credit, he (A.) would retain money falling due to C., and pay B. the debt already existing and for the goods furnished, is not within the statute of frauds.—*Nelson v. Hardy*, 7 Ind. 364.

[b] (*Sup.* 1866)

Where a junior mortgagee has taken possession of the property under a promise to the mortgagor that he would sell it, and from the proceeds first pay the senior mortgagee, his promise is not within the statute of frauds.—*Woodward v. Wilcox*, 27 Ind. 207.

[c] (*Sup.* 1888)

Neither a promise to discharge liens in consideration of a conveyance of land nor a promise to pay the purchase price of the land conveyed is within the provision of the statute of frauds which inhibits the maintenance of an action on a verbal contract for the sale of land.—*Turpie v. Lowe*, 15 N. E. 834, 114 Ind. 37.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, § 54.

See, also, 20 Cyc. p. 172.

### § 35. Release or transfer of lien or security.

[a] (*Sup.* 1855)

Where a creditor, having a specific lien, surrenders it upon the express promise of a third person to pay the debt, the undertaking

is an original one, and not within the statute of frauds.—*Spooner v. Dunn*, 7 Ind. 81, 63 Am. Dec. 414; *Same v. Shearer*, Id. 136; *Same v. Dawson*, Id. 236.

[b] (*Sup.* 1870)

An oral promise to pay the debt of another in consideration of the release of a lien on his property, if made with the view and the result of obtaining for the promisor a benefit from the release, is not within the statute of frauds, though the original debtor is not released from liability.—*Luark v. Malone*, 34 Ind. 444.

[c] (*Sup.* 1873)

The verbal promise of a mortgagee of a chattel to pay for repairs of the mortgaged property made for the mortgagor by a mechanic, in consideration of which the mechanic relinquishes his lien on the property for the repairs made by him, is not within the statute of frauds, and may be enforced.—*Conradt v. Sullivan*, 45 Ind. 180, 15 Am. Rep. 261.

[d] (*Sup.* 1878)

In an action by E. against F., the complaint recited substantially that E. held a mortgage on R.'s leasehold of a coal mine to secure payment of certain notes, not including one for \$327; that F., desiring security for R.'s indebtedness to himself, promised to pay E. this note, and E. consented to R.'s executing to F. a mortgage on the same leasehold to secure said indebtedness of R. to F., and in such mortgage said note was included; that R. became insolvent, and F. took possession; that by reason of said promises E. was induced to, and did, release R. Held, that F.'s promise was on a sufficient consideration not to be within the statute of frauds, and, under the issue made by the general denial, evidence was admissible to determine whether F.'s mortgage became a prior lien over E.'s, and also the extent of E.'s loss of security.—*Fleming v. Easter*, 60 Ind. 309.

[e] (*Sup.* 1882)

A verbal agreement founded on a valuable consideration to satisfy a lien is valid, and not affected by the statute of frauds.—*Felton v. Smith*, 84 Ind. 485.

[f] (*Sup.* 1888)

A creditor, who, as security for a debt, with plaintiff's consent, takes from his debtor an assignment of an insurance policy which had already been assigned to plaintiffs, to indemnify them as sureties for another debt, assuming and agreeing to pay the last-named debt, is liable to plaintiffs, who have been compelled to pay it, though the policy is not yet collected, such promise being original, and not within the statute.—*Leake v. Ball*, 116 Ind. 214, 17 N. E. 918.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 55, 57.

See, also, 20 Cyc. p. 192.

**§ 36. Purchase of debt.**

[a] (Sup. 1894)

A promise by a wife to accept, in payment of a note, property delivered to her husband, is not a promise to answer for the debt, default, or miscarriage of another, within the meaning of the statute of frauds.—*Collins v. Stanfield*, 139 Ind. 184, 38 N. E. 1001.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, § 58.

See, also, 20 Cyc. p. 195.

**IV. REPRESENTATIONS.**

**§ 37. Statutory provisions.**

[a] (App. 1898)

The word "person," as used in the statute of frauds, embraces corporations.—*Heintz v. Mueller*, 40 N. E. 203, 19 Ind. App. 240.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, § 59.

See, also, 20 Cyc. pp. 195, 196.

**§ 38. Nature and subject-matter.**

[a] (Sup. 1882)

An oral representation by persons in partnership, falsely and fraudulently made, that each of them had invested \$800 in the business, whereby another was induced to invest that sum and become a member of the co-partnership, is not a representation as to the credit or solvency of another, within Rev. St. 1881, § 4900.—*St. John v. Hendrickson*, 81 Ind. 350.

[b] (App. 1897)

Recovery may be had for the price of goods sold on credit through defendant's fraud in subscribing his name as a witness to a false signature to a letter of credit, as such action is not founded on an oral representation as to the solvency of another, within Rev. St. 1894, § 6634 (Rev. St. 1881, § 4909), providing that one cannot be charged for a representation as to the credit of another unless such representation be in writing, and signed by him.—*Mendenhall v. Stewart*, 47 N. E. 943, 18 Ind. App. 202.

[c] (App. 1888)

Plaintiff, relying on representations as to the condition of a corporation, purchased shares of defendant, which were issued "directly from the company," and paid him therefor. *Held*, that the alleged representations were made to establish the general credit of the corporation, with the intent that it should obtain money thereon, and the case was within *Burns' Rev. St. 1894, § 6634* (*Horner's Rev. St. 1897, § 4909*), providing that no action shall be maintained to charge a person by reason of any representation made concerning the credit, ability, trade, or dealings of any other person unless made in writing, and signed by the party to be charged.—*Heintz v. Mueller*, 49 N. E. 283, 19 Ind. App. 240.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, § 60.

**§ 39. Intent or purpose.**

[a] (Sup. 1885)

Representations concerning particular property or assets of another, when made with a view to establish his general credit and pecuniary ability, are within the statute.—*Cook v. Churchman*, 104 Ind. 141, 3 N. E. 759.

[b] (App. 1907)

Representations by members of a corporation of existing facts as to its property for the purpose of showing the value of stock sought to be sold are not representations concerning the character, etc., of a third person within *Burns' Ann. St. 1901, § 6634*, providing that no action shall be maintained to charge a person by reason of any representation concerning the character, conduct, credit, ability, trade, or dealings of any other person, unless the representation be made in writing and signed by the person to be charged thereby or his agent.—*Grover v. Cavanagh*, 82 N. E. 104, 40 Ind. App. 340.

Under such statute, the representations as to the character, conduct, credit, etc., of a third person required to be in writing, must be made with the intent that he shall in the first instance obtain credit, money, or goods thereupon.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, § 61.

See, also, 20 Cyc. p. 197.

**§ 42. Effect of fraud.**

[a] (Sup. 1885)

Under the provision of the statute of frauds declaring that no action shall be maintained to charge any person by reason of any representation made concerning the character, conduct, credit, ability, trade, or dealings of another, unless such representation is in writing and signed, etc., if parol representations are made regarding the credit and ability of a third person, with the intent that such third person shall obtain money or credit thereon, the statute applies, and no action thereon can be maintained, although the party making the representations may have entered into a conspiracy with such third person with the expectation of obtaining some incidental benefit for himself.—*Cook v. Churchman*, 104 Ind. 141, 3 N. E. 759.

[b] (Sup. 1888)

H. colluded with T. for the purpose of obtaining plaintiff's property and defrauding him out of part of the purchase price, by having a colorable sale made to T., an insolvent, whom H. orally represented to plaintiff as financially responsible; T. giving his note for part of the purchase price, and then making a pretended sale to H. *Held*, that the statute of frauds did not apply to what was an actual conspiracy to

defraud, and not merely an oral representation as to the solvency of T., and that both H. and T. were liable for the unpaid purchase price.—*Hodgin v. Bryant*, 114 Ind. 401, 16 N. E. 815.

[c] (Sup. 1903)

Fraudulent representations made by defendant in pursuance of a conspiracy entered into with the owners of worthless patent rights, whereby he induced plaintiff and others to purchase such rights in reliance on defendant's business judgment, and fictitious co-operation in the purchase by the execution of his notes, which it was agreed the sellers were to return to him, and pay him \$1,000 for his services, are not representations concerning "the character, credit, ability, trade, or dealings of another," within the meaning of the statute of frauds (Burns' Rev. St. 1901, § 6634; Rev. St. 1881, § 4909; Horner's Rev. St. 1901, § 4909), requiring such representations to be in writing to render them actionable.—*Coulter v. Clark*, 66 N. E. 739, 160 Ind. 311.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., St. of, § 64.  
See, also, 20 Cyc. p. 197.

### V. AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR.

Contracts as ground of defense, see post, § 141.

Contracts in part within statutes, see post, § 130.

Contracts performed only as to part not within statute, see post, § 136.

Leases for one year, see post, § 58.

Part performance, see post, § 129.

Reply to plea raising defense of statute, see post, § 155.

Validity and enforcement of contract in general, see post, § 125.

What law governs, see post, § 120.

#### § 44. Nature and subject-matter.

[a] (Sup. 1853)

An agreement to lease land for the term of two years, at a rent equal to the full rental value of the premises, the occupation to commence at a future day, is an agreement relating to an interest in land, and under Rev. St. 1843, c. 28, § 16, and notwithstanding the exception in that section relating to leases not exceeding the term of three years, to be valid, it must be in writing.—*Stackberger v. Mosteller*, 4 Ind. 461.

[b] (Sup. 1855)

The statute in relation to contracts not to be performed within a year which is substantially like that of 29 Car. II. c. 3, § 4, has no reference to agreements founded on a past consideration.—*Wiggins v. Keizer*, 6 Ind. 252.

[c] (Sup. 1859)

Contracts of partnership that are not to be performed within a year are within the statute of frauds.—*Wilson v. Ray*, 13 Ind. 1.

A promise to pay money after the expiration of a year is as much within the statute as a promise to do any other act.—Id.

[d] (Sup. 1874)

The fifth subdivision of the first section of the statute of frauds (1 Gav. & H. Rev. St. pp. 348, 349, 350), which declares that no action shall be brought "upon any agreement that is not to be performed within one year from the making thereof, unless the promise, contract or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, excepting, however, leases not exceeding the term of three years," does not extend to agreements concerning lands.—*Fall v. Hazelrigg*, 45 Ind. 576, 15 Am. Rep. 278.

[e] 1 Rev. St. 1876, pp. 503, 504, § 1, cl. 5, in relation to contracts not to be performed within one year, has no application to contracts for the sale of, or in relation to, real estate.—(Sup. 1879) *Baynes v. Chastain*, 68 Ind. 376; (1880) *Cole v. Wright*, 70 Ind. 179.

[f] (Sup. 1890)

Under the direct provisions of Rev. St. 1881, § 4904, a parol lease of land for a period not exceeding three years is valid.—*Lowman v. Sheets*, 24 N. E. 351, 124 Ind. 416, 7 L. R. A. 784.

[g] (App. 1895)

A parol lease for 10 years is within the statute of frauds (Rev. St. 1894, § 6629), and is therefore void.—*Kleespies v. McKenzie*, 40 N. E. 648, 12 Ind. App. 404.

[h] (Sup. 1901)

A contract for the lease of water rights for 25 years is not in violation of Burns' Rev. St. 1894, § 6629, subd. 5 (Rev. St. 1881, § 4904, subd. 5; Horner's Rev. St. 1897, § 4904, subd. 5), requiring contracts not to be performed in one year to be in writing, since the lease conveys an interest in real estate, and such section has no application to contracts conveying such interest.—*St. Joseph Hydraulic Co. v. Globe Tissue-Paper Co.*, 59 N. E. 995, 156 Ind. 665.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., St. of, § 66.

See, also, 20 Cyc. pp. 198-208; note, 35 L. R. A. 512.

### § 45. Stipulations as to time.

Possibility of performance, see post, § 49.

[a] (Sup. 1855)

The provision of the statute of frauds as to contracts which are not to be performed within a year applies to those contracts in which this is so by the express stipulation of the parties, and not to those which may or may not be performed within a year.—*Wiggins v. Keizer*, 6 Ind. 252.

[b] (Sup. 1863)

A contract whereby A. sells a horse to B. and warrants that it shall be sound for one year thereafter, and agrees that if, after the expiration of one year, the horse prove unsound, he will take it back and pay the plaintiff \$100, is within the statute of frauds, as not to be performed within a year, and not operative against A., unless in writing. 1 Gav. & H. St. p. 348, § 1, subsec. 5.—*Shipley v. Patton*, 21 Ind. 169.

[c] (Sup. 1864)

The statute of fraud applies only to contracts, which by the express stipulations of the parties are not to be performed in a year, and not to those which may or may not, upon a contingency, be performed within a year.—*Indiana & I. C. R. Co. v. Seearce*, 23 Ind. 223.

[d] (Sup. 1879)

A verbal agreement between J.'s putative father and her mother to support J. until majority is void, under 1 Rev. St. p. 503, § 1, cl. 5, as not to be performed within one year.—*Goodrich v. Johnson*, 66 Ind. 258.

[e] (Sup. 1881)

A contract whereby plaintiff paid a certain sum in consideration of acting as defendant's agent for a "reasonable time" held not within the statute of frauds as to contracts not to be performed within a year.—*Niagara Fire Ins. Co. v. Greene*, 77 Ind. 590.

[f] (Sup. 1885)

To bring a contract within the statute of frauds it must affirmatively appear by the terms of the contract that it is one not to be performed within one year.—*Hinkle v. Fisher*, 104 Ind. 84, 3 N. E. 624.

[g] (Sup. 1890)

A parol agreement, not amounting to a partnership, to keep mares for breeding purposes from 1887 until 1891, each party furnishing a part of the feed, with postponement of a settlement to that date, is within the statute of frauds.—*Lowman v. Sheets*, 24 N. E. 351, 124 Ind. 416, 7 L. R. A. 784.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 67-71.

#### § 46. Intent of parties.

[a] (Sup. 1859)

The plaintiff, in consideration that the defendant would draw, accept, and indorse paper, to enable the plaintiff to raise money to build a railroad, for which work the plaintiff was to be paid in bonds of the railroad com-

pany, agreed to pay the defendant one-half of all that he should realize on the bonds over 75 cents on the dollar, and the defendant agreed so to draw, accept, and indorse, and to make up to the plaintiff one-half of the loss on the bonds, should they not bring 75 cents on the dollar. Held, that this contract, when made, was purely executory, and within the statute of frauds, if its provisions were not intended to be performed within one year.—*Wilson v. Ray*, 13 Ind. 1.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, § 72.

See, also, 20 Cyc. p. 206.

#### § 48. Possibility of performance.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 74-77.

See, also, note, 20 Am. Rep. 150.

#### § 49. — In general.

[a] (Sup. 1860)

A marriage contract, providing for the disposition of the property of the parties to their respective heirs, is one which may be performed within a year, and therefore is not within the statute of frauds.—*Houghton v. Houghton*, 14 Ind. 505, 77 Am. Dec. 69.

[b] (Sup. 1873)

An agreement, connected with a contract letting lands, that the tenant will "during the term" (three years) erect a fence, is not within the statute of frauds, for it may be performed within the first year.—*Marley v. Noblett*, 42 Ind. 85.

[c] (Sup. 1875)

A parol contract of marriage that may be performed at any time within three years, and consequently within one year, is not within the statute of frauds; but, if not to be performed within one year, it is within the statute.—*Paris v. Strong*, 51 Ind. 339.

[d] (Sup. 1881)

A contract whereby plaintiff sells land to B., the latter agreeing to pay any excess over the purchase price for which he might sell the land within five years, is not within the statute of frauds, being an agreement possible to be performed within one year.—*Parker v. Siple*, 76 Ind. 345.

[e] (Sup. 1882)

A parol contract to breed a mare, and deliver the colt at weaning time, being impossible, in the course of nature, of performance within a year, is within the statute of frauds.—*Groves v. Cook*, 88 Ind. 169, 45 Am. Rep. 46.

[f] (Sup. 1887)

A verbal contract that the vendee shall sell the lands conveyed as soon as possible, and pay the vendor a stipulated sum, is not within the provision of the statute of frauds, requiring contracts not to be performed in a

year to be in writing.—*Worley v. Sipe*, 111 Ind. 238, 12 N. E. 385.

[g] (Sup. 1891)

To bring a contract within the provisions of the statute of frauds that no action shall be brought on any agreement that is not to be performed within a year from the making thereof, unless the agreement or some memorandum shall be in writing, and signed by the party to be charged, etc., it must affirmatively appear from its terms that its stipulations are not to be performed within a year after the time of making it, and it has no application to a contract, which may or may not be performed within a year.—*Durham v. Hiatt*, 26 N. E. 401, 127 Ind. 514.

A contract whereby plaintiff is to trade defendant's lands for other lands, to manage the lands thus acquired, and to resell them and the timber thereon for a compensation of half the profits after paying defendant his advances, is not within the statute of frauds invalidating agreements not to be performed within a year (Rev. St. 1881, § 4904), as it cannot be said that the contract could not be performed in a year.—*Id.*

[h] (Sup. 1906)

Where plaintiff was employed by a city as city engineer for a period of one year, and there was nothing to show that plaintiff's work could not be completed within such time, the contract was not within the statute of frauds (Burns' Ann. St. 1901, § 6629, subd. 5), as a contract not to be performed within a year.—*City of Decatur v. McKean*, 167 Ind. 249, 78 N. E. 982.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Frds., St. of, § 74.

## § 50. — Dependent on contingency.

See post, § 51.

[a] (Sup. 1859)

Where no time is fixed for the performance of a contract or where it is to be performed by a certain day, the right to perform it sooner not being precluded, or where the performance depends on a contingency which may or may not happen within the year, the contract is not within the statute of frauds (Rev. St. 1843, p. 589); but, where a contract is not to be performed within a year or where it cannot be performed within the year according to the intent and understanding of the parties as evidenced by the contract, it is within the statute.—*Wilson v. Ray*, 13 Ind. 1.

[b] (Sup. 1865)

In a suit against an executor upon a parol agreement of his testator to leave a certain sum by will to the plaintiff, if he continued to work for the testator until his death, it was held that the agreement was not within the statute of frauds, as it had been performed by the plaintiff, and because it might have been per-

formed within a year.—*Bell v. Hewitt's Ex'r*, 24 Ind. 280.

[c] In an action on a subscription the complaint set out the contract, which was as follows: "Ten days after the completion of the I. & St. L. Railroad from I. H. county, and the running of a train of cars thereon, I promise to pay to the order of said railroad company, at the Bank of D., the sum of one hundred dollars, without any relief whatever from valuation or appraisal laws. The consideration of this note is the construction of said road as aforesaid within one-half mile of the town of D., and the promise and agreement of said company that by means of said road and its connections the company will run trains through from I. within two years from the 1st day of January, 1869,"—dated November 25, 1868, and signed by the defendant, and averred performance within the time and in the manner mentioned. Held, that the contract, being capable of performance within one year, was not within the statute of frauds.—(Sup. 1871) *Straughan v. Indianapolis & St. L. R. Co.*, 38 Ind. 185; *Curtis v. Same*, Id. 222; *Wilson v. Same*, Id. 227; *Emmons v. Same*, Id. 247; *King v. Same*, Id. 266; *Seearce v. Same*, Id. 271; *Weaver v. Same*, Id. 277; *Nichols v. Same*, Id. 279; *Osborn v. Same*, Id. 294; *Blake v. Same*, Id. 323; *Keeney v. Same*, Id. 348; *Gregg v. Same*, Id. 372; *Hunt v. Same*, Id. 383; *Smith v. Same*, Id. 389; *Welsham v. Same*, Id.; *Nave v. Same*, Id. 443; (1872) *Newman v. Same*, 39 Ind. 153.

[d] (Sup. 1876)

A contract which by its terms is to be performed at the death of one of the parties is not within the provision of the statute of frauds which requires contracts not to be performed within a year from the making thereof to be in writing.—*Frost v. Tarr*, 53 Ind. 390.

[e] (Sup. 1877)

An agreement between grantor of lands and grantee that the latter, in consideration of the conveyance, shall support the former for life, is not within the statute of frauds, but may be oral.—*Harper v. Harper*, 57 Ind. 547.

[f] (Sup. 1896)

An agreement not to engage in a rival business in a certain locality so long as the other party remains in such business is not within the statute of frauds.—*O'Neal v. Hines*, 145 Ind. 32, 43 N. E. 946.

[g] (App. 1905)

Where plaintiff, in consideration of wages, nurse hire, and doctor's bills resulting from present disability, and employment when recovered, released defendant from liability for an injury to plaintiff on a specified date, such contract was not within the statute of frauds (Burns' Ann. St. 1901, § 6629, subd. 5), since it might have terminated within a year through

plaintiff's death.—*American Quarries Co. v. Lay*, 73 N. E. 608, 37 Ind. App. 386.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 75-77.

**§ 51. Possibility of discharge or other termination without performance.**

[a] (Sup. 1855)

An agreement to pay for the support of a child, both past and future, in consideration of a promise to continue the child's nurture, is not within the statute of frauds, since the contract might be terminated within a year by the death of the child.—*Wiggins v. Keizer*, 6 Ind. 252.

[b] (Sup. 1859)

Where the agreement of the defendant, upon which suit is brought, is not in any event to be performed within a year, it is within the statute, although there may be other stipulations providing for contingencies that would make the plaintiff liable to the defendant within a year, and release the defendant from liability altogether.—*Wilson v. Ray*, 13 Ind. 1.

[c] (Sup. 1861)

An agreement by one not to sell, or assist others in selling, musical instruments, is not invalid under the statute of frauds, as being a contract not to be finished within one year, as it may be ended by the death of the contractor within that time.—*Hill v. Jamieson*, 16 Ind. 125, 79 Am. Dec. 414.

[d] (Sup. 1882)

An agreement by a lessor not to engage in a rival business is not within the statute of frauds.—*Welz v. Rhodius*, 87 Ind. 1, 44 Am. Rep. 747.

[e] (App. 1892)

A verbal contract to furnish one with steady and permanent employment is not void under the provision of the statute of frauds (Rev. St. § 4904, subd. 5) relating to agreements not to be performed within one year, as such provision does not apply to contracts for personal services, which may terminate with the death of the party.—*Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, § 78.

**§ 53. Commencement of period.**

[a] (App. 1899)

An oral contract of employment to render services for a year, to commence in the future, is a contract within the statute of frauds, as an agreement not to be performed within a year from the making thereof.—*Board of Com'rs of Clark County v. Howell*, 52 N. E. 769, 21 Ind. App. 495.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 80, 92.

See, also, note, 2 L. R. A. (N. S.) 738.

**§ 54. Sufficiency of performance possible within year.**

[a] (Sup. 1859)

Though a contract may be performed on one side within a year, yet, if it cannot on the other side, it is within the statute of frauds (Rev. St. p. 589).—*Wilson v. Ray*, 13 Ind. 1.

[b] (Sup. 1863)

A contract for the sale of land, where the vendor is to convey instantly, but the vendee is not to make payment for over a year, is not within the statute of frauds.—*Haugh v. Blythe's Ex'rs*, 20 Ind. 24.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, § 81.

**VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.**

Burden of proof to show part performance, see post, § 158.

Contracts as ground of defense, see post, § 141.

Contracts completely performed, see post, § 139.

Contracts implied by law on part performance, see post, § 138.

Contracts in part within statute, see post, § 130.

Contracts not to be performed within one year, see ante, §§ 45, 49, 54.

Contracts performed only as to part not within statute, see post, § 137.

Issues, proof and variance, see post, § 156.

Necessity of pleading part performance, see post, § 149.

Necessity of pleading promise in writing, see post, § 148.

Necessity of pleading statute as defense, see post, § 152.

Necessity of pleading writing or other compliance with statute, see post, § 148.

Part performance, see post, §§ 129, 133.

Persons to whom statute is available, see post, § 143.

Requisites and sufficiency of memorandum of contract of sale, see post, §§ 103, 105-118.

Requisites and sufficiency of writing creating or conveying estates or interests in real property, see post, §§ 98-102.

Waiver of bar of statute, see post, § 144.

What law governs, see post, § 120.

**§ 56. Creation of estates or interests in general.**

Contracts as ground of defense, see post, § 141.

Contracts performed only as to part not within statutes, see post, § 137.

Modification, see post, § 131.

Necessity of pleading writing or other compliance with statute, see post, § 148.

Part performance, see post, §§ 129, 133.

Requisites and sufficiency of writing, see post, §§ 99, 100, 106, 110.

Validity and enforcement of contract in general, see post, § 125.

What law governs, see post, § 120.

[a] (Sup. 1857)

Where it was agreed that the husband should invest the wife's money in land for the use of her and her son, even if the agreement was verbal, it was not within the statute of frauds.—*Resor v. Resor*, 9 Ind. 347.

[b] (Sup. 1864)

A prescriptive title to real estate may be shown by parol.—*Stretch v. Schenck*, 23 Ind. 77.

[c] (Sup. 1864)

A. entered into a parol agreement with B., by which he was to erect a mill on the land of the latter, who was to convey to him an undivided half of the land, and become the owner of half of the mill; but the contract was to have no force unless B. discharged a judgment which was a lien on the land. If the judgment was not discharged, the mill was to remain the property of A. The mill was accordingly erected, but the judgment was not discharged, and the land was sold on execution; the sheriff, at the sale, stating that the mill did not belong to the owner of the land, and was personal property. The purchaser at the sheriff's sale afterwards conveyed the land to C. by a warranty deed, with a stipulation that the grantee assumed all risk of title to the mill. *Held*, that in an action for the conversion of a steam engine, boiler, and machinery in the mill, brought by a vendee of A. against C., evidence of the parol agreement was admissible.—*Yater v. Mullen*, 23 Ind. 562.

[d] (Sup. 1868)

A parol agreement, on the sale of land, that the crops growing thereon are to be reserved by the vendor as a part of the consideration, is valid. The execution of the deed is a performance of the contract by the vendor.—*Heavilon v. Heavilon*, 29 Ind. 509.

[e] (Sup. 1874)

Where there was a parol agreement between a mortgagor, a mortgagee, and a third person that an indemnifying mortgage of real estate, held by the mortgagee, should be changed by inserting therein a provision that such third person should also be indemnified as surety for the mortgagor, such agreement was equivalent to an agreement to execute a new mortgage, and was within the statute of frauds, and could not be enforced by such third person.—*Irwin v. Hubbard*, 49 Ind. 350, 19 Am. Rep. 679.

[f] (Sup. 1877)

Title to realty may be shown, in an action for unlawful detainer before a justice of the peace, by parol.—*Compton v. Ivey*, 59 Ind. 352.

[g] (Sup. 1879)

A parol reservation of growing crops on a sale of land is valid.—*Harvey v. Million*, 67 Ind. 90.

[h] (Sup. 1879)

A parol agreement between two adjoining landowners relative to the maintenance of a fence is not within the statute of frauds.—*Baynes v. Chastain*, 68 Ind. 376.

Where adjoining owners divide their partition fence into two parts, and each agrees to keep one of the parts in repair, the agreement thus made is not within the statute of frauds, since, being in relation to real estate, it is not within the clause applying to contracts not to be performed within one year, and, though in relation to real estate, is not for the sale of lands, and so not within the clause relating to sales of land.—*Id.*

[i] (Sup. 1880)

An oral contract between a husband and wife that money advanced by her for the purchase of land by him should be paid to their children did not give the wife any interest in the land, and was within the statute of frauds.—*Goff v. Rogers*, 71 Ind. 459.

[j] (Sup. 1881)

Though an agreement by a mortgagee to hold and sell the mortgaged land on the mortgagor conveying to him his equity of redemption therein is within the statute of frauds, his agreement to pay to the mortgagor the overplus which he might receive on the sale and after paying the mortgage debt is not within the statute.—*Humphrey v. Fair*, 79 Ind. 410.

[k] (Sup. 1882)

An agreement by a mortgagee that, if the mortgagor would permit a foreclosure and pay costs and attorney's fees, he would bid in the land for the full amount of the debt, *held* not required by the statute of frauds to be in writing.—*McQuat v. Cathcart*, 84 Ind. 567.

[l] (Sup. 1883)

A deed absolute in form, executed on a parol agreement that it shall be held as security for a debt, and that upon payment the grantee will reconvey, is a mortgage; and the statute of frauds cannot be pleaded in defense to an action for a reconveyance, as the legal title never passed from the grantor.—*Landers v. Beck*, 92 Ind. 49.

[m] (Sup. 1890)

A cross-complaint in an action for the recovery of real property alleged that defendant was owner of the land in controversy, and had been in possession thereof for 15 years; that he had made valuable improvements thereon, and had paid the taxes and other assessments against the property; that plaintiff was setting up a title, and had instituted an action to recover possession; that, after defendant had purchased the real estate, his grantor became insolvent; that plaintiff recovered a judgment against the grantor; that defendant was about

to institute proceedings to enjoin a sale under the judgment, when plaintiff in person and by his attorney informed defendant that he need not pay any attention to the sale; that it was not the intention of plaintiff to purchase or disturb defendant's title; that plaintiff would bid it off at a nominal sum merely to get it out of the way, inasmuch as he had to have the real estate levied on sold in the inverse order from that in which the debtor had conveyed it; that for this reason only had defendant's property been levied on and advertised for sale; that defendant relied on the promise and permitted the estate to be sold, and did not redeem from the sale; that the premises were purchased for the nominal sum of \$1, and that plaintiff knew that defendant was relying on the promise; that at the time of the sale the real estate was of the value of \$6,000. *Held*, that the statute of frauds had no application to the cause of action alleged in the cross-complaint, the defendant not seeking to enforce a contract for the sale of real estate; the theory of the pleading being that defendant was the owner and held the legal title, and that plaintiff was asserting a claim thereto.—*Detwiler v. Schultheis*, 23 N. E. 709, 122 Ind. 155.

[n] (Sup. 1890)

Where land is granted for use as a road, a parol agreement reserving the right to use a stream of water flowing across the land is not void under the statute of frauds, since the right would have remained in the grantor without any agreement therefor.—*Smith v. Holloway*, 124 Ind. 329, 24 N. E. 886.

[o] (App. 1894)

The grantor of farm lands may reserve the growing crops by oral agreement.—*Kluse v. Sparks*, 10 Ind. App. 444, 36 N. E. 914, 37 N. E. 1047.

[p] (Sup. 1896)

An oral agreement to the effect that a vendor of material used in the construction of a building shall have a lien on the property is in violation of the statute of frauds.—*Slack v. Collins*, 42 N. E. 910, 145 Ind. 569.

[q] (App. 1896)

Plaintiff purchased land for defendant, the latter furnishing part of the purchase price, and plaintiff executing a mortgage for the balance upon defendant's oral agreement to pay the same. Afterwards the land was conveyed, in trust for defendant, to another at defendant's request. Upon foreclosure of the mortgage, plaintiff was compelled to pay the deficiency remaining after sale of the land. *Held*, in an action to recover the amount thereof, that defendant's promise to pay the remainder of the purchase price was not an attempt to convey an interest in land by parol.—*Bedford Belt R. Co. v. Winstandley*, 16 Ind. App. 143, 44 N. E. 556.

[r] (Sup. 1902)

An agreement after the foreclosure sale of mortgaged premises, between the purchaser, or his assignee, and the mortgagor, to extend the time of redemption, where no part of the redemption money is paid as a consideration therefor, though not in writing, nor supported by any consideration, except the promise of the mortgagor to pay the amount to become due and interest thereon, is not within the statute of frauds.—*Turpie v. Lowe*, 158 Ind. 314, 62 N. E. 484, 92 Am. St. Rep. 310.

[s] (App. 1905)

A contract between the owners that each should keep in repair a certain part of their partition fence is not within the statute of frauds.—*Burck v. Davis*, 73 N. E. 192, 35 Ind. App. 648.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., St. of, §§ 83-89, 136-138.

See, also, 20 Cyc. pp. 209-217; note, 16 L. R. A. 745.

### § 57. Creation of leases.

Assignment of leases, see post, § 63.

Modification, see post, § 131.

Operation as tenancy from year to year, month

to month, or at will, of an estate or interest

created without writing, see post, § 123.

Part performance, see post, §§ 129, 133.

Persons to whom statute is available, see post, § 143.

Requisites and sufficiency of writing, see post, § 110.

Validity of leases for more than one year, see ante, §§ 44, 45.

What law governs, see post, § 120.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., St. of, §§ 90-93.

See, also, 20 Cyc. p. 214; notes, 26 L. R. A. 799, 3 L. R. A. (N. S.) 852; note, 17 Am. St. Rep. 752.

### § 58. — In general.

[a] (Sup. 1868)

A parol lease for a term of two years, with an agreement that the lessee shall have the right to renew at the end thereof, for an additional term of three years, on the same terms, by giving the lessor six months' notice in writing of his election, is within the statute of frauds, and void, although bona fide leases for a term not exceeding three years are not required by the statute to be in writing.—*Schmitz v. Lauferty*, 29 Ind. 400.

[b] (Sup. 1869)

A parol lease of lands for the term of 1 year, to commence 30 days after the making of the contract, is valid within the statute of frauds; and the lessee may maintain an action against the lessor to recover possession according to the terms of the lease.—*Huffman v. Starks*, 31 Ind. 474.

[c] (Sup. 1870)

The right to use for the purpose of worship a church edifice, when not occupied by the church to which it belongs, is an "interest" in real estate; and a contract therefor, to be valid under the statute of frauds, must be in writing, signed by the party to be charged.—*Brumfield v. Carson*, 33 Ind. 94, 5 Am. Rep. 184.

[d] (App. 1909)

Though *Burns' Ann. St.* 1908, § 7462, declares that a lease for more than three years must be in writing, and section 8054 that general tenancies are from year to year, where a lessee, at the expiration of his term, under a lease giving him an option to extend it for seven years, verbally notified the lessor of his intention to exercise the option reserved, and such notice was accepted, and the lessee continued in possession, paying rent as agreed, he was entitled to the full extended term, and he did not become a tenant from year to year.—*Remm v. Landon*, 43 Ind. App. 91, 86 N. E. 973.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 90-92.  
See, also, 20 Cyc. p. 214.

#### § 60. Creation of easements.

Contracts completely performed, see post, § 120.

Part performance, see post, § 129.

[a] (Sup. 1867)

A promise by a vendor to a purchaser of land to open a street adjacent, upon his own land, to the public, is a promise affecting an interest in real estate, viz. an easement, and, if oral, is void under the statute of frauds (1 Gav. & H. St. p. 348, § 1).—*Richter v. Irwin*, 28 Ind. 26.

[b] (Sup. 1882)

A perpetual right of way over land of another is an interest in real estate within the meaning of the statute of frauds.—*Simons v. Morehouse*, 88 Ind. 391.

[c] (Sup. 1887)

A right of way is an interest in lands, and a grant thereof by parol is void, under the statute of frauds.—*Robinson v. Thrailkill*, 110 Ind. 117, 10 N. E. 647.

[d] (Sup. 1896)

An executed parol license may become an easement upon the land of another.—*Joseph v. Wild*, 45 N. E. 467, 146 Ind. 249.

[e] (App. 1909)

A railroad right of way over land is an interest in real property which may be transferred only by an instrument in writing.—*Polk v. Givens*, 90 N. E. 19.

FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 83, 94, 95.  
See, also, 20 Cyc. p. 215.

#### § 62. Assignment, grant, or surrender of existing estates, interests, or terms.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 83, 97-112.

See, also, 20 Cyc. pp. 218-225; note, 15 L. R. A. 754.

#### § 63. — In general.

Requisites and sufficiency of writing, see post, §§ 102, 106.

[a] (Sup. 1858)

Where a party has entered upon and improved lands under a verbal contract of sale, and afterwards verbally contracts with his vendor to deliver back possession and improvements for a consideration, a suit may be maintained on the second contract by the vendee; it not being a contract for the "sale of lands." If it is to be regarded as a sale of goods, part of the consideration being a horse, which was delivered by the vendor, he could maintain an action on the contract, and, as the remedy must be mutual, the vendee can also.—*Sutton v. Sears*, 10 Ind. 223.

[b] (Sup. 1868)

A tenant from year to year by parol may by parol convey or surrender his right of possession.—*Ross v. Schneider*, 30 Ind. 423.

[c] (Sup. 1877)

An agreement between two persons, each owning real property and about to intermarry, that upon the death of either the survivor will not claim any of the property of the other, is within that provision of the statute of frauds which requires a contract for the transfer of real property to be in writing.—*Rainbolt v. East*, 56 Ind. 538, 26 Am. Rep. 40.

[d] (Sup. 1878)

A postnuptial agreement for the acceptance by a wife of a sum of money in lieu of her right in the husband's lands must be in writing, signed by her, to bind her. 1 Rev. St. 1876, p. 414.—*Randles v. Randles*, 63 Ind. 93.

[e] (Sup. 1883)

An agreement by a widow to renounce her interest in the land of her late husband will not bind her, if it is not in writing and without consideration, and there are no facts in the case which create an estoppel.—*Switzer v. Hauk*, 89 Ind. 73.

[f] (Sup. 1883)

Rev. St. 1881, § 2500, provides that when an estate in lands is conveyed to a person and his intended wife, or to such intended wife alone, or to any person in trust for her, for the purpose of creating a jointure for the intended wife, or when, for the same purpose, a pecuniary provision shall be made for her benefit, the same shall be a bar to the right or claim of such wife in land of her husband, provided she, at the time the jointure was created, signified in writing, indorsed on or attached to

the deed creating it, her assent to receive it in lieu of all right or claim in his lands. Section 2019 provides that conveyances of land or any interest therein shall be by deed in writing, except leases for a term not exceeding three years. *Held*, that a written antenuptial agreement which amounts to a deed creating a jointure, within the meaning of section 2500, made in good faith on a valuable consideration, cannot be rescinded by parol after the marriage.—*Craig v. Craig*, 90 Ind. 215.

- [g] (Sup. 1884)

In an action on a note and mortgage, the answer alleged that while the payee was still the holder of the note and mortgage a suit was brought on one of the notes executed and secured by the mortgage and assigned to K., and that a decree of foreclosure was rendered and a sale made, and that, after the sale, the payee agreed verbally that, if there was no redemption, he would treat the property and money previously paid to him as a full satisfaction of his claim and would release the makers from liability on any of the notes. *Held*, that the contract was not within the statute of frauds.—*Shade v. Creviston*, 93 Ind. 591.

[h] (Sup. 1884)

The agreement of a purchaser at an executor's or administrator's sale to pay the liens against the property is enforceable, though not in writing.—*State ex rel. Sparrow v. Kelso*, 94 Ind. 587.

[i] (App. 1896)

In an action against an assignee of a natural gas and oil lease, it is not necessary for the lessor to plead an assumption of the lease by the assignee, nor is such transaction within the statute of frauds.—*Edmonds v. Mounsey*, 44 N. E. 196, 15 Ind. App. 399.

[j] (App. 1906)

The written lease of an incorporeal hereditament can only be surrendered by a written instrument.—*Heller v. Dailey*, 34 Ind. App. 424, 70 N. E. 821.

A parol agreement between a lessor and lessee to substitute an assignee of the lessee and to bind the assignee to the terms of the lease and relieve the lessee is void as against the statute of frauds; it being for an interest in land and not for three years or less.—*Id.*

[k] (App. 1906)

Where an oil and gas lease granted and guarantied to the lessee and his assigns all the oil and gas underlying 20 acres of land, such lease constituted a conveyance of real estate, so that the lessee's liability could only be released by a writing duly acknowledged, as required by Burns' Ann. St. 1901, § 3335, and not by parol.—*Ramage v. Wilson*, 77 N. E. 368, 37 Ind. App. 532.

[l] (Sup. 1907)

Where the original transaction between the mortgagor and the mortgagee was not in the

form of a mortgage, but an absolute deed with a collateral written agreement to reconvey upon the payment of the money at a specified time, the equity of redemption may be released by parol or extinguished by such transaction between the parties as would render it inequitable that the mortgagor should be permitted to redeem, notwithstanding the statute of frauds.—*Ferguson v. Boyd*, 169 Ind. 537, 81 N. E. 71, 82 N. E. 1064.

The surrender of the equity of redemption of a grantor in a deed absolute on its face but accompanied by a written contract to reconvey on payment of money loaned is not within the statute of frauds; a conveyance or foreclosure being unnecessary to extinguish the grantor's title.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 83, 97-104.

See, also, note, 3 L. R. A. (N. S.) 147.

§ 65. — Redelivery, destruction, or alteration of deed.

[a] (Sup. 1855)

The statute of frauds will not permit a grantee of lands, who has voluntarily and without fraud or mistake destroyed the instrument of conveyance, to resort to parol evidence of the contents of the instrument destroyed in support of his title.—*Speer v. Speer*, 7 Ind. 178, 63 Am. Dec. 418.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, § 106.

See, also, 20 Cyc. p. 223.

§ 68. — Partition.

Parol partition in general, see PARTITION, § 5.

[a] (Sup. 1885)

The purpose of a testator, as expressed in his will, was to make provision for his widow for her lifetime, and then to secure an equal division of the property among his sons at her death. The widow surrendered her right to the personal estate to the sons under an oral agreement that the same should be treated as an advancement, and the shares equalized in the final partition of the real estate. The agreement was so far executed as that the mother had surrendered and the sons received the personal property in accordance therewith. *Held*, in an action to review the judgment of partition by the assignee of one of the sons, that the purpose of the testator had been substantially accomplished by such agreement and proceedings, and that the assignee could not, after the agreement had been so far executed, invoke the statute of frauds to defeat the partition.—*Foltz v. Wert*, 103 Ind. 404, 2 N. E. 930.

[b] (Sup. 1889)

A parol agreement for exchange of parts of lots, in performance of which the parties have taken possession, agreed upon dividing lines, and erected a division fence, and one

party has made street improvements in front of the land received by him in exchange, is a valid parol partition, and not within the statute of frauds.—*Tate v. Foshee*, 117 Ind. 322, 20 N. E. 241.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 109, 110.

See, also, 20 Cyc. pp. 224, 225.

**§ 69. — Exchange.**

See post, § 74.

**[a] (App. 1903)**

*Burns' Rev. St. 1901, § 6629*, prohibiting the enforcement of parol contracts for the sale of real estate, applies with equal force to contracts for the exchange of real estate.—*McCoy v. McCoy*, 69 N. E. 193, 32 Ind. App. 38, 102 Am. St. Rep. 223.

**[b] (App. 1909)**

An agreement between the widow and children of an intestate, by which the widow was to take all of the real estate of decedent and use it for her benefit during her life, and the children were to have it share and share alike, at the death of the widow, was not an agreement for a partition by the apportionment to the owners of their shares in realty, but was an agreement for the exchange of interests in land, within the statute.—*Garrick v. Garrick*, 43 Ind. App. 585, 87 N. E. 696, 88 N. E. 104.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 83, 111.

See, also, 20 Cyc. p. 225.

**§ 70. — Establishment of boundary.**

Location of boundaries of leased land and possession thereof as part performance, see post, § 129.

**[a] (Sup. 1860)**

Where adjoining landed proprietors agree by parol, upon a valuable consideration, on a boundary between them different from the true boundary, and the agreement is so far performed as to be taken out of the statute of frauds, it is valid, and may be enforced in a court of equity.—*Meyers v. Johnson*, 15 Ind. 261.

**[b] (App. 1909)**

An oral agreement between adjoining land-owners as to the boundary line, in effect a transfer of land from one party to the other, is within the statute (*Burns' Ann. St. 1908, § 7462*).—*Fuelling v. Fuesse*, 43 Ind. App. 441, 87 N. E. 700.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. FRDS., ST. OF, § 112.

**§ 71. Contracts for sale.**

See ante, §§ 63, 65, 68-70.

Agreement relating to purchase or sale of land, see ante, § 56.

Agreements for modification, see post, § 131.

Agreements not to be performed within one year, see ante, § 54.

Burden of proof to show part performance, see post, § 158.

Contracts completely performed, see post, § 139.

Contracts implied by law on part performance, see post, § 138.

Contracts performed only as to part not within statutes, see post, § 137.

Effect of readiness and willingness to perform, see post, § 132.

Interest created by contract of sale, see ante, § 63.

Issues, proof, and variance, see post, § 156.

Necessity of pleading part performance, see post, § 149.

Necessity of pleading promise in writing, see post, § 148.

Necessity of pleading statute as defense, see post, § 151.

Necessity of pleading writing or other compliance with statute, see post, § 148.

Part performance, see post, §§ 129, 133.

Persons to whom statute is available, see post, § 143.

Requisites and sufficiency of memorandum, see post, §§ 103, 105-118.

Validity and enforcement of contract in general, see post, § 125.

Waiver of bar of statute, see post, § 144.

[a] A parol promise to convey land is void by the statute of frauds.—(Sup. 1839) *McClure v. McCormick*, 5 Blackf. 129; (1867) *Thompson v. Elliott*, 28 Ind. 55.

[b] The statute of frauds will apply to a verbal contract for the sale of land, unless there is part performance or some other matter to prevent.—(Sup. 1851) *Lester v. Bartlett*, 2 Ind. 628; (1862) *Junction R. Co. v. Harpold*, 19 Ind. 347.

**[c] (App. 1892)**

A complaint which counted on a parol contract by which, in consideration of care and support by plaintiff during life, a decedent agreed to convey a certain amount of land of a specified value, is bad on demurrer; such contract being within Rev. St. 1881, § 4904, requiring all contracts for the sale of land to be in writing.—*Hershman v. Pascal*, 4 Ind. App. 330, 30 N. E. 932.

**[d] (App. 1902)**

An oral agreement to purchase land is void, as within the statute of frauds.—*Crafton v. Carmichael*, 29 Ind. App. 320, 64 N. E. 627.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 83, 113-139.

See, also, 20 Cyc. pp. 226-238.

**§ 72. — Nature of property.**

Crops to be grown, see post, § 83.

[a] Growing crops, raised annually by labor, are the subject of sale as personal property before maturity; and such sale does not necessarily involve an interest in the realty, requiring a written agreement.—(Sup. 1848) *Northern v. State ex rel. Lathrop*, 1 Ind. 113, Smith, 71; (1853) *Bricker v. Hughes*, 4 Ind. 146; (1858) *Sherry v. Picken*, 10 Ind. 375.

[b] (Sup. 1874)

A parol agreement for the sale of standing trees passes no title to, nor vests any right in, the vendee, if the vendor, before such trees are severed, revokes the license which the agreement creates to enter and remove the trees.—*Owens v. Lewis*, 46 Ind. 488, 15 Am. Rep. 295.

[c] A contract conveying standing timber is a contract concerning realty, which must be in writing.—(Sup. 1874) *Owens v. Lewis*, 46 Ind. 488, 15 Am. Rep. 295; (1882) *Cool v. Peters Box & Lumber Co.*, 87 Ind. 531; (1889) *Hosstetter v. Auman*, 20 N. E. 506, 119 Ind. 7.

[d] (Sup. 1881)

A tree growing permanently on land constitutes a part thereof, and a parol contract for the sale of such tree passes no title to it which can be enforced. Such a contract may amount to a license to enter upon the land and cut down and remove the tree; but the license thereby granted is one which may be revoked at any time before the tree is cut down.—*Armstrong v. Lawson*, 73 Ind. 498.

[e] (Sup. 1884)

A parol sale of a building not permanently annexed to the land, with right of removal, is not within the statute of frauds.—*Rogers v. Cox*, 96 Ind. 157, 49 Am. Rep. 152.

#### FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 116-118, 146.

See, also, 20 Cyc. pp. 228-230; notes, 19 L. R. A. 721, 23 L. R. A. 449; note, 86 Am. Dec. 182; note, 17 Am. Rep. 595.

### § 73. — Interest in or concerning property.

[a] (App. 1900)

A certificate of sale of real estate on foreclosure represents an interest in land, and a contract to transfer it is within the statute of frauds, and must be in writing.—*Cox v. Roberts*, 57 N. E. 937, 25 Ind. App. 252.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 119-121.

See, also, 20 Cyc. p. 230.

### § 74. — Nature of contract in general.

See, ante, §§ 56, 63, 65, 68-70.

[a] (Sup. 1866)

Certain real estate belonging to A. was sold at a sheriff's sale, on a judgment of foreclosure against A. and wife. B. and C. pur-

chased the land at the sale, and received a certificate of sale from the sheriff. About the time of the sale A. entered the military service of the United States, and while he was absent in such service D. purchased the land from B. and C., on a parol agreement to pay the sum of \$400 to them, take their assignment of the certificate of sale, sell the land, and out of the proceeds of the sale to retain a debt of about \$40 due him from A., and to pay the balance to the wife of A. B. and C. assigned the certificate to D. in consideration of his said undertaking, and he procured a sheriff's deed for the land, and afterwards sold it for \$2,800, and failed and refused to pay any portion of it to A.'s wife. Held, that the promise of D. to B. and C. in favor of the wife of A. was not within the statute of frauds.—*Gwaltney v. Wheeler*, 26 Ind. 415.

[b] (Sup. 1867)

Defendant sold to plaintiff a parcel of land, the purchase price being payable in four annual installments and secured by mortgage on the land. Plaintiff was unable to pay the first installment when it became due, and reconveyed the land to defendant, upon a parol agreement that defendant would hold such land for plaintiff until a certain day, and, if the first installment was then paid, he would reconvey the land to plaintiff upon the terms of the first contract. Held, that the agreement for a resale was void, under the statute of frauds, not being in writing.—*Thompson v. Elliott*, 28 Ind. 55.

[c] (Sup. 1871)

A husband cannot maintain an action upon a verbal contract to convey land as compensation for services rendered by his wife, in supporting and caring for the owner for the value of the land upon failure to convey.—*Baxter v. Kitch*, 37 Ind. 554.

[d] (Sup. 1873)

An action to recover from defendant money received by him on a sale of plaintiff's land, in which he acted as plaintiff's agent, is not an action on a sale of land, and the complaint therein need not allege writing.—*Ferguson v. Ramsey*, 41 Ind. 511.

[e] (Sup. 1873)

A parol agreement between A. and B., by the terms of which B. is to exchange certain land owned by him for certain other land owned by C., and convey the latter to Z. for a stipulated price, is within the statute of frauds.—*Sands v. Thompson*, 43 Ind. 18.

[f] (Sup. 1876)

Plaintiff informed defendant that, in order to procure means to purchase certain land of defendant, he would be compelled to dispose of his own at a certain sacrifice. Defendant verbally agreed with plaintiff that, if the latter would so dispose of his land and apply the proceeds to purchasing defendant's, he, on a certain day, for a fixed price, would sell and con-

vey his land to plaintiff. *Held*, that B.'s agreement to convey was within the statute of frauds, and that an action could not be maintained on it for a breach.—*Parker v. Heaton*, 55 Ind. 1.

[a] (Sup. 1880)

Defendant having a decree of foreclosure against land of plaintiff, it was agreed, in order to avoid a sale under decree, that plaintiff should convey the land to defendant; that defendant should pay plaintiff a sum of money and allow him to remain in possession for a certain length of time; and, if plaintiff could within that time find a purchaser at not less than the amount of the judgment, with interest, that defendant should convey to him and pay the surplus money to plaintiff. In an action to recover the surplus money, plaintiff having conveyed to defendant, and the latter to a purchaser found by the former, *held*, that the contract was not within the statute of frauds.—*Reyman v. Mosher*, 71 Ind. 596.

[b] (Sup. 1881)

After the mortgagee purchased at a sale under his mortgage, the mortgagor not being entitled to time for redemption, it was agreed between the parties to the mortgage and a third party that the latter should redeem the property for the mortgagor; and in pursuance of the agreement he paid the mortgagee the amount due under the mortgage, and took a deed to the property, agreeing to convey to the mortgagor on payment of the amount expended by him. *Held*, that the agreement was within the statute of frauds.—*Rucker v. Steelman*, 73 Ind. 396.

[l] (Sup. 1881)

A. and B., the holders of notes secured by mortgage on a mill, agreed by parol that A. should purchase the mill at foreclosure sale and run it; that, when the earnings of the mill had been sufficient to pay A.'s note and the incidental expenses, then A. and B. should each own one undivided half of the mill, or if, before the earnings were so sufficient, B. should find a purchaser who would pay A., A. should deliver up the mill. *Held*, that this was not a contract for a future sale, void under the statute of frauds, but that it created, after A.'s purchase, a trust in A.—*Hunt v. Elliott*, 80 Ind. 245, 41 Am. Rep. 794.

[j] (Sup. 1882)

Where land was to be conveyed by absolute deed, and the grantee was to execute an agreement for a defeasance, on his receipt of the deed he can be compelled to execute the agreement; it not being within the statute of frauds.—*Chambers v. Butcher*, 82 Ind. 508.

[k] (Sup. 1883)

A parol agreement by a purchaser at a sheriff's sale to give the owner six years within which to redeem, if acted upon by the owner is upon good consideration, though nothing was

paid therefor by the owner, and is not within the statute of frauds.—*Rector v. Shirk*, 92 Ind. 31.

[i] (Sup. 1886)

An agreement made during the year for redemption from a mortgage, extending the time for redemption is not within the statute of frauds.—*Cox v. Ratcliffe*, 105 Ind. 374, 5 N. E. 5.

[m] (Sup. 1887)

A parol contract whereby in consideration of a wife's release of her inchoate interest in her husband's land by joining in a mortgage thereon, the mortgagee agrees to purchase the land at foreclosure sale and convey to her a certain part thereof, is within the statute of frauds.—*Green v. Groves*, 109 Ind. 519, 10 N. E. 401.

[n] (App. 1896)

Plaintiff purchased land for defendant, the latter furnishing part of the purchase price, and plaintiff executing a mortgage for the balance upon defendant's oral agreement to pay the same. Afterwards the land was conveyed in trust for defendant to another at defendant's request. Upon foreclosure of the mortgage, plaintiff was compelled to pay the deficiency remaining after sale of the land. *Held*, in an action to recover the amount thereof, that defendant's promise to pay the remainder of the purchase price was not an attempt to convey an interest in land by parol.—*Bedford Belt R. Co. v. Winstandley*, 44 N. E. 556, 16 Ind. App. 143.

[o] (Sup. 1897)

Where land is conveyed in consideration of an agreement to convey other real estate and the grantor is not put in possession, the agreement is within the statute of frauds, and is incapable of being enforced or of supporting an action for damages for its breach.—*Lowe v. Turpie*, 44 N. E. 25, 147 Ind. 652, 37 L. R. A. 233.

[p] (App. 1897)

A parol agreement that if defendant would indorse to plaintiff the note of an insolvent, secured by mortgage, and procure a conveyance to plaintiff of the mortgaged property, plaintiff would deliver certain property to defendant, is not an agreement to convey land, within the meaning of the statute of frauds.—*Boos v. Hinkle*, 48 N. E. 383, 18 Ind. App. 509.

[q] (App. 1909)

A parol contract to convey land in consideration of services rendered is unenforceable under the statute of frauds.—*Flowers v. Poorman*, 43 Ind. App. 528, 87 N. E. 1107.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 83, 122-131.

See, also, 20 Cyc. pp. 226-228, 231-238; note, 5 L. R. A. (N. S.) 123.

**§ 75. — Contracts to devise.**

Contracts implied by law on part performance, see post, § 138.

Contracts performed only as to part not within statutes, see post, § 137.

Effect on collateral or subsequent contracts, see post, § 128.

Requisites and sufficiency of writing, see post, § 103.

[a] (Sup. 1876)

A promise to provide by will for payment for services rendered is not within the statute of frauds.—*Lee v. Carter*, 52 Ind. 342.

[b] (Sup. 1881)

An oral agreement to devise land to one who has furnished the money for its purchase is within the statute of frauds.—*Judy v. Gilbert*, 77 Ind. 96, 40 Am. Rep. 289.

[c] (Sup. 1886)

A parol agreement to treat a girl as a child of the promisors and to will her their property, which is real and personal, in consideration of services to be performed by her, is within the statute of frauds.—*Wallace v. Long*, 105 Ind. 522, 5 N. E. 666, 55 Am. Rep. 222.

[d] (App. 1891)

An agreement whereby a niece entered the home of her uncle under promise that, if she would live with him, he would educate, clothe, and support her as his own daughter, and would make her an heir to his estate, equal to his sons, is void, as within the statute of frauds.—*Nelson v. Masterton*, 28 N. E. 731, 2 Ind. App. 524.

[e] (App. 1903)

A parol contract for services to be paid for by a testamentary bequest of the testator's entire estate is within the statute of frauds, and not enforceable.—*Alderling v. Allison*, 68 N. E. 185, 31 Ind. App. 397.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, § 132.

See, also, 20 Cyc. p. 235; note, 14 L. R. A. 800.

**§ 76. — Partnership contracts and lands.**

[a] (Sup. 1875)

A parol contract of partnership to deal in lands is not within the statute of frauds.—*Holmes v. McCray*, 51 Ind. 358, 19 Am. Rep. 735.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 135-139.

See, also, 20 Cyc. pp. 236-238; note, 4 L. R. A. (N. S.) 427.

**§ 77. — Sales by auction.**

Requisites and sufficiency of writing, see post, § 113.

Sales of personalty, see post, § 84.

Signature by auctioneer as agent, see post, § 110.

[a] (Sup. 1840)

Sales of land at auction are within the statute of frauds.—*Hunt v. Gregg*, 8 Blackf. 105.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, § 133.

See, also, 20 Cyc. p. 235.

**§ 78. — Judicial sales.**

Requisites and sufficiency of writing, see post, § 103.

[a] (Sup. 1830)

After a resale under execution the liability of the first purchaser for the difference may be established by parol evidence.—*Cowgill v. Wooden*, 2 Blackf. 332.

[b] Sheriffs' sales of real estate are within the statute of frauds.—(Sup. 1834); *Ennis v. Waller*, 3 Blackf. 472; (1846) *Chapman v. Harwood*, 8 Blackf. 82, 44 Am. Dec. 736; (1856) *Hadden v. Johnson*, 7 Ind. 394; (1874) *Ruckle v. Barbour*, 48 Ind. 274.

[c] (Sup. 1876)

Sales on execution are within the statute of frauds, and require some note or memorandum thereof to be made at the time of the sale.—*Gossard v. Ferguson*, 54 Ind. 519.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, § 134.

See, also, 20 Cyc. p. 236.

**VII. SALES OF GOODS.**

Contracts completely performed, see post, § 139.

Necessity of pleading writing or other compliance with statute, see post, § 148.

Operation and effect of statute in general, see post, § 119.

Persons to whom statute is available, see post, § 143.

Pleading as ground of defense, see post, § 147.

Requisites and sufficiency of memorandum, see post, §§ 114-116, 118.

Validity and enforcement of contract in general, see post, § 125.

What law governs, see post, § 120.

**(A) CONTRACTS WITHIN STATUTE.****§ 81. Statutory provisions.**

[a] (Sup. 1846)

In this state a contract for the sale and delivery of goods for the price of \$50 or more is within the statute of frauds, and must be in writing, unless, etc.—*Smith v. Smith*, 8 Blackf. 208.

[b] (Sup. 1878)

A contract for a sale of goods for a price of over \$50, made by an agent of one doing business in another state with a merchant in

Indiana, is void, under the statute of frauds (1 Rev. St. 1876, p. 504, § 7), where no part of the property was received by the purchaser, and no earnest was given to bind the bargain or in part payment, and no note or memorandum was made and signed by the party to be charged or his lawfully authorized agent.—*Hausman v. Nye*, 62 Ind. 485, 30 Am. Rep. 199.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, § 140.

See, also, 20 Cyc. p. 238.

#### § 82. Nature of property.

Contracts for sale of buildings not annexed to realty, see ante, § 72.

Contracts for sale of growing crops, see ante, § 72.

Contracts for sale of standing timber, see ante, § 72.

Sale of emblements and payment of earnest money, see post, § 94.

##### [a] (Sup. 1872)

1 Gav. & H. St. p. 351, providing that "no contract for the sale of any goods for the price of fifty dollars or more shall be valid, unless the purchaser shall receive part of such property or shall give something in earnest to bind the bargain or in part payment, or unless some note or memorandum in writing of the bargain be made and signed by the party to be charged," etc., does not include contracts for the sale of choses in action.—*Vawter v. Griffin*, 40 Ind. 593.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 143–146.

See, also, 20 Cyc. pp. 243–245; note, 17 Am. Rep. 595.

#### § 83. Existence and condition of goods.

##### [a] (Sup. 1856)

A. agreed to sell and deliver to B. all the broomcorn that should be raised in 1853 on 25 acres of land at the rate of \$60 a ton. *Held*, that the contract was within the statute of frauds, and void.—*Bowman v. Conn*, 8 Ind. 58.

##### [b] (App. 1904)

A contract whereby a manufacturer agrees to make and deliver, for the usual price, articles habitually made by him in the ordinary course of his business, is one for the sale of goods within the statute of frauds (*Burns' Ann. St.* 1901, § 6635).—*Yoe v. Newcomb*, 71 N. E. 256, 33 Ind. App. 615.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 147–153.

See, also, note, 14 L. R. A. 230; note, 54 Am. Rep. 164.

#### § 84. Nature of contract.

Manufacture and sale of articles, see ante, § 83.

##### [a] (Sup. 1850)

A. entered into a contract in writing to deliver to B. a certain quantity of pork at Fairhaven for certain prices, and delivered a portion of it, when a verbal agreement was made by the parties that the residue on the contract, and all A. had, be delivered at Hamilton, for a higher price, within a reasonable time. Assumpsit was brought for the failure of A. to so deliver the pork at Hamilton. There was no averment or proof of waiver by B. of his right to demand a delivery of the remainder under the written contract, or that such a waiver formed a part of the consideration of the contract on which the suit was brought, or was accepted by A. *Held*, that the contract was void under the statute of frauds, and that B. could not recover.—*Bailey v. Epperly*, 2 Ind. 85.

##### [b] (Sup. 1865)

An agreement by a buyer of chattels on which there is an unrecorded mortgage, with the mortgagee, to surrender the property to him upon his delivering to the buyer a note which he has given the seller for the purchase money, is not within the statute of frauds.—*Clark v. Duffey*, 24 Ind. 271.

##### [c] (Sup. 1872)

A sale by public auction is within the statute of frauds.—*Norris v. Blair*, 39 Ind. 90, 10 Am. Rep. 135.

##### [d] (Sup. 1874)

An agreement by one person that, if another will assist him in getting a lot of hogs to market, he shall receive as his compensation a certain share of the profits, is not within the statute of frauds.—*Kelsey v. Henry*, 48 Ind. 37.

##### [e] (Sup. 1886)

A municipal corporation may be bound by a parol contract made by its authorized officers or agents, in proper case; but a parol contract made by such corporation for the purchase of a fire engine of the value of more than \$50 is invalid, under the statute of frauds, unless it appears that there has been part payment or a delivery, or something has been given in earnest to bind the bargain, so as to bring it within one of the exceptions to the statute.—*Over v. City of Greenfield*, 107 Ind. 231, 5 N. E. 872.

##### [f] (Sup. 1888)

A piano was sold on credit, under an agreement that it might be fully tested, and, if unsatisfactory, exchanged for another. Afterwards this agreement was modified by an oral agreement to rescind the sale absolutely, and refund the purchase money already paid. *Held* that, since the contract of sale had never been completed, the agreement to rescind was not a new and independent contract, and having

been fully performed by the purchaser, was not within the statute.—*Wulschner v. Ward*, 115 Ind. 219, 17 N. E. 273.

Where an unconditional sale has been entirely consummated, so that nothing further remains to be done, a contract for its rescission stands upon the footing of a new and independent contract, and hence is not a binding contract when it falls within the statute of frauds, that is to say, when such a contract is required to be in writing and is not; but where the sale has some condition or contingent agreement connected with it, or some material thing remains to be done before the transaction is complete, an oral agreement for its rescission is binding, provided the agreement is clear and distinct, and provided, further, that the party seeking a rescission promptly complies with the agreement on his part.—*Id.*

[g] (App. 1899)

A complaint in a suit brought to recover for certain merchandise alleged to have been sold by plaintiff to defendants at a price exceeding \$50, based upon a written proposal executed by defendants to a third person, is bad, such proposal or contract of sale being within the statute of frauds (*Burns' Rev. St. 1894, § 6630*), providing that no contract for the sale of goods for the price of \$50 or more shall be valid unless the purchaser shall receive part of such property or shall give something in earnest to bind the bargain or in part payment, or unless some note or memorandum in writing of the bargain be made and signed by the party to be charged thereby or by some person thereunto by him lawfully authorized.—*Sprinkle v. Trulove*, 54 N. E. 461, 22 Ind. App. 577.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 154-161.

See, also, 20 Cyc. pp. 240, 241; note, 14 L. R. A. 230.

§ 85. Nature and amount of price.

See ante, § 81.

[a] (Sup. 1853)

A parol contract for the sale of a colt for less than \$50 is valid, without writing, delivery, or earnest.—*Henline v. Hall*, 4 Ind. 189.

[b] (Sup. 1856)

A verbal contract to sell and deliver all the broom corn raised in a certain season on 25 acres of land at \$60 a ton, delivery to be made at the rate of one ton every two weeks, is within the statute as to the value of the goods.—*Bowman v. Conn*, 8 Ind. 58.

[c] (Sup. 1881)

A verbal agreement to purchase all the mules which may be bred from a certain jack during a certain season at \$46 each is within the statute, and cannot be enforced, unless the amount claimed is shown to be less than \$50.—*Carpenter v. Galloway*, 73 Ind. 418.

[d] (Sup. 1885)

*Rev. St. 1881, § 4910*, declaring contracts involving \$50 or more to be void in certain cases, has reference to the sale of goods the price of which amounts to \$50 or more.—*Hinkle v. Fisher*, 3 N. E. 624, 104 Ind. 84.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, § 141.

See, also, 20 Cyc. p. 238.

(B) ACCEPTANCE OF PART OF GOODS.

§ 89. Acceptance in general.

[a] (App. 1908)

Where the buyer of goods canceled the order before shipment, and refused them on shipment, and notified the seller that the goods were in the freighthouse at his risk, and awaiting his order, there was no acceptance within section 7 of the statute of frauds (*Burns' Ann. St. 1908, § 7469*) invalidating contracts for the sale of goods for the price of \$50 or more, unless the purchaser shall accept and receive a part thereof.—*Porter v. Patterson*, 42 Ind. App. 404, 85 N. E. 797.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 165-173.

See, also, 20 Cyc. pp. 247-249; note, 70 L. R. A. 321.

§ 90. Delivery and receipt.

Necessity of pleading delivery or receipt, see post, § 148.

[a] (Sup. 1850)

The statute of frauds does not require a delivery of goods sold where the contract is in writing, or where the purchase money, or part of it, is paid.—*Pierce v. Gibson*, 2 Ind. 408.

[b] (Sup. 1860)

It seems that a contract to buy, cut, and carry away, at the purchaser's convenience, standing timber, amounts to a completed sale when the trees are cut and marked.—*Wright v. Schneider*, 14 Ind. 527.

[c] (Sup. 1871)

Where one who has ordered a tombstone by parol approves the work and materials, and has it placed in his possession, there is sufficient evidence of delivery and acceptance to take the case out of the statute of frauds.—*Barkalow v. Pfeiffer*, 38 Ind. 214.

[d] (Sup. 1878)

Evidence of a delivery to a carrier, without the knowledge of the buyer, of part of a lot of goods sold merely verbally, the whole lot being for the price of \$50 or more, does not show a delivery or acceptance within 1 *Rev. St. p. 504, § 7*.—*Hausman v. Nye*, 62 Ind. 485, 30 Am. Rep. 199; *Keiwert v. Meyer*, 62 Ind. 587, 30 Am. Rep. 206.

[e] (Sup. 1878)

In a suit in Indiana by a resident of Wisconsin for liquors sold and delivered to a resident of Iowa, pursuant to a verbal order given in Iowa, the answer in which avers that the sale was made in violation of the Iowa statute prohibiting sales of such liquors, and making a copy of the statute a part of the answer, a reply that plaintiff had avoided the effect of such statute and also of the Iowa statute of frauds by delivering the liquors in Wisconsin for transportation to a railroad company designated by the parties at the time of the contract of sale, is insufficient.—*Keiwert v. Meyer*, 62 Ind. 557, 30 Am. Rep. 206.

[f] (Sup. 1884)

Where an agent of the seller was invoicing certain goods, and the purchaser said he thought he would take them at a certain amount, to which the seller, who was standing by, assented, *held*, that there was no delivery under the statute of frauds.—*Dehority v. Paxson*, 97 Ind. 253.

[g] (Sup. 1890)

The owner of certain mares, by an oral agreement, sold a half interest therein to defendant, payment to be made on or before four years. It was further agreed that defendant should have possession and care of all the mares from the time of the agreement; that they should be kept for four years, for breeding purposes only, at the joint expense of the parties, and should not be worked or sold within that time except by consent. At the end of the four years their interests were to be equal. *Held*, that the sale and delivery of the mares was not within the statute of frauds, as it was fully executed by the vendor.—*Lowman v. Sheets*, 124 Ind. 416, 24 N. E. 351, 7 L. R. A. 784.

A parol contract for the sale of a one-half interest in personal property for an agreed price, the possession of which is delivered to the buyer, is not within the statute of frauds.—*Id.*

[h] (App. 1885)

Where one orally contracting to buy goods, on being told by the seller to take them, directs a third person to do so, the latter, upon doing so, is not liable for their value to the seller, his receipt of the goods having the effect of taking the contract of sale out of the statute of frauds.—*Moore v. Hays*, 12 Ind. App. 476, 40 N. E. 639.

[i] (App. 1896)

Where plaintiff contracted with defendant for the purchase of a car load of wheat, and defendant, stating that he had a car of wheat at a railroad station several miles distant, agreed to have the same shipped at once to plaintiff, and to send him the bill of lading, the agreement to ship, being executory, did not constitute delivery, within the statute of frauds.—*Galbraith v. Holmes*, 15 Ind. App. 34, 43 N. E. 575.

[j] (App. 1899)

Averments to the effect that purchasers of a machine inspected it upon arrival, and said they would accept it if the seller would procure a new axle for the truck, which he did, and that thereupon they assisted in setting up the machine, but refused to accept it when the seller turned it over to them, do not show such a receipt and acceptance as will take a contract, void under the statute of frauds, out of the statute.—*Sprinkle v. Trulove*, 54 N. E. 461, 22 Ind. App. 577.

[k] (App. 1903)

The statute of frauds (Burns' Rev. St. 1901, § 6635) does not require a delivery of goods when the contract of sale is in writing.—*Warner v. Warner*, 66 N. E. 760, 30 Ind. App. 578.

## FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Frds., St. of, §§ 162, 170, 171, 174-179.

See, also, 20 Cyc. pp. 249-251.

## (C) GIVING EARNEST OR PART PAYMENT.

Necessity of pleading earnest or part payment, see post, § 148.

## § 94. Earnest.

[a] (Sup. 1858)

Emblements are personal property, and may be sold by parol contract; earnest being paid where the price reaches an amount within the statute of frauds.—*Sherry v. Picken*, 10 Ind. 375.

[b] (Sup. 1868)

The parties to a contract for the sale of goods to be delivered at a future time, the price of which was more than \$50, each delivered to the agent of both a check payable to said agent as a forfeiture, the money, on failure of either party, to be paid over by the agent to the other. *Held*, that nothing was given in earnest to bind the bargain, or in part payment for the goods.—*Noakes v. Morey*, 30 Ind. 103.

[c] (Sup. 1885)

A contract for the purchase of a certain number of bushels of corn at a certain price, payable on delivery, the purchaser, as part of the consideration, to furnish bags in which to put the corn, when shelled, which he does to the value of \$100, is within the statute. The delivery of the bags is neither earnest nor part payment.—*Hudnut v. Weir*, 100 Ind. 501.

[d] (Sup. 1888)

A complaint by the seller against the purchaser, for damages sustained from the refusal to accept corn sold and delivered, alleging that, as part of the consideration and price, defendant agreed to and did furnish plaintiff with the use of sacks to deliver the corn, that the use of the sacks was part payment for the corn,

and was worth a named sum, and that without such use the price of the corn would have been more, states a contract not within the statute, as the use of the sacks, if so agreed, was a sufficient payment or earnest to bind the bargain.—*Weir v. Hudnut*, 115 Ind. 525, 18 N. E. 24.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. FRDS., ST. OF, § 182.

See, also, 20 Cyc. p. 251.

**§ 95. Part payment.**

[a] (Sup. 1857)

Where an agreement was entered into by A. to deliver certain merchandise, the place and time of delivery and the price fixed, and he received a part of the contract price, and agreed to be present on the following day to receive a further sum and reduce the agreement to writing but failed to be present, and refused to perform his agreement, and the other party was present and ready, it was held that such agreement was a completed one, without being reduced to writing, and the part payment took the case out of the statute of frauds.—*White v. Allen*, 9 Ind. 561.

[b] (Sup. 1879)

In an action upon a parol contract for the sale of hogs at a price of over \$50, the giving of a note, not governed by the law merchant, for a part of the purchase money, did not take the case out of the statute of frauds (1 Rev. St. 1876, p. 504, § 7).—*Krohn v. Bantz*, 68 Ind. 277.

[c] (Sup. 1883)

An oral agreement to exchange a colt for a mare, accompanied by a delivery of the colt, to become the recipient's property on the approval of a third person, is not within the statute of frauds.—*Kuhns v. Gates*, 92 Ind. 66.

[d] (App. 1896)

Where plaintiff orally contracted to buy a car load of wheat from defendant, and agreed, as payment, to credit an account due from defendant, and to send him goods to make up the balance, the agreement as to credit to be allowed on defendant's account was not such a partial payment as would take the transaction out of the statute of frauds, there being no receipt or actual credit given at the time.—*Galbraith v. Holmes*, 15 Ind. App. 34, 43 N. E. 575.

[e] (App. 1908)

An acceptance of lumber by a buyer pursuant to a parol contract of purchase and a payment thereon amount to such performance of the contract as will take it out of the statute of frauds.—*Fletcher v. Southern*, 41 Ind. App. 550, 84 N. E. 526.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 183-185.

See, also, 20 Cyc. p. 252.

**VIII. REQUISITES AND SUFFICIENCY OF WRITING.**

Parol evidence to aid memoranda, see post, § 158.

Pleading writing or other compliance with statute, see post, § 148.

Sufficiency of memorandum to authorize specific performance, see SPECIFIC PERFORMANCE, § 39.

**§ 98. Creation or conveyance of estates or interests in real property.**

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 188-191.

See, also, 20 Cyc. pp. 252-264, 268-278.

**§ 99. — Nature and form of instrument.**

[a] (Sup. 1881)

The conditions on which a deed is placed in the hands of a depository as an escrow may be proved by parol.—*Freeland v. Charnley*, 80 Ind. 132.

[b] Contracts which are required to be in writing must be wholly in writing.—(Sup. 1881) *Pulse v. Miller*, 81 Ind. 190; (1895) *Carskadon v. City of South Bend*, 39 N. E. 667, 41 N. E. 1, 141 Ind. 596.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. FRDS., ST. OF, § 188.

See, also, 20 Cyc. pp. 253-257.

**§ 100. — Contents of instrument.**

[a] (Sup. 1856)

A lease which does not ascertain the demised premises is insufficient to take the contract out of the statute of frauds.—*Dingman v. Kelly*, 7 Ind. 717.

[b] (Sup. 1867)

The description of the premises demised, in a lease required by the statute to be in writing, cannot be supplied by parol evidence; but an ambiguity may be explained, and the premises identified.—*Guy v. Barnes*, 29 Ind. 103.

[c] (App. 1906)

A contract between plaintiffs and defendant for the purchase of land, they to furnish the purchase money and take title in certain proportions, is in writing, within the statute of frauds, though when it came to taking deed title was taken in defendant's name under a parol agreement that he should hold it as security for the part of their purchase money which he loaned to them.—*Holliday v. Perry*, 38 Ind. App. 588, 78 N. E. 877.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. FRDS., ST. OF, § 189.

See, also, 20 Cyc. pp. 268-270.

**§ 102. — Signature by agent.**

[a] (App. 1906)

Where a lessee under an oil and gas lease had a vested interest in the land for the purposes authorized by the lease, which contained no provision specifying the manner of its termination or cancellation in whole or in part, a release of the lease purporting to be the act of an agent of the owner thereof was ineffective unless the agent had written authority to execute the same, under Burns' Ann. St. 1901, §§ 3336, 3337, providing that no conveyance of lands by attorney shall be good unless the attorney shall have been empowered by an instrument in writing, subscribed, sealed, and acknowledged by his principal in like manner as a conveyance is required to be, and duly recorded, etc.—Ramage v. Wilson, 77 N. E. 368, 37 Ind. App. 532.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. FRDS., ST. OF, § 191.

See, also, 20 Cyc. pp. 275-277.

**§ 103. Nature and form of memorandum in general.**

Letters in connection with other writings, see post, § 109.

[a] (Sup. 1841)

A receipt for the purchase money of real estate may constitute a sufficient agreement under the statute of frauds, provided it show on its face, or by reference to some other instrument, every material part of a valid contract on the subject, but not otherwise.—Barickman v. Kuykendall, 6 Blackf. 21.

[b] (Sup. 1846)

Sales of land on execution are also within the statute of frauds, and the sheriff's return of the execution, stating fully the terms of the contract, if made immediately on striking off the property, will bind the purchaser under the statute; but a return subsequently made will not have that effect.—Hunt v. Gregg, 8 Blackf. 105.

[c] (Sup. 1876)

The testimony of a sheriff that his return on an execution was made "immediately after" the sale thereunder does not render such return sufficient to take the sale out of the statute of frauds.—Gossard v. Ferguson, 54 Ind. 519.

[d] (Sup. 1879)

A memorandum written on a bill head of defendant, and, by an averred mistake, omitting the word "sold" before his name, and set up in his answer and offer of set-off, denying delivery, etc., is not a "note or memorandum in writing of the bargain," within the statute of frauds (1 Rev. St. p. 504, § 7).—Lee v. Hills, 66 Ind. 474.

[e] (Sup. 1881)

The sheriff's return of a sale of land under a mortgage foreclosure, bearing date of the

day of the sale, is sufficient memorandum in writing to take the sale out of the statute of frauds.—Jones v. Kokomo Bldg. Ass'n, 77 Ind. 340.

[f] (Sup. 1885)

Under a special finding that a sheriff made a certificate at a sale on execution, it will be presumed to have been a sufficient memorandum within the statute of frauds.—Elston v. Castor, 101 Ind. 426, 51 Am. Rep. 754.

[g] (Sup. 1888)

A contract to dispose of property by will is sufficient, under the statute of frauds, when it can be extracted from letters written by the parties in the course of the negotiations.—Roehl v. Haumesser, 114 Ind. 311, 15 N. E. 345.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 192-208.

See, also, 20 Cyc. pp. 252-257; note, 50 L. R. A. 240; note, 7 Am. Dec. 288.

**§ 105. Contents of memorandum.****FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 210-241.

See, also, 20 Cyc. pp. 258-270; note, 22 L. R. A. 426.

**§ 106. — In general.**

[a] (Sup. 1855)

A complaint against E.'s executor alleged that E., in his lifetime, in consideration of the rescinding a sale of certain real estate sold by him to B., C., and D., was indebted to them, severally, to A. \$200, B. \$200, and C. \$100, according to the effect of a certain writing, as follows: "E. agrees to pay what he thinks right in case of a quit-off, to B. and C. \$200 each, and to D. \$100," etc., and that the sums were due and unpaid. The writing was not signed, but the plaintiffs showed that it was in E.'s handwriting, and offered to show by a witness that testator had said in conversation that he owed B., C., and D., \$500. Held, that the evidence was insufficient to prove a rescission of the sale, so as to render the unsigned agreement binding on the decedent.—Coburn v. Hall, 7 Ind. 291.

[b] (Sup. 1868)

The following was held not to be a sufficient memorandum of sale of lands to take the case out of the statute of frauds, because it contained no promise to convey: "Received of L. Underwood \$300 cash, on payment on house."—Patterson v. Underwood, 29 Ind. 607.

[c] (Sup. 1881)

Where A. orally guarantied the debt of another, and subsequently wrote to the party creditor, "Give John a little more time, and I will see that you get your money," the writing was sufficient, within the statute of frauds, to render

A. liable as guarantor.—*Wills v. Ross*, 77 Ind. 1, 40 Am. Rep. 279.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 193, 210, 211.

See, also, 20 Cyc. p. 258.

### § 108. — Statement of consideration.

[a] (Sup. 1844)

The presence of a seal is sufficient recital of consideration to satisfy the statute of frauds.—*Gregory v. Logan*, 7 Blackf. 112.

[b] (Sup. 1867)

The statute of frauds does not require that a written undertaking to pay the debt of another should state the consideration of the promise.—*Hiatt v. Hiatt*, 28 Ind. 53.

[c] (Sup. 1906)

A complaint for damages for breach of contract to convey land alleged a contract by which plaintiff offered to exchange his stock of groceries, etc., to be invoiced at cost price for land owned by defendant, but the contract concluded, "I am to pay for said farm \$50 per acre in merchandise and fixtures. When merchandise has been invoiced at cost, I am to deduct therefrom the sum of \$246, and the remainder is the amount that I am to receive for said stock." *Held*, that it appeared from the contract that the parties expected that the value of the merchandise as fixed by invoice less \$246 would equal or exceed the sum at which the land was to be taken by plaintiff, and that he was to pay in cash any excess in value of the land over the merchandise, and, therefore, the contract was not indefinite and uncertain within the meaning of the statute of frauds.—*Howard v. Adkins*, 167 Ind. 184, 78 N. E. 665.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 214-221.

See, also, 20 Cyc. pp. 262-269; note, 46 C. C. A. 183; note, 60 Am. St. Rep. 432.

### § 109. — Subject-matter in general.

[a] (App. 1908)

The written memorandum necessary to take a contract out of the statute of frauds may consist of letters, and the terms of the contract, or some of them not shown by the letters, may be shown by some other writing which clearly adopts the letters, but the memorandum, whether consisting of a single writing or of different writings, must contain all the essential elements of the contract.—*Porter v. Patterson*, 42 Ind. App. 404, 85 N. E. 797.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 222-224.

See, also, 20 Cyc. p. 270.

### § 110. — Description of lands.

[a] (Sup. 1849)

A covenant to convey such land as the covenantee may select out of a certain tract is not void, under the statute of frauds, by reason of not containing a particular description of the land to be conveyed; and the selection of certain land from the tract may be proved by parol in action on the covenant.—*Carpenter v. Lockhart*, 1 Ind. 434, Smith, 326.

[b] (Sup. 1861)

A parol contract for labor, to be paid for by a conveyance of whichever of two town lots the party doing the labor shall select, is not within the statute of frauds.—*Lingle v. Clemens*, 17 Ind. 124.

[c] (Sup. 1874)

A contract to convey "six hundred and forty acres of land in Anderson county, Kansas," is too indefinite to constitute the memorandum required by the statute.—*Baldwin v. Kerlin*, 46 Ind. 426.

A contract to convey "our woolen mills, in the northwest corner of public square in the town of Franklin," is too indefinite, where the mills were not in the public square, but were across the street from it.—*Id.*

[d] (Sup. 1875)

A contract for the sale of "the one hundred and twenty acres of land in Shannon county, Missouri," does not sufficiently describe the land.—*Miller v. Campbell*, 52 Ind. 125.

[e] (Sup. 1881)

A. wrote to B., offering to buy certain land. B. accepted in writing, and sent to C. a deed of the land, to be delivered to A. upon payment of the price. The correspondence between A. and B. did not describe the land. D. with full knowledge of the above facts, procured a deed to the same land from B., and secured the destruction of the deed in C.'s hands. *Held*, that A. could not compel D. to convey to him on payment of the price.—*Freeland v. Charnley*, 80 Ind. 132.

[f] (Sup. 1881)

In order to render a contract for the conveyance of lands valid, it is not necessary that the description of the lands should be contained in one of a series of instruments; but, if taking all the instruments in the series together the description appears, it will be sufficient.—*Pulse v. Miller*, 81 Ind. 190.

In order that a contract for the sale of lands may be valid, the instrument which contains the description of the lands must be clearly referred to and identified by the contract.—*Id.*

A contract for the conveyance of lands must describe the property on which it is intended to operate, and, if there is no description of the land, the statute of frauds prohibits enforcement.—*Id.*

A written agreement providing that the parties of the first part had conveyed certain lands situated in a certain county "in part" and agreed to have the same completed within 20 days was insufficient under the statute of frauds for indefiniteness of description.—Id.

[g] (Sup. 1890)

A contract for sale of land which contains no description of the land sold is not rendered valid by having such description indorsed on the back of the contract, without any words connecting such indorsement with the contract itself.—Wilstach v. Heyd, 122 Ind. 574, 23 N. E. 963.

[h] (Sup. 1894)

A contract for the sale of lands, describing them by section, township, and range, is valid under the statute of frauds, though the names of the state and county are omitted; and parol evidence is admissible to complete the description, and identify the property.—Tewksbury v. Howard, 138 Ind. 103, 37 N. E. 355.

[i] (App. 1896)

A contract for the conveyance of lands, to be selected by vendee from certain tracts owned by vendor, is valid, though the lands to be so conveyed are not specifically described in such contract.—Lingeman v. Shirk, 15 Ind. App. 432, 43 N. E. 33.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 225-236.

See, also, 20 Cyc. p. 270.

§ 113. — Statement of terms and conditions.

[a] (Sup. 1872)

Where a sale was made at public auction upon a credit, and a note was to be given with security, waiving valuation and appraisal laws, a memorandum of the sale, made by the clerk thereof, which did not state these facts, was insufficient to avoid the effect of the statute provision.—Norris v. Blair, 39 Ind. 90, 10 Am. Rep. 135.

[b] (Sup. 1875)

A memorandum, to be sufficient within the statute of frauds, must set out the contract with such reasonable certainty that its terms may be understood from the writing itself, without recourse to parol proof. The fact that such memorandum is indorsed on the order of sale, but without any reference to it for the ascertainment of the thing sold, is no better than if indorsed on any other paper.—Ridgway v. Ingram, 50 Ind. 145, 19 Am. Rep. 706.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 230-241.

§ 114. Signature of memorandum.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 242-260.

See, also, 20 Cyc. pp. 272-277; note, 25 Am. Rep. 543.

§ 115. — In general.

[a] (Sup. 1845)

The statute of frauds does not require that an agreement for the sale of real estate should be signed by both parties. It is sufficient if it have the signature of the party sued.—Shirley v. Shirley, 7 Blackf. 452.

[b] (Sup. 1846)

It is not necessary that a contract in writing, under the statute, should be signed by both parties. If it have the signature of the party sued, it is sufficient.—Smith v. Smith, 8 Blackf. 208.

[c] (Sup. 1864)

An agent who made a purchase for his principal drew up a memorandum of the sale, writing his principal's name at the commencement. Some time after, when no one was present, he subscribed his principal's name, but immediately marked it off. *Held*, that there was no signing within the meaning of the statute of frauds; there being no proof of the principal's name being written at the commencement with the intention of signing for him.—McMillen v. Terrell, 23 Ind. 163; Same v. Smith, Id. 168.

[d] (Sup. 1864)

The law does not prescribe the particular place where the obligor's name must be placed; but, wherever placed, it must be done with the intention of executing the instrument as the obligation of the party so signing it.—McMillen v. Terrell, 23 Ind. 163.

[e] (Sup. 1872)

Plaintiff engaged by writing, signed by him alone, to furnish defendant a certain number of hogs of a certain average weight at a stipulated price per head between specified dates, acknowledging the receipt of money on the contract. *Held*, in a suit by plaintiff for the failure of defendant to receive and pay for the hogs, that the writing, not being signed by the party to be charged, was not a valid note or memorandum in writing under the statute of frauds, but, defendant having treated it as a memorandum of the contract, the writing was admissible in evidence in support of an action on a parol contract.—Newby v. Rogers, 40 Ind. 9.

By the words "the party to be charged," in the statute of frauds (1 Gav. & H. St. p. 351, § 7), the defendant in the action is to be understood.—Id.

[f] (Sup. 1874)

A memorandum of a sale of lands, made at the time of the sale in a private sale book kept by the sheriff and opposite a printed no-

tice of the sale posted therein, stating the name of the purchaser and the amount for which the land sold, but which is not signed by the sheriff or his deputy, is not a sufficient memorandum to satisfy the statute of frauds.—*Ruckle v. Barbour*, 48 Ind. 274.

[g] (Sup. 1896)

The acceptance by the grantee of a deed containing a personal agreement to be performed by him, though not connected with the land conveyed, is equivalent to his signature to the agreement, within the requirement of the statute of frauds, that such contracts shall be "signed by the party to be charged therewith."—*Thiebaud v. Union Furniture Co.*, 143 Ind. 340, 42 N. E. 741.

[h] (Sup. 1902)

Under Burns' Rev. St. 1901, § 6029, requiring a promise, contract, or agreement within the statute of frauds, or some memorandum or note therefor, to be in writing, and to be signed by the party to be charged therefor, a contract for the conveyance of land in consideration of the promisee's agreement to pay a certain amount was sufficient as to the promisors, if signed by them.—*Burke v. Mead*, 64 N. E. 880, 159 Ind. 252.

FOR CASES FROM OTHER STATES,

SEE 23 CENT DIG. Frds., St. of, §§ 242-250.

See, also, 20 Cyc. p. 272.

§ 116. — By agent.

Instrument creating or conveying interest in real property, see ante, § 102.

[a] (Sup. 1845)

At a public sale of town lots, a lot was struck off to a person for a certain sum, and a memorandum of the purchase was made at the time by the clerk of the sale in the sale book. *Held*, that the sale was valid, under the statute of frauds.—*Hart v. Woods*, 7 Blackf. 568.

[b] (Sup. 1846)

An auctioneer is the agent of the purchaser of either lands or goods at auction, to sign a contract for him as the highest bidder; and if he sign the memorandum of sale, in the name of the purchaser, immediately on receiving the bid and knocking down the hammer, this is a sufficient signing of the contract, within the statute of frauds.—*Hunt v. Gregg*, 8 Blackf. 105.

A memorandum of the sale, stating with certainty the terms and conditions of the contract, and signed by the auctioneer with his own name, is sufficient to bind both parties.—*Id.*

[c] (Sup. 1868)

A memorandum made by an agent of two parties to a contract for the purchase of corn, and signed by him in his own name, in the absence of the parties, not by their agreement,

but at his own instance, and for his own use and convenience, is not sufficient to take the case out of the statute of frauds.—*Noakes v. Morey*, 30 Ind. 103.

[d] (Sup. 1888)

In the absence of statutory prohibition, authority of an agent to sign a letter relied on to take a contract out of the statute may be proved by parol, as in any other case of agency.—*Roehl v. Haumesser*, 114 Ind. 311, 15 N. E. 345.

[e] (Sup. 1894)

An agent may make a contract, good within the statute of frauds, without disclosing his principal, and the true relation may be shown by parol.—*Tewksbury v. Howard*, 138 Ind. 103, 37 N. E. 355.

[f] (App. 1899)

An exhibit set out in a complaint as an order passed by defendant county board of commissioners, and spread on its records, which is signed "Peter Dillon, P. B.," is not, without further allegation, shown to be signed by an authorized agent of defendant, so as to satisfy the statute of frauds.—*Board of Com'rs of Clark County v. Howell*, 52 N. E. 769, 21 Ind. App. 495.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. Frds., St. of, §§ 251-260.

See, also, 20 Cyc. pp. 275-277.

§ 117. Delivery of memorandum.

[a] (Sup. 1881)

A deed duly executed by the vendors and delivered to their agent to be delivered to the vendee on payment of the price, while retained by such agent and undelivered did not constitute a sufficient writing to satisfy the statute of frauds.—*Freeland v. Charnley*, 80 Ind. 132.

[b] (Sup. 1881)

An undelivered deed is not a sufficient writing to take a case out of the statute of frauds.—*Pulse v. Miller*, 81 Ind. 190.

[c] (App. 1910)

Where the parties orally agreed to the terms of the contract for the sale of land, and the terms were afterward reduced to writing, no delivery of the writing is necessary to take the contract out of the statute of frauds and render it enforceable.—*Ames v. Ames*, 91 N. E. 509.

As the writing evidencing an oral contract for the sale of land is not the contract, but only the evidence thereof, whether it remains in the hands of one of the parties or another, it fulfills the purpose of the statute of frauds and renders the oral contract enforceable, if it is properly identified as the full expression of the contract on which the parties agree.—*Id.*

The rules governing delivery of deeds and notes do not apply to a writing evidencing an oral contract for the sale of land to take the

same out of the operation of the statute of frauds.—Id.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, § 261.

See, also, 20 Cyc. p. 277; note, 22 L. R. A. 273.

#### § 118. Separate writings.

Letters by one party, see ante, § 103.

##### [a] (Sup. 1875)

A memorandum, in order to make another writing a part thereof so as to constitute a part of the contract, must refer to such other writing, and parol proof of the connection of the papers is not admissible to establish a contract required by the statute to be in writing.—*Ridgway v. Ingram*, 50 Ind. 145, 19 Am. Rep. 706.

On an order of sale issued on a judgment and decree of foreclosure of a mortgage of real estate, an indorsement made by a sheriff as follows: "Sold to A. B., for \$2,400, October 16, 1869. [Signed] C. D., Sheriff,"—was held not a sufficient contract or memorandum of a sale made by a sheriff, within the statute of frauds.—Id.

##### [b] (Sup. 1881)

A memorandum, signed by the party or his agent, and distinctly referring to another writing, which contains the terms of the contract, is sufficient to take it out of the statute, although none of such terms may be contained in the memorandum.—*Wills v. Ross*, 77 Ind. 1, 40 Am. Rep. 279.

##### [c] (App. 1908)

The complaint alleged an oral contract made in January for the sale of goods, and that in March the buyer canceled the order by letter, and thereafter, on July 15th, the goods were shipped and invoices forwarded, which the buyer acknowledged by letter in which he referred to the prior cancellation of the order and refused to receive the goods, stating that they were at the seller's order and at his risk. Held, that the two letters of the buyer could not be coupled with the invoices acknowledged in the last letter, so as to constitute a good contract within the statute of frauds, as the first letter canceled the contract and the last letter affirmed the cancellation; and hence the complaint was materially defective.—*Porter v. Patterson*, 42 Ind. App. 404, 85 N. E. 797.

##### [d] (App. 1909)

The written memorandum of a sale of goods required by the statute of frauds (Burns' Ann. St. 1908, § 7469), may be made up of letters or telegrams, but such writings must exhibit terms upon which the parties have met; and, if anything is left for further negotiation, the statute is not satisfied.—*Jennings v. Shertz*, 89 N. E. 729.

Where a proposition is submitted by letter calling for an answer based on such propo-

posal, the answer need not necessarily repeat all the terms of the proposal to satisfy the statute of frauds (Burns' Ann. St. 1908, § 7469), but is to be read in connection with the proposal, and the whole together constitutes the contract.—Id.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 190, 262-265.

See, also, 20 Cyc. p. 278.

### IX. OPERATION AND EFFECT OF STATUTE.

Acceptance of part of goods sold within statute, see ante, §§ 87, 89.

As defense to action on account stated, see ACCOUNT STATED, § 15.

Giving earnest or part payment for goods sold, see ante, §§ 94, 95.

Marriage as execution of contract to convey in consideration of marriage, see ante, § 6.

Specific performance of oral contracts partly performed, see SPECIFIC PERFORMANCE, §§ 40-47.

#### § 119. Operation as to rights or remedies in general.

Refusal or neglect to reduce agreement to writing according to promise, see post, § 126.

##### [a] (Sup. 1864)

The true ground of relief against the statute of frauds, and the only defensible ground on which the cases can be put, is fraud; that equity will not permit a suitor to make use of a statute against frauds as a means of perpetrating frauds, because to do so would defeat the very purpose for which the statute was made.—*Eastburn v. Wheeler*, 23 Ind. 305.

##### [b] (Sup. 1865)

Statutes against frauds cannot as a general rule be pleaded to protect a fraud.—*Gray v. Stiver*, 24 Ind. 174.

##### [c] (Sup. 1877)

The statute of frauds cannot be used as a cover to protect the perpetration of a fraud.—*Tengue v. Fowler*, 56 Ind. 569.

##### [d] (Sup. 1889)

A mere neglect or refusal to convey land in accordance with a parol contract is not such a fraud as to take the case out of the statute of frauds.—*Jackson v. Myers*, 120 Ind. 504, 22 N. E. 190, 23 N. E. 86.

##### [e] (App. 1906)

Where fraud is involved in an equity case, evidence will be admitted which the statute of frauds by its terms would exclude, to prevent a misappropriation of the property.—*Holliday v. Perry*, 38 Ind. App. 588, 78 N. E. 877.

One may not avail himself of the defense of the statute of frauds to shield him in the perpetration of a fraud.—Id.

[f] (App. 1808)

An oral contract for the sale of goods being invalid under the statute of frauds, whether a provision thereof permitting the buyer to cancel in the event of purchasing elsewhere required notice of cancellation to the seller was immaterial; the entire contract being unenforceable, regardless of the oral contract and of any injustice done the seller.—*Porter v. Patterson*, 42 Ind. App. 404, 85 N. E. 797.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 113, 266, 270.

See, also, 20 Cyc. pp. 279-282; note, 2 L. R. A. (N. S.) 713; note, 40 Am. Dec. 210.

### § 120. What law governs transactions.

[a] (Sup. 1859)

Where a sale of personal property is made in another state, and suit is brought on it in this state, it will be presumed, in the absence of evidence to the contrary, that the common law prevails in that state, and that a parol sale is valid.—*Johnson v. Chambers*, 12 Ind. 102.

[b] (App. 1892)

A parol agreement, made in Illinois, to lease land situated therein for the term of a year, to begin at some definite future time, being within the Illinois statute of frauds, cannot be enforced in Indiana, although it is not repugnant to the statute of the latter state, as the law of Illinois governs.—*Cochran v. Ward*, 5 Ind. App. 89, 29 N. E. 795, 31 N. E. 581, 51 Am. St. Rep. 229.

The rule that in matters of procedure the *lex fori* governs, does not control an action brought in Indiana to enforce a parol agreement made in Illinois relating to land situated there, which agreement is within the Illinois statute of frauds, though not repugnant to that of Indiana; "procedure" in this connection applying to the nature of the action, to the rules of evidence and pleading, the order and manner of trial, etc., and not to matters of remedy which are incorporated into a contract as affecting its nature and obligatory character.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, § 268.

See, also, 20 Cyc. pp. 279, 280; notes, 19 L. R. A. 792, 64 L. R. A. 119; note, 93 Am. Dec. 776.

### § 121. Construction of statute in general.

Construction of statutes adopted from other countries, see STATUTES, § 226.

[a] (Sup. 1856)

The statute of frauds should be closely adhered to by the courts.—*Ball v. Cox*, 7 Ind. 453.

[b] (Sup. 1856)

Our statute of frauds being substantially in the language of the English statute (29 Car. II.), the court will adopt the English construction of it.—*Bowman v. Conn*, 8 Ind. 58.

[c] (Sup. 1872)

In adopting section 17 of the English statute of frauds as the statute of Indiana, the omission of the words "wares and merchandise" after the word "goods" does not change the applicability thereto of the construction given to that section in the English statute.—*Vawter v. Griffin*, 40 Ind. 593.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 140, 269.

### § 123. Operation as tenancy from year to year, month to month, or at will, of estate or interest created without writing.

Creation of leases in general, see ante, § 57.

[a] (Sup. 1881)

Where possession of land is taken under a parol contract for an indefinite time, this constitutes a tenancy from year to year, which is not within the statute of frauds.—*Swan v. Clark*, 80 Ind. 57.

[b] (Sup. 1882)

A parol lease of land for a period longer than three years is not void, but the lessee who takes possession holds as a tenant from year to year; the tenancy in all other respects being governed by the lease.—*Nash v. Berkmeir*, 83 Ind. 536.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 272-274.

See, also, 20 Cyc. p. 282.

### § 125. Validity and enforcement of contracts in general.

[a] (Sup. 1856)

A parol contract for the sale of land is voidable merely, and not void. The statute does not wholly vacate it, but merely inhibits bringing an action to enforce it. The parties may execute it if they choose, but they cannot be compelled to do it.—*Hadden v. Johnson*, 7 Ind. 394.

[b] (Sup. 1861)

If one purchase property at a sale on execution at the request of the execution debtor, under an agreement to restore it to the debtor, whereby the debtor is induced to relax his exertions to satisfy the execution, the agreement will be enforced.—*Arnold v. Cord*, 16 Ind. 177.

[c] The statute of frauds does not vacate such contracts as, though required to be in writing, yet are not so, but only inhibits all actions brought to enforce them.—(Sup. 1861) *Fowler v. Burget*, 16 Ind. 341; (1870) *Mather v. Scoles*,

35 Ind. 1; (1881) *Wills v. Ross*, 77 Ind. 1, 40 Am. Rep. 279.

[d] (Sup. 1861)

A contract by a father that his son should work for defendant until his majority, his maintenance to be provided in the term for his services, though not reduced to writing, was not void, but merely voidable.—*Fowler v. Burget*, 16 Ind. 341.

[e] (Sup. 1880)

While it is true that specific performance of a promise to execute a note and mortgage cannot be enforced, yet the injured party may bring an action for damages for breach of such a promise.—*Johnson v. Hoover*, 72 Ind. 395.

[f] (Sup. 1881)

Where a contract for the sale of goods is within the statute of frauds, the failure of the buyer to measure the goods in accordance with the terms of the agreement is not actionable negligence which will render him liable in tort to the seller for a loss of the goods while awaiting delivery.—*Pittsburgh, C. & St. L. R. Co. v. Noel*, 77 Ind. 110.

[g] (Sup. 1890)

Contracts within the statute of frauds are not void, but only voidable at the election of the party to be charged.—*Lowman v. Sheets*, 24 N. E. 351, 124 Ind. 416, 7 L. R. A. 784.

[h] (App. 1832)

Though within the statute of frauds, a parol agreement between a widow and her children, under which she is to have a life use in certain lands, is not absolutely void, and a condition therein that the widow shall maintain the improvements is binding upon her.—*Ohio & M. R. Co. v. Trapp*, 4 Ind. App. 69, 30 N. E. 812.

[i] (App. 1907)

A parol contract binding one to purchase real estate and convey the same to another is not within Burns' Ann. St. 1901, § 6629a, providing that no contract for the payment of money for finding a purchaser for the real estate of another shall be valid unless in writing, etc., but is within section 6629, rendering contracts for the sale of lands unenforceable unless in writing, and the purchaser cannot maintain an action for the difference between what the land would have cost him and what it was worth on the refusal of the vendor to convey, unless performance is shown.—*Collins v. Green*, 40 Ind. App. 630, 82 N. E. 932.

[l] (App. 1910)

An oral contract for the sale of land is not void; but, because of the statute of frauds, it is unenforceable.—*Ames v. Ames*, 91 N. E. 509.

FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 275-277½.

See, also, 20 Cyc. pp. 279-284.

## § 126. Promise to reduce agreement to writing.

[a] (Sup. 1884)

The refusal of a party to a contract to fulfill his promise to put it in writing is not such a fraud as will take the contract out of the statute of frauds.—*Caylor v. Roe*, 99 Ind. 1.

FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. FRDS., ST. OF, § 279.

See, also, 20 Cyc. p. 285.

## § 128. Effect on collateral or subsequent contracts.

[a] (Sup. 1903)

Burns' Rev. St. 1901, § 6629, cl. 4, requiring contracts for the sale of land to be in writing, does not invalidate a note given in consideration of a devise, into possession of which the devisee's heirs have come.—*Ballard v. Camplin*, 67 N. E. 505, 161 Ind. 16.

FOR CASES FROM OTHER STATES.

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 83, 278.

## § 129. Part performance in general.

Burden of proof to show part performance, see post, § 149.

Necessity of pleading part performance, see post, § 149.

Part performance of marriage contract, see ante, § 6.

Possession of tenant as creating tenancy from year to year or at will, see ante, § 123.

[a] An oral contract for the sale of lands, which contract is partly performed by a transfer of the possession of the land to the bargainee, and the erection by him of valuable improvements thereon, is taken out of the prohibition of the statute of frauds.—(Sup. 1820) *Tibbs v. Barker*, 1 Blackf. 58; (1835) *Johnston v. Glancy*, 4 Blackf. 94, 28 Am. Dec. 45; (1837) *Moreland v. Lemasters*, 4 Blackf. 383; (1887) *Burns v. Fox*, 113 Ind. 205, 14 N. E. 541; (1894) *Starkey v. Starkey*, 136 Ind. 349, 36 N. E. 287.

[aa] (Sup. 1830)

A. and B. jointly purchased a land-office certificate, which was assigned to A. alone. They agreed upon a division of the land, by which A. was to receive a few acres more than B., and was to allow a certain sum for the excess, and each entered upon and held possession of the portion allotted to him. *Held*, that the agreement between them was not within the statute of frauds.—*Green v. Vardiman*, 2 Blackf. 324.

[b] Payment of the price of land under a parol contract for its conveyance is not such a part performance as will take the contract out of the statute of frauds.—(Sup. 1835) *Johnston v. Glancy*, 4 Blackf. 94, 28 Am. Dec. 45; (1879) *Carlisle v. Brennan*, 67 Ind. 12; (1879) *Suman v. Springate*, Id. 115; (1882) *Felton v. Smith*, 84 Ind. 485.

[bb] (Sup. 1835)

Where a vendee of land under an oral contract is in possession at the time of his purchase, his continuing in possession is insufficient to take the case out of the statute.—*Johnston v. Glancy*, 4 Blackf. 94, 28 Am. Dec. 45.

[c] (Sup. 1841)

The doctrine of courts of equity that payment of part of the purchase money on a parol contract for real estate, with taking possession of the premises under the contract, is such a part performance as takes the case out of the statute of frauds, does not prevail in courts of law.—*Barickman v. Kuykendall*, 6 Blackf. 21.

[cc] (Sup. 1844)

A. purchased land, paid most of the purchase money, and took a bond for a conveyance. A. sold the land by parol, without assigning the bond, to B., who paid the purchase money and was put in possession. B. sold in the same manner to C., C. to D., D. to E. (who made valuable improvements thereon), E. to F., and F. to G. F. gave G. an order on A. for an assignment of the bond to G., which was shown to A., and he acknowledged the right of F. to control the assignment of the bond, but afterwards, on F.'s request, conveyed the bond to F. G. thereupon brought a bill in equity for an assignment of the bond, and a conveyance of the land by the obligor; and A., B., C., D., E., F., and the obligor were made parties. *Held*, that the case was not within the statute of frauds.—*Underhill v. Williams*, 7 Blackf. 125.

[d] (Sup. 1848)

A parol contract for the sale of land is void at law, notwithstanding possession taken and improvements made, and money paid on such contract may be recovered back.—*Sailors v. Gambriel*, 1 Ind. 88, 1 Smith, 82.

[dd] Possession, improvements, and payment of the purchase price by performance of services stipulated are sufficient part performance to take a parol contract to convey land out of the statute of frauds.—(Sup. 1856) *Atkinson v. Jackson*, 8 Ind. 31; (1858) *Stater v. Hill*, 10 Ind. 176; (1863) *Watson v. Mahan*, 20 Ind. 223.

[e] (Sup. 1861)

A parol contract for the sale of land is voidable, not void; and payment of the consideration may be such part performance as to take it out of the statute of frauds.—*Lingle v. Clemens*, 17 Ind. 124.

[ee] (Sup. 1864)

In a complaint to foreclose a mortgage, the answer alleged, by way of cross complaint, that after the delivery of the mortgage a third person applied to the mortgagor to purchase a certain tract of land, offering a satisfactory price, provided he would take a certain lot at \$300 in part payment, which he refused to do, and declined the offer, and that the plaintiff

thereupon agreed with the mortgagor that, if he would accept the rejected offer and take the lot at \$300, he would purchase and take a conveyance thereof from the defendant at \$300, and credit that sum upon the mortgage note, whereby the defendant was induced to sell his land at the price offered, and to take a conveyance of the lot, and he immediately tendered a conveyance thereof to the plaintiff, and asked that the credit be made upon his note, which was refused. *Held*, that the agreement was taken out of the statute of frauds by the defendant's part performance.—*Eastburn v. Wheeler*, 23 Ind. 305.

[f] (Sup. 1868)

In an action against a husband to foreclose a mortgage, the wife filed a cross-complaint, alleging that before the mortgage she had purchased the land of her husband, but he had failed to convey, of which the mortgagee had notice, and that she had ever since continued in possession with her husband, and prayed specific performance. *Held* that, as there was no change of possession and no such part performance by her payment that she could not be placed in statu quo, the sale was void under the statute of frauds.—*Cuppy v. Hixon*, 29 Ind. 522.

[ff] (Sup. 1870)

Payment of purchase price of land is not such a part performance as will take a case out of the statute of frauds.—*Mather v. Scoles*, 35 Ind. 1.

[g] (Sup. 1873)

Where a son, having a claim against his father for labor and for an interest in certain crops, released the claim, moved upon certain land belonging to his father, cultivated the same, and made visible, lasting, and valuable improvements, upon the verbal promise by his father to convey the land to him, and, after nine years' residence and labor on the land, built a dwelling house thereon, upon the receipt of a letter from his father, stating that, if he would erect a building on the land, he should be paid the value of the building and interest thereon, or a deed to the land should be made, at the option of the father, *held*, that the letter did not merge the parol promise previously made, the performance of which, by the plaintiff, took it out of the statute of frauds, and that the contract could be enforced after the death of the father, in an action against the other heirs to have the title of the son in the land declared.—*Haddon v. Haddon*, 42 Ind. 378.

[gg] (Sup. 1873)

A. and B. made a parol agreement that, if B. would exchange certain of his real estate for certain real estate owned by C., and convey the real estate procured of C. to A., the latter would pay to B. a certain price for the same. *Held*, that the exchange by B. of his property for that of C. was not a part performance of the contract between A. and B.,

so as to take the case out of the statute of frauds.—*Sands v. Thompson*, 43 Ind. 18.

[h] (Sup. 1874)

Where a mortgagor, the mortgagee, and a third person agreed by parol that an indemnifying mortgage on real estate should be changed by inserting therein a provision that such third person should also be indemnified as surety for the mortgagor, and in reliance on which agreements the third person signed the bond as surety, this was not such a part performance of the agreement as to take the case out of the statute of frauds, nor was the refusal on the part of the mortgagor such a fraud as to have that effect.—*Irwin v. Hubbard*, 49 Ind. 350. 19 Am. Rep. 679.

[hh] (Sup. 1876)

A sale of lands on execution is within the statute of frauds; and if no certificate nor deed is given to the purchaser, and no memorandum of the sale is made by the auctioneer on striking off the property, the sale cannot be enforced, even though the purchase money is paid and the sheriff makes a due return of the sale.—*Gossard v. Ferguson*, 54 Ind. 519.

[i] (Sup. 1876)

Plaintiff informed defendant that, in order to procure means to purchase certain land of defendant, he would be compelled to dispose of his own at a certain sacrifice, and defendant orally agreed with plaintiff that, if the latter would so dispose of his land and apply the proceeds to purchasing defendant's, he, on a certain day, for a fixed price, would sell and convey his land to plaintiff, who thereupon sold his land at such sacrifice. *Held*, that the disposal by plaintiff of his land was not such part performance as would take the oral agreement between the parties out of the statute of frauds.—*Parker v. Heaton*, 55 Ind. 1.

[ii] (Sup. 1877)

In an action on a note, defendant alleged that by parol contract between him and plaintiff he sold plaintiff, and agreed to convey to a third person named, certain land on condition of a full satisfaction of such note, and payment by plaintiff to defendant of a specified sum; that defendant, pursuant to such contract, delivered possession of such land, which was still retained; that waste had been committed thereon; that defendant had executed and tendered to plaintiff a deed for the land pursuant to such contract, on condition that plaintiff would comply with it on his part, which he refused to do; and that defendant was still willing to comply with such contract and execute such deed, on compliance by plaintiff. *Held*, that the answer alleged facts which showed part performance of the contract sufficient to avoid the statute of frauds.—*Melton v. Coffelt*, 59 Ind. 310.

[j] (Sup. 1877)

A contract not in writing by an owner of land, giving a party the right to set out and

grow 500 peach trees thereon, and to receive two-thirds of the product during the lifetime of the trees, is, after part performance, not void by the statute of frauds.—*Wiley v. Bradley*, 60 Ind. 62.

[jj] (Sup. 1879)

A wife, sued with her husband in an action to recover real estate, filed a cross-complaint alleging that the plaintiff knew that the property had been purchased with her money; that her husband had been indebted to plaintiff, and that she had joined him in a mortgage to plaintiff, on an agreement that if she so mortgaged, and paid plaintiff the debt out of her own property and the expenses of foreclosure, plaintiff should foreclose, buy in the property, and at once convey it to her in fee simple; that she had performed her part of the agreement, but that plaintiff refused to convey to her. *Held*, that the agreement was within the statute of frauds, and that the cross-complaint did not show such part performance as would take the case out of the statute.—*Carlisle v. Brennan*, 67 Ind. 12.

[k] (Sup. 1879)

The mere payment of the price of real estate under a parol contract for the purchase thereof will not take the case out of the statute of frauds.—*Suman v. Springate*, 67 Ind. 115.

[kk] (Sup. 1879)

A verbal agreement for the exchange of lands for other lands subject to a mortgage is taken out of the statute of frauds by part performance, where the parties exchange possession, and valuable improvements are made, and the mortgage paid off by the one receiving the lands subject thereto.—*Armstrong v. Fearnaw*, 67 Ind. 429.

[l] (Sup. 1880)

In order that taking possession of the land shall take the contract out of the statute of frauds, it must have been under or by virtue of the contract.—*Neal v. Neal*, 69 Ind. 419.

[ll] (Sup. 1880)

When the parties to contracts within the statute of frauds and the statutes concerning trusts and powers have voluntarily and fully executed their agreements, so far as they affect real estate or any interest or trust therein, there is no reason why the statutes should be interposed against the further enforcement of the contracts according to their terms.—*Tinkler v. Swaynie*, 71 Ind. 562.

[lll] (Sup. 1881)

An allegation merely that a party was in possession of land, for the purchase of which he had made an oral agreement, was not sufficient to take the contract out of the statute of frauds, since it does not show that the possession was taken under the contract.—*Rucker v. Steelman*, 73 Ind. 396.

Payment of all the purchase money does not take a contract for the sale of land out of the statute of frauds.—*Id.*

[m] Where possession is relied on to take a contract for the sale of lands out of the statute of frauds, as part performance, possession must be taken under the contract, and not otherwise.—(Sup. 1881) *Judy v. Gilbert*, 77 Ind. 96, 40 Am. Rep. 289; (1882) *Felton v. Smith*, 84 Ind. 485.

[mm] (Sup. 1881)

Where a verbal agreement for the sale of land is so far performed that the purchaser acquires a perfect title and full possession, the vendor may recover the stipulated price.—*Arnold v. Stephenson*, 79 Ind. 126.

[mmm] (Sup. 1881)

Defendant agreed by parol to sell certain land for plaintiff, and render the surplus to him after settling his own account. *Held* that, after sale by defendant, there was such part performance as to take the case out of the statute of frauds.—*Humphrey v. Fair*, 79 Ind. 410.

[mmmm] (Sup. 1882)

In ejectment, the answer alleged that defendant had been the owner in fee and continuously in possession of the land more than 40 years, when upon foreclosure of a mortgage it was sold, and a son of defendant obtained a deed; that, the son being indebted to the defendant in a specified amount for which defendant held the sons's notes, it was agreed that if defendant, who was old and infirm, would surrender to the son all the notes and discharge him from liability defendant should continue in the undisturbed possession of the premises for five years, having all the rents and profits; and that defendant surrendered the notes and continued to occupy and cultivate the land. *Held*, that the answer did not show a part performance sufficient to take the lease out of the statute of frauds.—*Railsback v. Walke*, 81 Ind. 409.

Where the tenant under a parol lease for a longer term than three years takes and holds possession for more than a year, pays the consideration, and cultivates the land, the contract will not, because of part performance, be taken out of the statute.—*Id.*

Land was sold by the sheriff under a mortgage foreclosure, and the owner, by contract with the purchaser at the foreclosure sale, retained possession under a parol lease for five years. *Held*, that his mere continuing in possession was not a sufficient performance of the contract to take it out of the statute of frauds.—*Id.*

[n] The mere continuance of a possession taken under a contract made prior to an oral contract for the sale of lands will not take the case out of the statute of frauds.—(Sup. 1882) *Felton v. Smith*, 84 Ind. 485; (1895) *Waymire v. Waymire*, 40 N. E. 523, 141 Ind. 164.

[nn] (Sup. 1882)

Part performance of a contract void within the statute of frauds will not entitle the party

to enforce the contract where such a part performance was entirely to his advantage, and he suffered no loss or inconvenience, and parted with no advantage or value in the transaction.—*Groves v. Cook*, 88 Ind. 169, 45 Am. Rep. 462.

[o] (Sup. 1883)

A parol agreement by one tenant in common with her cotenants, without consideration, that she would release and renounce her interest to them each in his respective piece, and they each accordingly made improvements, is not taken out of the statute of frauds in the absence of any other showing of part performance.—*Switzer v. Hawk*, 89 Ind. 73.

[oo] (Sup. 1884)

Where the grantee in a contract for the sale of land went into possession thereof under the contract, there was a sufficient part performance to take it out of the statute of frauds.—*Paulus v. Latta*, 93 Ind. 34.

[p] (Sup. 1884)

Possession taken under an oral contract for the sale of realty is part performance, within the meaning of the statute of frauds.—*Coe v. Johnson*, 93 Ind. 418.

[pp] (Sup. 1884)

Where a building which is not permanent and is not annexed to the freehold is sold with a right of removal, the contract, though verbal, will justify the purchaser, if he has fully complied with his contract, in entering and removing it.—*Rogers v. Cox*, 96 Ind. 157, 49 Am. Rep. 152.

[q] (Sup. 1884)

Where the plaintiff, as assignee and holder of a certificate of sale, agreed with defendants to give them time to redeem certain real estate in controversy beyond the year allowed by law for the redemption, and actually received of them a certain sum in part payment of the redemption money, such agreement was not within the statute of frauds, and if it was it could not be invoked to avoid the agreement so long as plaintiff retained in his possession the sum which had been paid him.—*McMakin v. Schenck*, 98 Ind. 264.

[qq] (Sup. 1885)

Part performance of an oral contract that cannot be performed within a year does not take it out of the statute.—*Wolke v. Fleming*, 103 Ind. 105, 2 N. E. 325, 53 Am. Rep. 495.

Where an oral contract not to be performed within a year is fully performed on one side within a year, the statute of frauds does not apply.—*Id.*

[r] (Sup. 1887)

A parol contract whereby, in consideration of a wife's release of her inchoate interest in her husband's land by joining in a mortgage thereon, the mortgagee agrees to purchase the land at foreclosure sale, and convey to her a certain part thereof, is not taken out of the

statute of frauds by the execution of the mortgage, nor by the continuance of her possession already existing before the agreement.—*Green v. Groves*, 109 Ind. 519, 10 N. E. 401.

[rr] (Sup. 1887)

A private right of way, though it is an easement and an interest in land, within the statute of frauds, may be conveyed by parol contract where immediate possession is taken under it, and it is constantly used thereafter, constituting a part performance.—*Robinson v. Thraikill*, 110 Ind. 117, 10 N. E. 647.

[s] (Sup. 1888)

Purchasing, paying for, and taking exclusive possession by one of two tenants in common of his co-tenant's interest, and making valuable improvements thereon, takes the case out of the statute, where no deed has been given, and puts a subsequent purchaser of such interest on inquiry.—*Peck v. Williams*, 113 Ind. 256, 15 N. E. 270.

[ss] (Sup. 1890)

A parol agreement to compromise a claim to land cannot be avoided, as within the statute of frauds, where, in pursuance thereof, defendant has conveyed to a trustee who has quieted title as against third persons, and executed a note and mortgage to plaintiff for his interest, and then conveyed to defendant subject to the mortgage.—*Hatfield v. Miller*, 123 Ind. 463, 24 N. E. 330.

[ss] (Sup. 1890)

The statute prohibiting the making of contracts not to be performed within one year has no application to contracts which have been fully performed by one of the parties.—*Lowman v. Sheets*, 24 N. E. 351, 124 Ind. 416, 7 L. R. A. 784.

[t] (Sup. 1890)

On the 10th of November, defendant orally agreed with plaintiff that, if the latter would move on to defendant's farm and work for him, defendant would pay him a certain sum per month, commencing on the 1st of March, then next, and to continue nine months. *Held*, in an action for damages for failure to furnish work, that the contract was within the statute of frauds, as one not to be performed within a year, and was void so far as it remained unexecuted, and that it was not rescued from the operation of the statute by the fact that plaintiff moved his family and effects on to the farm; it not appearing that plaintiff either conferred any benefit upon defendant or sustained any damage thereby.—*Shumate v. Farlow*, 125 Ind. 359, 25 N. E. 432.

[tu] (Sup. 1890)

Where the vendees were occupying the land, either as tenants or as former owners, there is no such taking of possession under the contract as will avoid the statute of frauds.—*Swales v. Jackson*, 126 Ind. 282, 26 N. E. 62.

[u] (Sup. 1891)

Where the parties themselves put a practical construction on the contract, and the premises are taken possession of and occupied under the lease by the consent of both parties, it should be sufficient to take the contract out of the operation of the statute of frauds where the only infirmity in the contract is the insufficiency of the description of the lands.—*Weaver v. Shipley*, 27 N. E. 146, 127 Ind. 526.

The agreement as to the boundaries of leased land and its occupancy for four years, with the knowledge and consent of the landlord, is an important element in the partial performance relied on to take it out of the statute of frauds.—*Id.*

The practical location of the boundaries of leased premises, coupled with the subsequent possession of the same by the tenants by and with the landlord's knowledge and consent, is a sufficient location of the property, and takes the contract out of the operation of the statute of frauds.—*Id.*

[uu] (Sup. 1892)

Where plaintiff took possession of land under contract with the owner, the taking of possession being a part of the consideration for a promised conveyance to plaintiff, the possession was a part performance which took the case out of the statute of frauds.—*Puterbaugh v. Puterbaugh*, 30 N. E. 519, 131 Ind. 288, 15 L. R. A. 341.

[v] (App. 1892)

Taking possession under a parol lease of part of the premises, and paying rent for such part, does not take the lease out of the statute of frauds, so as to give the lessee any right to the balance of the premises.—*Cochran v. Ward*, 5 Ind. App. 89, 29 N. E. 795, 31 N. E. 581, 51 Am. St. Rep. 229.

[vv] (Sup. 1894)

W., who had a contract with C. for the conveyance of land, contracted with plaintiff to convey a certain portion thereof to him. Defendant agreed verbally with W. and plaintiff that, in consideration of the land being conveyed to him, he would convey to plaintiff said portion. *Held* that, after the land was conveyed to defendant, there was such a part performance as to take his promise out of the statute of frauds.—*Boruff v. Hudson*, 138 Ind. 280, 37 N. E. 786.

[w] (Sup. 1895)

Allegations, in a complaint for the specific performance of a parol contract for the sale of lands, that the purchaser "went into possession of the same," and that he "immediately entered upon, and cleared up, and put buildings and other valuable improvements upon, said land," do not sufficiently show that he took possession under the contract, to take the case out of the statute of frauds.—*Waymire v. Waymire*, 141 Ind. 164, 40 N. E. 523.

[ww] (App. 1895)

Defendant and others, desiring to locate a factory near C., agreed with an improvement company to purchase a number of lots, at a fixed price, from lands thereafter to be acquired. The improvement company contracted with plaintiff corporation for the factory, sold it land on which to build the factory, and agreed to furnish purchasers for 150 of the lots at the prices agreed on with defendant and the other subscribers to the fund. Plaintiff platted the land, and threw it open. Defendant went on it, selected a lot by number, and took possession of it as his choice, but did not remain in possession, or exercise any ownership over it. His choice was recorded by the secretary of the subscribers' meeting, and the lot withdrawn from selection. Plaintiff did not thereafter claim possession or exercise control over the lot, was not present at the subscribers' meeting, and had no knowledge that defendant had taken possession. The contract of purchase gave defendant no right to the lot until he settled for it and received a deed. *Held*, that the possession of defendant was not a sufficient part performance to take the parol contract for the purchase of the lot out of the statute of frauds.—*Barnett v. Washington Glass Co.*, 12 Ind. App. 631, 40 N. E. 1102.

[x] (App. 1895)

Where one by rightfully going into possession of land as a purchaser has taken the contract of purchase out of the statute of frauds, equity will not permit him to be transformed into a trespasser and wrongdoer at the will of the vendor or persons claiming under him.—*Mowrey v. Davis*, 40 N. E. 1108, 12 Ind. App. 681.

A parol contract for the sale of a growing perennial crop is taken out of the statute of frauds by the purchaser's entry on the land with the owner's consent to harvest the crop.—*Id.*

[xx] (Sup. 1896)

Where a license to erect a stairway over a vacant lot, for entrance to the upper story of a building to be erected by the licensee on adjoining land, is to continue until the erection of a permanent stairway, to be constructed when the licensor builds, it is performed, so as to take it out of the statute of frauds, by the erection of a building and temporary stairway by the licensee.—*Joseph v. Wild*, 45 N. E. 467, 146 Ind. 249.

[xxx] (App. 1898)

M. and others made a parol agreement with an improvement company to purchase a certain number of lots, to be platted on certain land. The consideration was the location in the town of a certain factory. The lot which was to be conveyed to M. was to be selected in the manner agreed on by him and others, who were parties to the contract. Such company and a glass company then made a contract whereby the latter agreed to locate a factory on certain land, and lay out a part of the land into lots, and the improvement company, agreed to sell a certain number of the lots at an aver-

age price of \$200 each. The glass company performed the contract, and M. subscribed for and selected one lot, and took possession. *Held*, that the statute of frauds did not apply to an action by the glass company against M. to recover the price of such lot.—*Washington Glass Co. v. Mosbaugh*, 49 N. E. 178, 19 Ind. App. 105.

[y] (App. 1899)

Part performance of a contract that cannot be performed by either party within a year does not prevent interposition of the statute of frauds to an action to enforce or recover damages for the breach thereof.—*Board of Com'rs of Clark County v. Howell*, 52 N. E. 769, 21 Ind. App. 495.

[yy] (Sup. 1902)

Where a parent enters into an oral contract with a daughter to convey certain real estate to her if she will move on the land, improve it, and make a home thereof, and the latter, with the knowledge and encouragement of the parent, enters and continues in possession of the land for 12 years, and erects valuable improvements thereon and fully performs her part of the contract, there is sufficient performance to take the contract out of the statute of frauds.—*Horner v. McConnell*, 63 N. E. 472, 158 Ind. 280.

[yyy] (App. 1902)

Where it was agreed that plaintiff should sell his farm and purchase defendant's the proceeds of plaintiff's farm to be paid to defendant in addition to another sum, and plaintiff took possession by asserting his ownership in the presence of the defendant, and paid defendant \$50, and sold his farm, and tendered the price to defendant within the time agreed on, there was not a part performance sufficient to take the contract out of Burns' Rev. St. 1901, § 6629, providing that contracts for the sale of lands cannot be enforced unless in writing, and signed by the party to be bound.—*Riley v. Haworth*, 64 N. E. 928, 30 Ind. App. 377.

The payment of part of the price of land is not such a part performance as will remove an oral contract from the operation of Burns' Rev. St. 1901, § 6629, providing that no action shall be brought on a contract for the sale of land, unless in writing.—*Id.*

[z] (App. 1904)

A purchaser of land under a parol contract providing for the execution of a deed to the land on demand and payment of the purchase price, who entered into and continued in the possession of the land and made lasting improvements, is, on complying with the terms of the contract, entitled to a deed.—*Elsbury v. Shull*, 70 N. E. 287, 32 Ind. App. 556.

[zz] (Sup. 1905)

Where a widow took actual absolute possession of every part and interest in certain real estate under an alleged parol contract of the heirs to surrender to her their interest in

consideration of her paying the debts of the estate out of her separate property, which she did, and thereafter continued in possession undisturbed and made valuable improvements on the land, the contract was not within the statute of frauds.—*O'Brien v. Knotts*, 75 N. E. 504, 165 Ind. 308.

[122] (App. 1909)

The payment of the price of land alone is not a sufficient part performance to take the transaction out of the statute.—*Garrick v. Garrick*, 87 N. E. 696, 43 Ind. App. 585, rehearing denied 88 N. E. 104, 43 Ind. App. 585.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., St. of, §§ 287-292, 603, 306-308, 311, 314, 318-320, 322, 325, 326.

See, also, 20 Cyc. pp. 289-293; note, 3 L. R. A. (N. S.) 790; note, 53 Am. Dec. 539.

§ 130. Contracts in part within statute.

Contracts performed as to part within statutes, see post, § 133.

Contracts performed only as to part not within statute, see post, §§ 136, 137.

[a] (Sup. 1870)

An agreement in the alternative, to convey land, or, in case of failure to convey, then to pay a sum of money, is within the statute of frauds, and must be in writing. If it is not, neither branch of it can be enforced, and no action can be maintained upon it, either for damages for failure to convey or for recovery of the sum of money stipulated.—*Mather v. Scoles*, 35 Ind. 1.

[b] (Sup. 1890)

Where there are a number of contracts made at the same time and as parts of the same transaction, some of which are within the statute of frauds, and the others not, and they are of such a nature that they can reasonably be considered as separate, those which are not within the statute will be enforced, though the others may fall within the statute.—*Lowman v. Sheets*, 24 N. E. 351, 124 Ind. 416, 7 L. R. A. 784.

The owner of certain mares, by an oral agreement, sold a half interest therein to defendant, payment to be made on or before four years. It was further agreed that defendant should have possession and care of all the mares from the time of the agreement; that they should be kept for four years, for breeding purposes only, at the joint expense of the parties, and should not be worked or sold within that time except by consent. At the end of the four years, their interests were to be equal. *Held* that, though the agreement to keep the mares for breeding purposes for more than a year was within the statute, the two contracts were so far separated from and independent of each other that the refusal of the vendor to carry out the latter agreement would not deprive defendant of his rights under the

former, though this contract would not have been entered into except for the other.—*Id.*

[c] (App. 1893)

Where a guardian who has failed to account for moneys received verbally promises to hold them for the ward and pay them over, with accretions, and also to make the ward his heir, the fact that the latter promise is within the statute of frauds does not prevent enforcement of the former.—*Doan v. Dow*, 8 Ind. App. 324, 35 N. E. 709.

[d] (App. 1896)

A contract partly written and partly verbal is a parol contract, and therefore, when relating to the sale of land, unenforceable by reason of the statute of frauds.—*Lingeman v. Shirk*, 43 N. E. 33, 15 Ind. App. 432.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., St. of, §§ 280-282.

See, also, 20 Cyc. pp. 285, 286.

§ 131. Modification of contract.

Persons to whom statute is available, see post, § 143.

[a] (Sup. 1861)

A. sold to B. land, and took his notes in part payment. In consideration of a defect in title, by reason of the refusal of the grantor's wife to sign the deed, it was agreed by A. that only two of the notes should be paid. *Held*, that this agreement was valid, though not in writing.—*Friermood v. Pierce*, 17 Ind. 461.

[b] (Sup. 1881)

A written contract falling within the statute of frauds cannot be varied by any subsequent agreement of the parties, unless such new agreement is also in writing.—*Carpenter v. Galloway*, 73 Ind. 418.

[c] (Sup. 1881)

The statute of frauds has no application to a suit to correct a description in a deed, though the agreement in pursuance of which the deed was made rested in parol.—*Morrison v. Collier*, 79 Ind. 417.

[d] (Sup. 1881)

There is nothing in the statute of frauds which prevents a correction of the description of the premises in a deed or mortgage of real estate.—*Dutch v. Boyd*, 81 Ind. 146.

[e] (Sup. 1901)

Plaintiffs purchased land under a written agreement whereby they were to divide the land into town lots, the purchaser of each lot to give a mortgage to plaintiffs' vendor, and to receive a deed from him. When the total sales should equal the purchase price of the tract, a deed of the unsold lots was to be made to plaintiffs. Thereafter plaintiffs sued the vendor, alleging that an oral modification of the contract had been made, whereby the vendor should accept in part payment of the lots other

pieces of land; that the vendor had refused to accept property offered in exchange for the lots. *Held* that, the oral modification being a modification of terms of a contract required by the statute of frauds to be in writing, there could be no recovery.—*Bradley v. Harter*, 60 N. E. 139, 156 Ind. 499.

[f] (App. 1903)

A contract, which, being within the statute of frauds, has been made in compliance therewith, cannot be orally modified.—*Christian v. Highlands*, 69 N. E. 266, 32 Ind. App. 104.

[g] (App. 1906)

A complaint, showing a written contract by which defendant and plaintiffs agreed to purchase coal lands under certain conditions; that plaintiffs afterwards orally agreed that defendant should advance their share of the money, take the legal title to the land, and hold as security until payment; that plaintiffs offered to repay said sum, but defendant refused to accept or to convey their interest—counts on a contract in writing for the purchase of such land, the oral agreement as to payment being collateral.—*Holliday v. Perry*, 38 Ind. App. 588, 78 N. E. 877.

[h] (App. 1909)

Since a lease for over three years is required by *Burns' Ann. St.* 1908, § 7462, to be in writing, such a lease can be changed or modified only by a written instrument.—*Burgett v. Loeb*, 43 Ind. App. 657, 88 N. E. 346.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., St. of, §§ 283, 284.

See, also, 20 Cyc. p. 287; note, 4 L. R. A. (N. S.) 980; note, 100 Am. Dec. 169; note, 56 Am. St. Rep. 659.

**§ 132. Readiness and willingness to perform contract.**

Actual performance by tender of deed, see post, § 133.

[a] (Sup. 1881)

An allegation that, under a parol contract for the sale of land, plaintiff tendered a warranty deed and possession, does not show such part performance as will take the case out of the statute of frauds; there being no acceptance.—*Arnold v. Stephenson*, 79 Ind. 126.

[b] (Sup. 1882)

One who has paid part of the purchase money on a verbal contract for the purchase of real estate cannot, by refusing to accept a deed, recover back the money paid.—*Day v. Wilson*, 83 Ind. 463, 43 Am. Rep. 76.

[c] (Sup. 1882)

A parol contract for the sale of land is not void, but only voidable, and is sufficient consideration for a promissory note. If the vendor show himself able and willing to perform, he can recover on the note.—*Schierman v. Beckett*, 88 Ind. 52.

[d] (Sup. 1883)

Where a vendor offers to the purchaser or fully secures to him the title contracted for, he is entitled to recover the purchase money, though the contract was by parol.—*Stephenson v. Arnold*, 89 Ind. 426; *Ayers v. Slifer*, Id. 433.

[e] (App. 1898)

A vendor of land under a parol contract, who is able and willing to perform, may maintain an action for the purchase money.—*Washington Glass Co. v. Mosbaugh*, 49 N. E. 178, 19 Ind. App. 105.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., St. of, §§ 285, 286.

See, also, 20 Cyc. p. 288.

**§ 133. Contracts performed as to part within statute.**

Executed contracts, see post, § 139.

Part performance in general, see ante, § 130.

Possession under contract, see ante, § 79.

[a] (Sup. 1861)

A lease was made for a term coming within the statute of frauds, but nevertheless not put into writing. The lessee executed two notes for his rent, and, after holding possession during the full term, he refused to pay the notes, on the ground that the contract could not have been enforced had either party refused to perform his part before expiration of the term. *Held* that, after conclusion of the term and peaceful possession on his part throughout, it was too late for him to avail himself of this defense.—*Gibson v. Wilcoxon*, 16 Ind. 333.

[b] (Sup. 1862)

Where a verbal contract for the conveyance of real estate has been executed on one side by a conveyance of the property, the proper action is upon an implied promise arising from the plaintiff's performance, implied promises not being embraced by the statute of frauds; but in such case no action can be maintained on the special contract itself.—*Fisher v. Wilson*, 18 Ind. 133.

[c] In an action on a subscription, the complaint set out the contract, which was as follows: "Ten days after the completion of the I. & St. L. Railroad from I. H. county, and the running of a train of cars thereon, I promise to pay to the order of said railroad company, at the Bank of D., the sum of \$100, without any relief whatever from valuation or appraisement laws. The consideration of this note is the construction of said road as aforesaid within one-half mile of the town of D., and the promise and agreement of said company that by means of said road and its connections the company will run trains through from I. L. within two years from the 1st day of January, 1869,"—dated November 25, 1868, and signed by the defendant; and it averred performance within the time and in the manner

mentioned. *Held*, that if the contract had originally been within the statute, and therefore not binding on the plaintiff, yet after such performance by the company the maker could not defend on the ground that he alone signed the instrument.—(Sup. 1871) *Straughan v. Indianapolis & St. L. R. Co.*, 38 Ind. 185; *Curtis v. Same*, Id. 222; *Wilson v. Same*, Id. 227; *Fmmons v. Same*, Id. 247; *King v. Same*, Id. 246; *Seearce v. Same*, Id. 271; *Weaver v. Same*, Id. 277; *Nichols v. Same*, Id. 279; *Osborn v. Same*, Id. 294; *Blake v. Same*, Id. 323; *Keeney v. Same*, Id. 348; *Gregg v. Same*, Id. 372; *Hunt v. Same*, Id. 383; *Smith v. Same*, Id. 389; *Welsham v. Same*, Id.; *Nave v. Same*, Id. 443; (1872) *Newman v. Same*, 39 Ind. 153.

[d] Where a deed is executed and delivered, and possession taken thereunder, it is no defense to an action for the price that the promise to pay therefor was in parol.—(Sup. 1872) *Curran v. Curran*, 40 Ind. 473; (1878) *Huston v. Stewart*, 64 Ind. 388; (1887) *Worley v. Sipe*, 111 Ind. 238, 12 N. E. 385.

[e] (Sup. 1881)

Where a purchaser receives a sheriff's deed, and acquires full title and complete possession of land, he cannot escape liability to the vendor under a verbal contract on the ground that the statute of frauds prohibits the enforcement of such contracts for the sale of an interest in land.—*Arnold v. Stephenson*, 79 Ind. 126.

[f] (Sup. 1885)

Two out of several co-tenants orally agreed to exchange their interests in definite portions of the common estate, and made mutual deeds, each grantee taking possession of the portion conveyed to him, exclusive of his grantor, and made lasting improvements; the agreement being acquiesced in for 14 years. *Held*, that there was sufficient part performance to take the agreement out of the statute of frauds.—*Savage v. Lee*, 101 Ind. 514.

[g] (App. 1903)

*Burns' Rev. St.* 1901, § 6629, prohibiting the enforcement of parol contracts for the sale of land, does not prevent an action to enforce a vendor's lien on land conveyed pursuant to an oral contract to exchange.—*McCoy v. McCoy*, 69 N. E. 193, 32 Ind. App. 38, 102 Am. St. Rep. 221.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 293-298.

See, also, 20 Cyc. pp. 293-295.

#### §134. Contracts performed only as to part not within statute.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 299-326.

See, also, 20 Cyc. pp. 295-298; note, 27 Am. Dec. 745.

#### § 136. — Agreements not to be performed within one year.

[a] (Sup. 1890)

In settlement of a suit on two notes against his daughter and her husband, decedent promised, in consideration of their relinquishing their defense, and giving security for interest to accrue to the time his granddaughter should become 21, to indorse the notes to his granddaughter, and pay her \$2,000 more when she arrived at that age. *Held*, that performance by the others within the year took the promise of decedent as to such payment of the statute of frauds (*Rev. St.* 1881, § 4904), forbidding suit on oral contracts not to be performed within one year.—*Piper v. Fosher*, 121 Ind. 407, 23 N. E. 269.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, § 300.

See, also, 20 Cyc. p. 295.

#### § 137. — Agreements relating to real property.

[a] (Sup. 1878)

In an action for the partition of certain lands, one of the defendants answered, claiming title thereto and setting up a verbal contract between himself and the former owner of the lands, who had died intestate, by which said defendant was to board and care for such intestate during her life, and in consideration therefor said intestate was to convey said lands to the defendant or devise the same to him by will. It was also alleged that the defendant had performed his part of such contract, and that said intestate had put him into possession of the lands under the same. *Held*, such such contract was not within the statute of frauds.—*Mauck v. Melton*, 64 Ind. 414.

[b] (Sup. 1879)

The owner of lands agreed verbally with his sons, then living with him, that, if they would support him and his wife, he would convey to them. They did so, the family continuing to reside together. No conveyance was made. The father died intestate. *Held*, that the verbal contract was not taken out of the statute of frauds.—*Johns v. Johns*, 67 Ind. 440.

[c] (Sup. 1886)

A parol agreement to treat a girl as a child of the promisors, and to will her their property, consisting of real and personal estate, in consideration of services to be performed by her, is not taken out of the statute of frauds by performance on the girl's part.—*Wallace v. Long*, 105 Ind. 522, 5 N. E. 666, 55 Am. Rep. 222.

[d] (Sup. 1888)

An agreement between a father and son that the son is to receive a piece of land for work done for his father is taken out of the statute by the son performing his part of the agreement, being put in possession, making valuable improvements, and holding the land for

26 years.—*Cutsinger v. Ballard*, 115 Ind. 93, 17 N. E. 206.

[e] (Sup. 1891)

A verbal contract on the part of a wife, after her husband's death, to leave to an adopted child all her property at her death, is void under the statute of frauds, where the property is land and personalty exceeding \$50, and performance on the part of the child is not sufficient to take the case out of the statute.—*Austin v. Davis*, 128 Ind. 472, 26 N. E. 890, 25 Am. St. Rep. 456, 12 L. R. A. 120.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., St. of, §§ 301-326.

See, also, 20 Cyc. pp. 296-298.

**§ 138. Contracts implied by law on part performance.**

[a] (Sup. 1871)

Suit cannot be maintained to recover the value of the land orally agreed to be conveyed in payment for services.—*Baxter v. Kitch*, 37 Ind. 554.

[b] (Sup. 1872)

A person who takes possession of a tract of land under a contract of purchase that is illegal and void is liable for the rent of the premises.—*Mattox v. Hightshue*, 39 Ind. 95.

[c] (Sup. 1881)

The implied promise to pay the value of property, arising where a verbal contract has been performed by the conveyance of the property bargained for, is not within the statute of frauds.—*Arnold v. Stephenson*, 79 Ind. 126.

[d] (Sup. 1881)

Defendant made a parol agreement to pay plaintiff "\$100 in growing timber," for which he received the consideration, and then he refused to allow the trees to be cut. *Held*, that plaintiff could recover \$100 as damages.—*Terrell v. Frazier*, 79 Ind. 473.

[e] (Sup. 1882)

An action to recover the value of lands conveyed in performance of an oral contract whereby defendant was to convey other lands in payment, and which he refuses to execute, is not an action on a contract within the meaning of the statute of frauds.—*Jarboe v. Severin*, 85 Ind. 496.

Where damages cannot be recovered for breach of an agreement because of the statute of frauds, a party to it who has performed his part must in an action at law recover upon an agreement implied by the law from the facts.—*Id.*

[f] Where labor and services are rendered under a contract void under the statute of frauds, a recovery may be had on a quantum meruit.—(Sup. 1885) *Wolke v. Fleming*, 103 Ind. 105, 2 N. E. 325, 53 Am. Rep. 495; (1886) *Wallace v. Long*, 105 Ind. 522, 5 N. E. 666, 55 Am. Rep. 222.

[g] (Sup. 1885)

One who has transferred property under a contract voidable under the statute of frauds may recover the value of the property under quantum valebat.—*Wolke v. Fleming*, 103 Ind. 105, 2 N. E. 325, 53 Am. Rep. 495.

[h] (Sup. 1889)

A parol agreement to devise a farm in consideration of support for life, though void under the statute of frauds, is sufficient foundation for a claim against the promisor's estate after his death for the value of the support rendered.—*Schoonover v. Vachon*, 121 Ind. 3, 22 N. E. 777.

[i] (Sup. 1891)

Where plaintiff served the decedent under an agreement that he would make proper provision in his will for her as compensation, and he fails to do so, and the contract is void under the statute of frauds, she can recover on a quantum meruit.—*Miller v. Eldridge*, 126 Ind. 461, 27 N. E. 132; *Taggart v. Tevanny*, 1 Ind. App. 339, 27 N. E. 511.

[j] (App. 1893)

Where an agreement for continuous services for a long period of time is fully performed by the party rendering the services, he will not be left without remedy on the ground that the contract is within the statute of frauds.—*Knight v. Knight*, 33 N. E. 456, 6 Ind. App. 268.

[k] (App. 1894)

A recovery may be had for services rendered under a void parol agreement to convey or devise land, in consideration thereof, on a quantum meruit, and evidence of the promise is admissible to rebut the presumption that such services were rendered gratuitously.—*Kettry v. Thumma*, 9 Ind. App. 498, 36 N. E. 919.

[l] (App. 1902)

Where services are rendered on an oral agreement to make provision for the servant by will, and the employer dies without making such provision, the servant may recover the value of his services from the estate on a quantum meruit, though the promise itself is within the statute of frauds.—*Gullett v. Gullett*, 63 N. E. 782, 28 Ind. App. 670.

[m] (App. 1909)

Where a parol contract to convey land in consideration of personal services was unenforceable because of the statute of frauds, and the party receiving the services died without conveying the lands, the servant could recover the value of the services on a quantum meruit against decedent's estate.—*Flowers v. Poorman*, 43 Ind. App. 528, 87 N. E. 1107.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., St. of, §§ 327-333; 49 CENT. DIG. WILLS, § 177.

See, also, 20 Cyc. pp. 298-301; note. 105 Am. St. Rep. 793-798.

**§ 139. Contracts completely performed.****[a] (Sup. 1856)**

If the purchaser at an execution sale, on bidding off the land, pays the purchase money, and the sheriff fails at the time to make the note or memorandum, but during the lifetime of the execution executes a deed pursuant to the sale, which the vendee accepts, the sale is valid, and the vendee's title cannot be impeached.—*Hadden v. Johnson*, 7 Ind. 394.

**[b] (Sup. 1885)**

Where the money was not paid at the time of a sheriff's sale, but the party subsequently completed the sale by the payment of the money and the delivery of the certificate, and no new rights of third parties had intervened, the sale became valid so far as it might have been affected by the statute of frauds.—*Elston v. Castor*, 101 Ind. 426, 51 Am. Rep. 754.

**[c] (Sup. 1885)**

Full performance of a verbal contract for the sale of goods, the price of which amounts to \$50 or more, takes the contract out of the operation of the statute of frauds.—*Hinkle v. Fisher*, 104 Ind. 84, 3 N. E. 624.

**[cc] (Sup. 1886)**

Where a contract for the sale of land is so far executed as to deliver a deed upon condition, it is taken out of the statute of frauds when the condition is fully performed.—*McCasland v. Aetna Life Ins. Co.*, 108 Ind. 130, 9 N. E. 119.

**[d] (Sup. 1891)**

The statute of frauds does not apply to executed contracts.—*Anderson School Tp. v. Milroy Lodge Free & Accepted Masons*, No. 139, 130 Ind. 108, 29 N. E. 411, 30 Am. St. Rep. 206.

**[e] (App. 1893)**

An executed parol agreement for the construction of a ditch across one man's land, to drain the land of another, creates an easement appurtenant to the latter tract of land.—*Steinke v. Bentley*, 6 Ind. App. 663, 34 N. E. 97.

**[f] (App. 1906)**

Where plaintiffs and defendant agreed in writing to buy lands, and plaintiffs borrowed from defendant their part of the money with which to pay therefor, and such lands were so bought and paid for, such contract was fully performed; such borrowed money in legal effect being theirs.—*Holliday v. Perry*, 38 Ind. App. 588, 78 N. E. 877.

**[g] (App. 1907)**

A parol contract bound one to purchase real estate and convey the same to another. The latter did not pay any part of the price and the former did not make the conveyance, but sold the land to a third person. *Held* not to show performance taking the contract out

of the statute of frauds.—*Collins v. Green*, 40 Ind. App. 630, 82 N. E. 932.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Frds., St. of, §§ 334-341; 21 CENT. DIG. Execution, § 139; 32 CENT. DIG. Land. & Ten. § 68.

See, also, 20 Cyc. pp. 302-304.

**§ 141. Contracts as ground of defense.****[a] (Sup. 1852)**

After a sealed note had been executed and delivered, a third person wrote a guaranty thereon in consideration that the maker deliver to the guarantor, canceled, another note made by the guarantor in favor of the maker of the sealed note; the payee of the sealed note agreeing at the time to accept the guarantor as his debtor in lieu of the original maker. *Held*, that this arrangement, being void under the statute of frauds as an attempt to alter the effect of the written guaranty by parol evidence, could not be shown in an action by the payee of the sealed note against its maker.—*Smith v. Stevens*, 3 Ind. 332.

**[b] (Sup. 1861)**

Where one agrees with a mortgagor to purchase the land at the sale, promising to allow the former to redeem, but fraudulently failing to give a written instrument evidencing such promise until too late to prevent the sale, the conveyance to the purchaser will be set aside, and possession given the mortgagor; the statute of frauds not being a defense in such a case.—*Arnold v. Cord*, 16 Ind. 177.

**[c] (Sup. 1865)**

In an action by a minor to recover for work and labor, the defendant cannot avail himself of an oral contract with the plaintiff's mother for the plaintiff's services, on certain terms, until he became of age. The contract, not being in writing, is not a contract of apprenticeship, and is void by the statute of frauds, as not to be performed within a year.—*Tague v. Hayward*, 25 Ind. 427.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. Frds., St. of, § 343.

See, also, 20 Cyc. pp. 304, 305.

**§ 142. Contracts as ground for equitable relief.**

Contracts as ground of defense, see ante, § 141. Recovery of money paid, see ante, § 138.

**[a] (Sup. 1889)**

A parol agreement to devise a farm in consideration of support for life, though void under the statute of frauds, is sufficient foundation for a claim against the promisor's estate after his death for the value of the support rendered.—*Schoonover v. Vachon*, 121 Ind. 3, 22 N. E. 777.

[b] (App. 1892)

A husband died without fulfilling his contract to convey to his wife land in consideration of her joining him in deeds to other lands owned by him. *Held* that, though the contract is within the statute of frauds, the wife can recover, from the husband's estate, the consideration received by him, which is the value of her interest in the land which she joined in conveying.—*Worth v. Patton*, 5 Ind. App. 272, 31 N. E. 1130.

[c] (Sup. 1907)

Plaintiff in a suit to redeem from a mortgage cannot interpose the statute of frauds to cut off equitable defenses.—*Ferguson v. Boyd*, 169 Ind. 537, 81 N. E. 71, 82 N. E. 1064.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, § 343;

22 CENT. DIG. EX. & AD. §§ 730, 737.

See, also, 20 Cyc. pp. 304, 305.

### § 143. Persons to whom statute is available.

[a] (Sup. 1837)

The owner of personal property sold it while in transit to plaintiff to whom the carrier delivered it. The property having been damaged in shipment, plaintiff brought suit against the carrier for damages. *Held*, that plaintiff could not recover, the sale being for more than \$30, without proof of writing, or payment of the purchase price, or constructive delivery.—*Law v. Hatcher*, 4 Blackf. 364.

[b] (Sup. 1873)

Plaintiff alleged that defendant, as agent of plaintiff, sold certain real estate and received money therefor, but failed to account, and also charged him with a balance due for personal property sold by him. *Held*, that an answer that the contract for the sale of the land was not in writing was no defense.—*Ferguson v. Ramsey*, 41 Ind. 511.

[c] (Sup. 1880)

A creditor cannot attack a conveyance by his debtor on the ground that the debtor's obligation to convey arose out of an agreement which was void under the statute of frauds.—*Brown v. Rawlings*, 72 Ind. 505.

[d] (Sup. 1881)

Where a deed incorrectly describes the land intended to be conveyed, and a creditor of the grantor has levied thereon, he cannot interpose the statute of frauds in a suit against him and the grantor to correct the deed; the right to plead the statute being personal to the contracting parties.—*Morrison v. Collier*, 79 Ind. 417.

[e] (Sup. 1882)

A creditor seeking to subject to sale, property sold to another by the debtor in good faith cannot avoid the sale on the ground that the contract was not evidenced as required by the statute of frauds.—*Dixon v. Duke*, 85 Ind. 434

[f] (Sup. 1882)

The statute of frauds is available as a defense only to the parties to the contract, and not to a stranger.—*Cool v. Peters Box & Lumber Co.*, 87 Ind. 531.

[g] (Sup. 1883)

In an action by a lessee against a prior lessee of the same land, who has kept plaintiff out of possession, neither party can avail himself of the fact that the other party's lease is not in writing.—*Boyce v. Graham*, 91 Ind. 420.

[h] (Sup. 1884)

A life insurance company, having been sued by a beneficiary who has procured insurance on the life of his debtor, cannot raise the question whether the contract by which the indebtedness was created was sufficient under the statute of frauds.—*North Western Mut. Life Ins. Co. v. Heimann*, 93 Ind. 24.

[i] The defense of the statute of frauds is personal and can only be relied on by the parties or their privies.—(Sup. 1885) *Savage v. Lee*, 101 Ind. 514; (1885) *Bodkin v. Merit*, 102 Ind. 293, 1 N. E. 625; (1886) *Burrow v. Terre Haute & L. R. Co.*, 107 Ind. 432, 8 N. E. 167.

[j] (Sup. 1886)

A creditor cannot compel his debtor to avoid an oral contract by pleading the defense of the statute of frauds, nor can a creditor plead such a defense for the debtor; and the fact that an agreement to take a life estate in lieu of that given by law, made by a husband with his wife, was an oral one does not destroy the rights of the children as against the husband's creditors.—*Wright v. Jones*, 105 Ind. 17, 4 N. E. 281.

[k] (Sup. 1888)

It does not lie in the mouth of a third person to set up the statute of frauds in order to defeat a contract which the parties themselves have fully executed.—*Peck v. Williams*, 15 N. E. 270, 113 Ind. 256.

[l] (Sup. 1892)

A creditor cannot take advantage of the statute of frauds in order to avoid a sale of lands made by the debtor, although the latter might have done so had he elected.—*Old Nat. Bank of Evansville v. Findley*, 31 N. E. 62, 131 Ind. 225.

[m] (Sup. 1894)

Parties to contracts and their privies can alone take advantage of the fact that a contract is invalid under the statute of frauds. A third person cannot make the statute of frauds available to overthrow a transaction between other persons. The defense of this statute is purely a personal one, and cannot be made by strangers.—*Jackson v. Stanfield*, 36 N. E. 345, 37 N. E. 14, 137 Ind. 592, 23 L. R. A. 588.

One who by conspiracy prevents another from carrying out a contract with a third person

cannot plead that such contract was within the statute of frauds.—Id.

[n] (App. 1903)

Under the provisions of the statute of frauds (Burns' Rev. St. 1901, § 6636), a sale of personal property without delivery is presumptively void only as against creditors of the vendor and purchasers in good faith.—*Warner v. Warner*, 66 N. E. 760, 30 Ind. App. 578.

[o] (Sup. 1906)

A creditor cannot object to a conveyance as fraudulent merely because made in performance of a contract within the statute of frauds; such contract not being void, and the defense of the statute being personal to the party to the contract.—*Cannon v. Castleman*, 73 N. E. 689, 164 Ind. 343.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 344-350; 21 CENT. DIG. EXECUTION, § 121.

See, also, 20 Cyc. pp. 306-308; note, 18 L. A. 142; note, 127 Am. St. Rep. 756.

#### § 144. Waiver of bar of statute.

[a] (Sup. 1870)

Plaintiff, defendant, and a third person purchased real estate as tenants in common, and in consideration therefor verbally agreed to pay their vendor's certain note. When said note fell due, it was renewed by all said grantees, and upon a second renewal it was signed only by plaintiff and said third person. This note was afterwards paid, two-thirds by plaintiff and one-third by the third grantee. Plaintiff then brought action against defendant for a contribution. *Held*, that evidence was admissible to show the parol agreement to pay the vendor's note, as whatever objection defendant might have made under the statute of frauds was removed by his becoming a party to the first renewal note.—*Boulden v. Scircle*, 34 Ind. 60.

[b] (Sup. 1892)

Since under Rev. St. 1881, § 5117, a wife is under disability to enter into an executory contract for the sale of her land, except by written contract in which her husband joins, no acts or representations by her can estop her from asserting the invalidity of a parol contract for the sale of her land entered into by her husband as her agent.—*Percifield v. Black*, 31 N. E. 955, 132 Ind. 384.

[c] (App. 1908)

The repudiation of a contract, invalid under the statute of frauds, is sufficient whether a good reason, a wrong reason, or no reason be given therefor.—*Porter v. Patterson*, 42 Ind. App. 404, 85 N. E. 797.

#### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, § 351; 44 CENT. DIG. SPEC. PERF. § 119.

See, also, 20 Cyc. p. 308.

### X. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

#### § 145. Pleading contract or transaction within statute.

##### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 352-359.

See, also, 20 Cyc. pp. 308-316.

#### § 146. — As cause of action in general.

[a] (Sup. 1881)

Where a complaint for breach of a parol contract alleges that the contract was to continue for a reasonable time, the fact that such allegation is followed by the words, "that is to say, for the period of three years," does not render the complaint demurrable as showing a contract within the statute of frauds.—*Niagara Fire Ins. Co. v. Greene*, 77 Ind. 500.

##### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 352, 353-357.

See, also, 20 Cyc. p. 308.

#### § 147. — As ground of defense.

[a] (Sup. 1873)

Where a contract for the sale of personal property of the value of over \$50 is pleaded in defense, and the memorandum thereof is insufficient under the statute, and it is prayed by defendant that the memorandum be reformed so as to express the real agreement of the parties, it is not error to strike out such plea, where it is also alleged that a payment was made of a part of the purchase price, because the payment authorized parol proof of the contract, and reformation was not necessary.—*Baker v. Farmbrough*, 43 Ind. 240.

##### FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 352, 358.

#### § 148. — Writing or other compliance with statute.

[a] (Sup. 1827)

The promise of an administrator to pay a debt of the intestate need not be averred in the declaration to be in writing; the statute of frauds applying to the proof, and not to the declaration.—*Mills v. Kuykendall*, 2 Blackf. 47.

[b] (Sup. 1846)

A sheriff's notice of an intended motion against a purchaser of land on execution to recover the purchase money need not state that the contract was in writing.—*Hunt v. Gregg*, 8 Blackf. 105.

[c] Where by the statute of frauds it is requisite that the contract sued on should be in writing, the declaration need not aver that it was so; the provisions of the statute affecting only the rules of evidence, and not those of pleading.—(Sup. 1853) *Bailey v. Ricketts*, 4 Ind. 488; (1854) *Miller v. Upton*, 6 Ind. 53.

[d] (Sup. 1861)

At common law, even where the statute of frauds required a contract to be in writing, and it actually was so, it was not necessary that a copy of the writing should be made a part of the declaration, nor that the declaration should aver that the contract was in writing.—Booker v. Ray, 17 Ind. 522.

[e] (Sup. 1862)

Where a pleading sets up an agreement which the statute of frauds requires to be in writing, either the agreement, a copy thereof, or an excuse for not furnishing either must be given.—Estep v. Burke, 19 Ind. 87.

[f] (Sup. 1866)

As the statute of frauds operates as a rule of evidence, and not as a rule of pleading, it is not necessary, in an action upon a contract for the sale of goods, which, though not in writing, has been rendered valid by a part payment or by delivery to aver in the complaint the receipt by the purchaser of the part of the property, or the giving by him of something in earnest or in part payment.—Harper v. Miller, 27 Ind. 277.

[g] (Sup. 1877)

A contract not alleged to be in writing will be presumed to be by parol, and, if to answer for the debt of another, to be within the statute of frauds.—Langford v. Freeman, 60 Ind. 46.

[h] It will be presumed, in the absence of any contrary allegation or showing in a pleading setting up an agreement which, if not in writing, would be within the statute of frauds, that such agreement rested in parol.—(Sup. 1879) Carlisle v. Brennan, 67 Ind. 12; (1879) Suman v. Springate, Id. 115; (1895) Waymire v. Waymire, 141 Ind. 164, 40 N. E. 523; (App. 1902) Crafton v. Carmichael, 64 N. E. 627, 29 Ind. App. 320; (1904) Yoe v. Newcomb, 33 Ind. App. 615, 71 N. E. 256.

[i] (Sup. 1879)

A complaint upon a parol contract for the sale of goods, which is within 1 Rev. St. 1876, § 7, must set out some of the exceptions, or it will be demurrable.—Krohn v. Bantz, 68 Ind. 277.

[j] Where a contract in relation to land is declared on, and not stated to have been in writing, it will be presumed to have been in parol.—(Sup. 1879) Baynes v. Chastain, 68 Ind. 376; (1882) Jarboe v. Severin, 85 Ind. 496.

[k] (Sup. 1881)

An instrument to secure performance of an agreement to convey land was sued upon as a contract. Its terms were not stated, and, for all that appeared, it might have been a parol agreement. *Held*, that the statute might be successfully pleaded.—Pulse v. Miller, 81 Ind. 190.

[l] (Sup. 1897)

Where plaintiff in an action to recover the value of land agreed to be conveyed by defendant to plaintiff in consideration for a deed of other land, executed by plaintiff to defendant, failed to allege that the agreement was in writing, it will be presumed to have been by parol, and therefore within the statute of frauds.—Lowe v. Turpie, 147 Ind. 652, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233.

[m] (App. 1897)

Where a pleading does not allege whether a contract is in writing, and it is required to be in writing by the statute of frauds, it is presumed to be in writing.—Boos v. Hinkle, 48 N. E. 383, 18 Ind. App. 509.

[n] (Sup. 1902)

Where the complaint in a suit for the specific performance of a contract to convey land does not state whether the contract is in writing or oral, it will be presumed to be oral.—Horner v. McConnell, 63 N. E. 472, 158 Ind. 280.

[o] (App. 1903)

Where no written contract for a sale of land is pleaded, the presumption is that the contract was oral.—McCoy v. McCoy, 69 N. E. 193, 32 Ind. App. 38, 102 Am. St. Rep. 223.

[p] (Sup. 1906)

A complaint seeking to recover for the breach of a contract to convey land alleged that the land was described as "120 acres of land more or less, owned by H. of Dana, Ind., and located about three miles west of Winamac, Pulaski county, Ind., in sections 17, 18, township 30 N. of range 2 W." *Held*, that this description was prima facie sufficient, and the complaint need not allege that defendant, H., had only one tract answering such description; but if he in fact had more than one tract answering the description, thereby destroying the means of identifying the property, it was a matter of defense.—Howard v. Adkins, 167 Ind. 184, 78 N. E. 665.

[q] (App. 1908)

In an action to foreclose a mortgage against the mortgagor and his grantees, who were merely alleged to have "assumed to pay the mortgage," the contract by which the assumption was made not being alleged to have been in writing, it must not be presumed that it was a parol contract, and not a part of the deed to them.—Southern Indiana Loan & Savings Inst. v. Roberts, 42 Ind. App. 653, 86 N. E. 490.

[r] (App. 1910)

A complaint for the contract price of goods sold, exceeding the value of \$50, should show that the contract was in writing, in compliance with the statute of frauds (Burns' Ann. St. 1908, § 7469).—Penn-American Plate Glass Co.

v. Harshaw, Fuller & Goodwin Co., 90 N. E. 1047.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. FRDS., St. of, §§ 353, 354.

**§ 149. — Matter in avoidance of bar of statute.**

[a] (Sup. 1892)

A complaint on a contract which alleges that the secretary of a school board "willfully and purposely failed and refused" to reduce to writing a contract approved at a certain meeting, employing the plaintiff as teacher from a period commencing at a certain subsequent time, and continuing for a year, but without alleging that defendant fraudulently prevented the reduction of the said contract to writing, is insufficient to take the case out of Rev. St. 1881, § 4904, requiring such contracts, or some memorandum, to be in writing.—Caldwell v. School City of Huntington, 132 Ind. 92, 31 N. E. 566.

[b] (Sup. 1901)

Where plaintiffs contracted in writing to purchase land from defendants, and to make payments therefor from the proceeds of lots sold from the tract, and subsequently defendants by parol agreed as a part of the purchase price to receive lands which plaintiff had received in exchange for some of the lots, allegations of the complaint in an action by plaintiff for damages for defendant's failure to perform to the effect that plaintiffs had expended moneys in laying out the tract into lots, etc., did not show a partial performance, taking the case out of the statute of frauds, since it was apparent that whatever had been done in that direction had been done under the written agreement, not under the parol.—Bradley v. Harter, 60 N. E. 139, 156 Ind. 499.

[c] (Sup. 1901)

Under the statute of frauds (Burns' Rev. St. 1901, § 6635 [Rev. St. 1881, § 4910; Horner's Rev. St. 1901, § 4910]), providing that an oral contract for the sale of goods of the value of \$50 or more shall be void unless the purchaser "shall receive part of such property," or shall give something in earnest to bind the bargain or in part payment, a complaint for the breach of an oral contract for the sale of corn of greater value than \$50, which alleged that defendant had "delivered" to the plaintiff a part of the corn, but had refused and neglected to deliver any more, is insufficient, delivery not implying that the goods were "received" by the purchaser under the contract.—Goodwine v. Cadwallader, 61 N. E. 939, 158 Ind. 202.

[d] (Sup. 1902)

Where the complainant in a suit for specific performance of an oral contract to convey land relies on a partial performance as removing the contract from the operation of the statute of frauds, the facts showing such perform-

ance must be distinctly averred.—Horner v. McConnell, 63 N. E. 472, 158 Ind. 280.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. FRDS., St. of, § 359.

**§ 150. Demurrer raising defense.**

Necessity of raising defense by plea or demurrer, see post, § 152.

[a] Since, under the Code, a contract not shown to be in writing is presumed to be in parol, if the complaint shows a contract such as should be in writing objection may be made by demurrer.—(Sup. 1873) King v. Enterprise Ins. Co., 45 Ind. 43; (1874) Western Union Tel. Co. v. Hopkins, 49 Ind. 223.

[b] (Sup. 1874)

Where, upon the face of a pleading based upon a contract, it is shown that it was a parol contract, the question whether it was within the statute of frauds may be raised by demurrer or motion in arrest of judgment.—Fall v. Hazelrigg, 45 Ind. 576, 15 Am. Rep. 278.

[c] (Sup. 1879)

Where an agreement or contract set up in a pleading is such as is required by the statute of frauds to be in writing, the objection that it is not shown to have been in writing may be taken by demurrer for want of sufficient facts.—Carlisle v. Brennan, 67 Ind. 12.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. FRDS., St. of, §§ 360-362.

See, also, 20 Cyc. pp. 311-315.

**§ 151. Pleading statute as defense.**

Demurrer raising defense, see ante, § 150.

**FOR CASES FROM OTHER STATES,**

SEE 23 CENT. DIG. FRDS., St. of, §§ 363-369, 371, 372; 44 CENT. DIG. Spec. Perf. § 119.

See, also, 20 Cyc. pp. 311-316.

**§ 152. — Necessity.**

Issues, proof, and variance, see post, § 156.

[a] (Sup. 1855)

Where, to a bill for specific performance of a parol contract for the sale of land, the answer admitted the verbal contract, but the defendant pleaded the statute of frauds, it was held that the defense must prevail.—Ash v. Daggy, 6 Ind. 259.

[b] (Sup. 1884)

Where the contract sued on is void under the statute of frauds, the objection can be taken at the trial.—McMillen v. Terrell, 23 Ind. 163.

[c] (Sup. 1879)

In a suit for specific performance of a contract to convey land, the objection that the contract is void under the statute of frauds may be offered at the trial, although the statute was not pleaded.—Suman v. Springate, 67 Ind. 115.

[d] (Sup. 1903)

A party may rely on the statute of frauds under the general issue or a general denial.—*Indiana Trust Co. v. Finitzer*, 67 N. E. 520, 160 Ind. 647.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., St. of, §§ 363–366, 371, 372; 44 CENT. DIG. SPEC. PERF. § 119.

### § 155. — Demurrer or reply to plea or answer.

[a] (Sup. 1859)

Where the defense to an action on a verbal contract is that it was not to be performed within a year, it is not a sufficient replication to say that the defendant, for the purpose of committing a fraud on a third party, of which purpose the plaintiff was then ignorant, specially requested the plaintiff that the contract should not be reduced to writing.—*Wilson v. Ray*, 13 Ind. 1.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., St. of, § 369.  
See, also, 20 Cyc. pp. 315, 316.

### § 156. Issues, proof, and variance.

Defense of statute of frauds under general issue or general denial, see ante, § 152.

[a] (Sup. 1868)

In a suit for specific performance of a contract to convey real estate, where the complaint shows that the agreement to convey was not in writing, and there is no averment that possession of the land was given under the contract, the general denial does not raise the issue of the statute of frauds.—*Livesey v. Livesey*, 30 Ind. 398.

[b] (Sup. 1874)

In an action against a telegraph company for failure to transmit a dispatch, by reason of which the plaintiff lost the advantage of certain contracts made by him with other parties, the action is not founded on such contracts, but on the contract of the company to send and deliver the dispatch. Therefore said contracts with other parties may be proved, under the allegation of the complaint, to have been in writing.—*Western Union Tel. Co. v. Hopkins*, 49 Ind. 223.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., St. of, §§ 370–372.  
See, also, 20 Cyc. p. 316.

### § 158. Evidence.

Presumption from failure to plead writing or other compliance with statute, see ante, § 148. Presumptions on appeal, see post, § 162.

[a] (Sup. 1863)

Where a certificate of deposit issued by a bank is indorsed in blank by an individual, the

legal presumption is that the person placing his name on the back did so as an indorser, and parol evidence is not admissible to show that he signed as a guarantor, as that would have the effect to charge him with the debt of another without writing, in contravention of the statute of frauds.—*Drake v. Markle*, 21 Ind. 433, 83 Am. Dec. 358.

[b] (Sup. 1864)

If the signature is placed at the close of an instrument, the inference is that it was so placed at the final execution of the instrument. This inference does not necessarily arise where the name is found at the commencement or in the body.—*McMillen v. Terrell*, 23 Ind. 163.

[c] (Sup. 1864)

A mill was erected under a parol agreement that the owner of the land would satisfy a judgment that stood as a lien on the land, and convey an undivided half thereof to the person erecting the mill, and thereby become the owner of half the mill; the landowner failing to discharge the lien, the mill to remain the property of the person erecting it. *Held*, in a suit between the person erecting the mill and the purchaser at the sale under an execution levied on the judgment the landowner failed to discharge, that evidence of the parol contract was admissible, as, if acted upon, it would create the relation of landlord and tenant, and give the builder of the mill the right to claim it as a fixture erected for the purpose of manufacture.—*Yater v. Mullen*, 23 Ind. 562.

[d] (Sup. 1867)

A defendant, in order to avoid liability upon a promise on the ground that it was not reduced to writing, as required by the statute of frauds, must prove facts necessary to bring the engagement within the prohibition of the statute.—*Solomon v. Walpole's Adm'r*, 27 Ind. 464.

[e] (Sup. 1881)

The return of a sheriff indorsed on an execution being a sufficient memorandum to take the sale of land sold under such execution out of the statute of frauds, it will be presumed that the return was written out by the sheriff at the time of the sale; the date of the return corresponding with the date of the sale.—*Jones v. Kokomo Bldg. Ass'n*, 77 Ind. 340.

[f] (Sup. 1881)

Where a contract for the sale of lands does not appear to be in writing, it is to be presumed that it was not.—*Pulse v. Miller*, 81 Ind. 190.

[g] (Sup. 1891)

In a suit for specific performance of a contract to convey real estate, where the contract sued on is within the statute of frauds, the burden is on the plaintiff to show that such things have been done as take the case out of the statute.—*Luzader v. Richmond*, 27 N. E. 736, 128 Ind. 344.

[b] (App. 1899)

Parol evidence is inadmissible to supply anything which a written proposal needs to make it an agreement of sale so as to be sufficient under the statute.—*Sprinkle v. Trulove*, 54 N. E. 461, 22 Ind. App. 577.

[i] (Sup. 1902)

Under Burns' Rev. St. 1901, § 6630, declaring that the consideration of any promise, contract, or agreement within the statute of frauds need not be set forth in writing, but may be proved, where the contract states the consideration indefinitely, parol evidence is admissible to relieve the ambiguity.—*Burke v. Mead*, 64 N. E. 880, 159 Ind. 252.

[j] (Sup. 1906)

Parol evidence may be given of the situation and relation of the parties and the surrounding circumstances in the construction of a contract governed by the statute of frauds.—*Howard v. Adkins*, 167 Ind. 184, 78 N. E. 665.

Where the description of land in a contract governed by the statute of frauds is consistent, but incomplete, and its completion does not require contradiction or alteration, nor that a new description should be introduced, parol evidence is admissible to complete the description and identify the property.—*Id.*

[k] (App. 1908)

Parol evidence is not admissible to supply any essential element of the contract or memorandum so as to take it out of the statute of frauds.—*Porter v. Patterson*, 42 Ind. App. 404, 55 N. E. 797.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, §§ 373-376.

See, also, 20 Cyc. pp. 316-320.

#### § 160. Instructions.

[a] (Sup. 1871)

An instruction that, where one promised to guarantee or warrant the pay to a volunteer which had been promised to be paid by a public meeting, his promise was only collateral, and not binding on him unless in writing, is proper in a case where, if the evidence shows any contract, it has a tendency to show that it was thus collateral.—*Druly v. Hunt*, 35 Ind. 507.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, § 379.

See, also, 20 Cyc. p. 321.

#### § 162. Review.

[a] (Sup. 1884)

Where it appears in a special finding that a sheriff, at the time of a sale of land by him on execution, wrote and signed a certificate of sale to the purchaser, it will be presumed on appeal that such certificate conformed to the statute, and was therefore sufficient to take the sale out of the statute of frauds.—*Elston v. Castor*, 101 Ind. 426, 51 Am. Rep. 754.

FOR CASES FROM OTHER STATES,

SEE 23 CENT. DIG. FRDS., ST. OF, § 381.

See, also, 20 Cyc. p. 322.

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

# FRAUDULENT CONVEYANCES.

## Scope-Note.

[INCLUDES transfers of property and other transactions or proceedings void as to creditors because intended or operating to delay, hinder, or defraud them, and conveyances void as to subsequent purchasers for inadequacy of consideration, reservation of power to revoke them, etc.; evidence relating thereto; rights, liabilities, and remedies in general of the parties and those claiming under them, and of creditors and subsequent purchasers, more particularly actions to set aside such transfers; and criminal responsibility for such fraudulent transfers.

[EXCLUDES transfers by husband or by wife fraudulent as to the other (see *Husband and Wife*); transfers by partners fraudulent as to partnership or individual creditors (see *Partnership*); mortgages of personal property invalid as to creditors on grounds other than fraud (see *Chattel Mortgages*); fraud in assignments for benefit of creditors (see *Assignments for Benefit of Creditors*); transfers fraudulent under insolvent or bankrupt laws (see *Insolvency*; *Bankruptcy*); fraud in disposing of property as ground for arrest (see *Arrest*) or attachment (see *Attachment*); and proceedings by judgment creditors to subject property to their judgments, either supplementary to execution (see *Execution*), or by action (see *Creditors' Suit*). For complete list of matters excluded, see cross-references, post.]

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## I. TRANSFERS AND TRANSACTIONS INVALID.

### (A) GROUNDS OF INVALIDITY IN GENERAL.

#### § 1. Nature of fraud in transfers of property.

[a] (Sup. 1881)

The character of a sale or transfer of property must be judged of by the circumstances existing at the time, and not by subsequent events having no actual connection with the transaction.—Ray v. Simons, 76 Ind. 150.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. § 1.

#### § 7. Elements of fraud as to creditors.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 8-15, 20.

See, also, 20 Cyc. pp. 461-465.

#### § 8. — In general.

[a] (Sup. 1849)

A conveyance, to be valid against creditors, must not only be founded on a valuable consideration, but must be also bona fide.—Basye v. Daniel, 1 Ind. 378, Smith, 252.

[b] (Sup. 1884)

A conveyance should not be set aside as in fraud of creditors unless the evidence shows that the debtor did not at the time thereof retain sufficient property to pay his other debts, and that the conveyance was without consideration, or that the grantee was aware of the debtor's intention of defrauding his creditors.—Andrews v. Flanagan, 94 Ind. 383.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 8, 9.

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Presumptions and burden of proof see post, § 273.

Question for jury, see post, § 308.

Verdict and findings, see post, § 310.

Weight and sufficiency of evidence, see post, § 298.

[a] (Sup. 1855)

The inquiry in a suit to set aside an alleged fraudulent conveyance should always be

whether the act done was a bona fide transaction or a mere trick or contrivance to defeat creditors.—Stewart v. English, 6 Ind. 176.

[b] Any sale, contract, or arrangement, whether founded on good consideration or not, if entered into with the intent to hinder, delay, or defraud creditors, is void as to them.—(Sup. 1859) Rufing v. Tilton, 12 Ind. 259; (1882) Flannagan v. Donaldson, 85 Ind. 517; (1894) Slagle v. Hoover, 137 Ind. 314, 36 N. E. 1099.

[c] (Sup. 1886)

Subsequent creditors can impeach a voluntary deed only by proving the existence of an actual intent in the minds of the parties at the time of the execution of the conveyance to hinder, delay, or defraud creditors by means thereof.—Barrow v. Barrow, 108 Ind. 345, 9 N. E. 371.

[d] (Sup. 1889)

To constitute a transfer of property fraudulent in fact as against creditors, it must be made with intent on the part of the debtor to defraud, delay, or hinder creditors.—Citizens' Bank v. Bolen, 121 Ind. 301, 23 N. E. 146.

[e] (Sup. 1893)

A voluntary conveyance in fraud of creditors may be set aside at the suit of a subsequent creditor, where he avers and proves that such conveyance was made for the purpose of defrauding subsequent, as well as existing, creditors.—Petree v. Brotherton, 133 Ind. 692, 32 N. E. 300.

[f] (Sup. 1895)

If a deed is made and accepted for the fraudulent purpose of cheating, hindering, or delaying creditors, it may be overthrown no matter what may have been the consideration paid therefor, or how pure the motive which induced it.—Gable v. Columbus Cigar Co., 39 N. E. 474, 140 Ind. 563.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 10-14.

See, also, 20 Cyc. pp. 461-465.

#### § 11. — Effect of transaction to delay, hinder, or defraud.

[a] (Sup. 1859)

To avoid a transfer, on the ground that it operates to hinder and delay the creditors of the grantor therein, it is not necessary to show that the act of the grantor therein is corruptly fraudulent. If the conveyance hinders and delays creditors, it is fraudulent in law, irre-

spective of the motives of the grantor.—Ewing v. Gray, 12 Ind. 64.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. § 15.

### § 13. Badges of fraud.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 17-19, 21, 22.

See, also, 20 Cyc. pp. 439-453.

### § 16. — Conclusiveness and effect.

[a] (Sup. 1861)

A deed made to defraud creditors is void as to subsequent, as well as existing, creditors.—Dart v. Stewart, 17 Ind. 221.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. § 22.

### § 18. Transactions fraudulent in part.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 24-29.

### § 20. — Fraud as to one or more grantees.

[a] (Sup. 1902)

A mortgage in favor of its creditors by an insolvent corporation, in which it fraudulently preferred stockholders to unsecured creditors, is by such preference rendered void as an entirety unless the contract is such that the legal part thereof may be separated from the illegal.—Reagan v. First Nat. Bank of Chicago, 157 Ind. 623, 61 N. E. 575, 62 N. E. 701.

Where an insolvent corporation executed a mortgage in favor of creditors who accepted the same, and the mortgage was invalid as to preferences therein granted to stockholders over unsecured creditors, the mortgage will be deemed inseverable and invalid as a whole.—Id.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. § 26.

### § 21. — Fraud in one or more separate conveyances or transactions.

[a] (Sup. 1865)

Though the sale of chattels in part satisfaction of a debt and the transfer of notes at the same time as collateral to the remaining debt were in execution of one agreement, the transactions were nevertheless separable, and hence, if the transfer of the notes was fraudulent, it could not contaminate the sale, if bona fide, of the chattels.—Keen v. Preston, 24 Ind. 395.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 27-29.

### § 22. Purging transaction of fraud.

[a] (Sup. 1884)

A reconveyance to the grantor by a fraudulent grantee, pursuant to an agreement made

at the time of the first conveyance, is not itself fraudulent.—Second Nat. Bank of Lafayette v. Brady, 96 Ind. 498.

[b] (Sup. 1885)

A conveyance originally made on a secret trust in fraud of creditors may become valid by so modifying the terms of the trust as to give to creditors their rights in the proceeds of the sale to be made by the trustee.—Langsdale v. Woollen, 99 Ind. 575.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. § 30.

See, also, 20 Cyc. p. 453.

### (B) NATURE AND FORM OF TRANSFER.

Assignment of life insurance policy, see INSURANCE, § 590.

Effect of gift as to bona fide purchasers, see GIFTS, § 44.

Pleading fraudulent transaction, see post, § 263.

Proof of transaction, see post, §§ 290, 299.

### § 23. Elements or evidence of fraud in general.

[a] (Sup. 1866)

Upon a sale of personal property, the title passes to the purchaser by a delivery of the property sold, and no bill of sale or conveyance in writing is necessary; but such evidence of the purchase is not improper or illegal of itself, nor is the fact that a witness may be called to attest it. Such precautions are of frequent occurrence, and cannot be deemed badges of fraud.—Kane v. Drake, 27 Ind. 29.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. § 31.

### § 24. Transactions subject to attack by creditors.

Creditors entitled to attack conveyance, see post, §§ 206-210, 212-218, 223.

[a] (Sup. 1830)

Where a debtor purchases property and has the conveyance taken in the name of a third person, such conveyance is fraudulent as to his creditors.—Kipper v. Glancey, 2 Blackf. 356.

[b] (Sup. 1880)

Where it appeared, in a suit by a judgment creditor against a debtor, that there had been an execution sale, at which a receipt was given by the sheriff for the amount of the bid, without receiving the money, the receipt will be set aside as void.—McCormick v. Walter A. Wood Mowing & Reaping Mach. Co., 72 Ind. 518.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 32-46.

**§ 26. Absolute transfers.**

[a] (Sup. 1873)

A voluntary deed placed on record by the grantor, but never delivered to the grantee nor accepted by him, is inoperative to convey the grantor's title as against his creditors.—Tharp v. Jarrell, 66 Ind. 52.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 61-65.

See, also, 20 Cyc. p. 446.

**§ 29. Collusive legal proceedings in general.**

[a] (Sup. 1873)

The property of an insolvent debtor may be seized and sold on an execution issued on a judgment which was entered on proof of a bona fide debt, though the debtor voluntarily entered his appearance in the action wherein the judgment was rendered at a time when he contemplated an assignment.—McGoldrick v. Slevin, 43 Ind. 522.

[b] (Sup. 1884)

Where a debtor, 12 days before a voluntary assignment, conveyed \$5,700 worth of property by mortgages to his sister, his uncle, and his attorney, to secure \$1,400, and shortly after the assignment the mortgages were foreclosed, the assignee making voluntary appearance and the three mortgagees assenting to the sale of the goods in entirety, there was such evidence of collusion as justified the creditors in suing for conversion of the property.—Wright v. Mack, 95 Ind. 332; Mathews v. Same, Id. 431.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 72, 76-78, 81.

See, also, 20 Cyc. pp. 397-403.

**§ 31. Suffering levy of attachment or execution.**

[a] (Sup. 1872)

That a judgment debtor suffered certain mortgaged premises to be sold on execution, subject to incumbrances, for a nominal sum, is not sufficient to constitute fraud on the part of the judgment debtor.—Lippperd v. Edwards, 39 Ind. 165.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 72, 79, 80, 82; 21 CENT. DIG. Execution, §§ 237, 738.

See, also, 20 Cyc. pp. 402, 403.

**§ 32. Suffering loss of property.**

[a] (Sup. 1871)

A complaint alleging that the holder of a certificate of purchase of public lands combined and confederated with his wife for the fraudulent purpose of depriving a creditor of a lien on such land, and, in pursuance of such purpose, failed to pay the interest on his purchase, so as to cause a forfeiture to the state, where-

upon he caused the officers of the sinking fund to offer the land for sale at public auction, when it was purchased by his wife, and that the wife took the conveyance with full knowledge of the creditor's rights, while the debtor, by false representations to the creditor that the interest on the purchase was paid, kept him in ignorance of the forfeiture and resale of the land, sufficiently alleges a fraudulent transaction, so as to entitle the creditor to relief against the wife's title.—Truitt v. Truitt, 87 Ind. 514.

[b] (Sup. 1881)

A surrender of notes and mortgage without consideration, and with an intent to defraud creditors, is void, under 1 Rev. St. 1876, p. 506, making void all conveyances or assignments "of any estate in land, or of goods or things in action, every charge upon lands, goods, or things in action, and all bonds, contracts, evidences of debt, judgments, decrees," etc., contrary to the common law, whereby the property must have been such as could have been taken on execution.—Johnson v. Jones, 79 Ind. 141.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 49, 50.

**§ 33. Release of right to conveyance, or reconveyance.**

[a] (Sup. 1858)

An agreement, by one entitled to a conveyance, that the grantor shall remain in possession and shall not convey, in order to cover the land from the grantee's creditors, amounts to a conveyance to defraud, under 2 Rev. St. p. 154, § 526.—Pennington v. Clifton, 11 Ind. 162.

As lands the legal title to which the debtor is entitled, but refuses to take in order to defraud creditors are subject to execution under 2 Rev. St. p. 154, § 526, enacting that "lands fraudulently conveyed with intent to delay or defraud creditors" shall be so subject, the creditors entitled to take the land on execution may proceed to settle the title by suit before levy and sale, or it may be settled and perfected in a suit brought by the purchaser at the execution sale.—Id.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 50, 51.

See, also, 20 Cyc. p. 406.

**§ 39. Payment of premiums for insurance.**

[a] (Sup. 1879)

A. took out a policy of insurance on his life, payable to his wife in trust for her and her children, paid the premiums for three years, and then made an assignment of his property for the benefit of his creditors. Soon after he surrendered this policy to the company, receiving in return the sum of \$40 and a new policy, also payable to his wife, with annual premiums thereon paid up for two years. In the following year A. died, and the assignee brought suit for the amount of the policy, claiming that it

was fraudulent as to creditors, and had passed to him by the assignment; that A. was insolvent at the time he took out the first policy; and that he remained so until his death. *Held*, that the new policy was certainly not fraudulent, and that, as the complaint did not allege that the first one had been obtained with any fraudulent intent, but simply that A. was then insolvent, and not that he knew or believed at the time that he was so, the court could not say, in view of the facts, that it was fraudulent as to creditors.—*Foster v. Brown*, 65 Ind. 234.

[b] (Sup. 1890)

The law favors the making of a reasonable provision by a man for his family and those who are dependent upon him, and it is not a violation of the statute and in fraud of creditors for a debtor, though insolvent, to contribute and pay a reasonable amount for insurance for the benefit of his family.—*Johnson v. Alexander*, 25 N. E. 706, 125 Ind. 575, 9 L. R. A. 600.

A debtor took out a policy upon his life, and, after holding it a short time, in good faith, transferred it by indorsement to certain of his creditors, and took from them an agreement by which they were to pay the premiums, and, from the proceeds, when paid, retain the amount due, and pay any surplus to his heirs or to his order. He died without making any further order as to the proceeds of the policy. *Held*, that the transfer was not in fraud of creditors, but was complete and valid, and transferred the surplus to the heirs.—*Id.*

[c] (App. 1897)

Where the insured, prior to his death, by a written communication directed the general agent of the insurer to transfer his policy payable to his estate to his wife, and died before the transfer was actually made, such transfer of the policy was valid, and not in fraud of creditors.—*State ex rel. Wright v. Tomlinson*, 45 N. E. 1116, 16 Ind. App. 662, 59 Am. St. Rep. 335.

Where a husband took out a life policy in January, 1892, and assigned it to his wife in March, 1894, at which date he died, the transfer was valid, and not in fraud of creditors, except as to the amount of the premium paid for the two years.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 56, 57, 158.

See, also, note, 88 Am. Dec. 530; note, 29 Am. St. Rep. 360.

(C) PROPERTY AND RIGHTS TRANSFERRED.

Description of property in pleading. see post, § 262.

§ 43. Property subject to claims of creditors in general.

[a] (Sup. 1878)

A mortgage executed by a tenant as security for rent on crops to be raised by him on the leased premises is valid against his execution creditors.—*Headrick v. Brattain*, 63 Ind. 438.

[b] (Sup. 1893)

Creditors cannot complain of the disposal of property that they cannot reach.—*Phenix Ins. Co. v. Fielder*, 33 N. E. 270, 133 Ind. 557.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 41, 95-100, 301.

See, also, 20 Cyc. pp. 348-389; note, 21 L. R. A. 623.

§ 44. Interest of debtor in property in general.

[a] (Sup. 1854)

A debtor may sell his equitable interest, if it be done without fraud, before a bill is filed by a creditor to enforce the payment of his judgment out of such equitable estate.—*Russell v. Houston*, 5 Ind. 190.

[b] (Sup. 1885)

To a complaint to set aside an alleged fraudulent deed, an answer stating that the deed was drawn up in the debtor's name as grantee, that it was never delivered, that the grantor intended to give the land to his daughter, the debtor's wife, and that at his request he made another deed conveying the land to her, *held* good, if for no other reason than that the deed was never delivered to the husband, and hence he never had any title to the property which his creditors could reach.—*Bremmerman v. Jennings*, 101 Ind. 253.

[c] (Sup. 1906)

Husband and wife contracted for purchase of land to be conveyed to them as tenants by the entireties. Thereafter they paid for it, and at the request of the wife had it conveyed to the husband, under agreement between them that he should have the title quieted at his expense, and then have it conveyed so as to vest the title in them as tenants by the entireties, which he did. *Held* that, husband and wife having acquired the equitable title by their contract of purchase, and it having remained in them when the deed was made to him, the question of whether there was a conveyance in fraud of his creditors was to be determined as of the time of the purchase and the deed to him, and as though the deed had then been made to both.—*Cannon v. Castleman*, 73 N. E. 689, 164 Ind. 343.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 102-104.

**§ 46. Personal property in general.**

[a] (Sup. 1874)

Shares of stock in an incorporated company being liable by statute to levy and sale on execution, a judgment creditor may maintain an action against the judgment defendant and his assignee to set aside a fraudulent sale of such stock to the latter.—*Scott v. Indianapolis Wagon Works*, 48 Ind. 75.

[b] (Sup. 1885)

A creditor may maintain a bill against the debtor and his assignee, to set aside a fraudulent transfer of the capital stock of a corporation.—*Quarl v. Abbett*, 102 Ind. 233, 1 N. E. 476, 52 Am. St. Rep. 662.

[c] (Sup. 1888)

Where a husband, having no property subject to execution, gives his wife a sum of money, with intent to defraud his creditors, which facts the wife knew, and the wife still holds the money, and has not accounted therefor, it may be reached in equity by the husband's judgment creditors.—*Blair v. Smith*, 114 Ind. 114, 15 N. E. 817, 5 Am. St. Rep. 593.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. §§ 6, 108, 110.

See, also, 20 Cyc. p. 350.

**§ 49. Particular estates and interests.**

[a] (Sup. 1883)

Rev. St. 1881, §§ 2974, 2976, provide that where a conveyance for a valuable consideration is made to one person, and the consideration therefor is paid another, a resulting trust shall arise in favor of the latter individual, if it shall be made to appear that by agreement and without any fraudulent intent the party in whom the title is vested was to hold the land in trust for the one paying the purchase money. *Held*, in a suit by a creditor to set aside his debtor's conveyance as fraudulent, that the grantee's answer that the property in controversy was purchased with her own separate funds, and by mutual agreement and without fraudulent intent the deed was made to the debtor as her trustee, and that he so held the land as her trustee up to the time of the conveyance assailed as fraudulent, and her further answer that the grantee paid the purchase money, but that the title was, without her knowledge or consent, made to the debtor, who held as her trustee, stated good defenses under the above statute.—*Robertson v. Huffman*, 92 Ind. 247.

[b] (Sup. 1894)

An agreement by a husband with his wife to take a specified sum of money named in her will in lieu of his dower interest in her lands, provided that she allowed the will to stand as made, is valid as against creditors of the husband whose claims were in judgment prior

to the agreement.—*Huffman v. Copeland*, 139 Ind. 221, 38 N. E. 861.

[c] (App. 1909)

A conveyance of land, held by the heir in trust for all the heirs, to another, in compliance with a parol agreement and upon a sufficient consideration, is valid as against the trustee's creditors.—*Fraser v. Churchman*, 43 Ind. App. 200, 86 N. E. 1029.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. §§ 105, 106, 111.

See, also, 20 Cyc. p. 351.

**§ 50. Property or rights without pecuniary value.**

Necessity of alleging value in action to set aside conveyance, see post, §§ 259, 263.

Verdict and findings as to value, see post, § 310.

[a] (App. 1902)

Where, in an action to set aside an alleged fraudulent conveyance of property, it appeared that the property was worth \$1,200, and was mortgaged for \$900; that defendant was entitled to an exemption of \$600; and that his wife's interest, not subject to execution, amounted to \$700,—there was nothing which could be applied on the judgment, even if the conveyance was vacated, and a judgment in favor of the creditor was erroneous.—*Jackson v. Saylor*, 63 N. E. 881, 30 Ind. App. 72.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. §§ 112, 113.

See, also, 20 Cyc. p. 350.

**§ 51. Exempt property in general.**

Mortgage pending execution, see EXECUTION, § 115.

Pleading, see post, §§ 266, 269.

Presumptions and burden of proof, see post, § 271.

[a] (Sup. 1848)

If, between the times of the rendition of judgment and the issuing of execution, an execution defendant fraudulently conveys all his property to a third person, and it is afterwards levied on to satisfy the execution, he is not entitled to hold \$125 worth of the property exempt from execution.—*Mandlove v. Burton*, 1 Ind. 39, Smith, 3.

[b] As exempt property cannot be taken in satisfaction of debts, a conveyance thereof is not invalid because voluntary, nor because it was executed with intent to hinder and delay creditors.—(Sup. 1886) *Burdge v. Bolin*, 106 Ind. 175, 6 N. E. 140, 55 Am. Rep. 724; (1888) *Phelps v. Smith*, 116 Ind. 387, 17 N. E. 602, 19 N. E. 156; (1899) *Goudy v. Werbe*, 117 Ind.

154, 19 N. E. 764, 3 L. R. A. 114; (1889) Ray v. Yarnell, 118 Ind. 112, 20 N. E. 705; (1889) Citizens' Bank v. Bolen, 121 Ind. 301, 23 N. E. 146.

[c] (Sup. 1886)

As a general rule, a voluntary conveyance, made by an insolvent debtor who has not sufficient other property subject to execution to pay his debts, is constructively fraudulent as against existing creditors; but this is true only where the property so disposed of was not at the time exempt from execution, but such as the creditor might have reached in the hands of the debtor.—*Faurote v. Carr*, 108 Ind. 123, 9 N. E. 350.

[d] A debtor's conveyance of exempt property cannot be fraudulent as to creditors.—(Sup. 1888) *Blair v. Smith*, 15 N. E. 817, 114 Ind. 114, 5 Am. St. Rep. 593; (1897) *Isgrigg v. Pauley*, 47 N. E. 821, 148 Ind. 436; (App. 1897) *Kolb v. Raison*, 47 N. E. 177, 17 Ind. App. 551.

[e] (Sup. 1892)

Where a conveyance of land is set aside as fraudulent, and the property sold, the debtor cannot claim a portion of the proceeds as exempt from execution.—*Chandler v. Jessup*, 132 Ind. 351, 31 N. E. 1109.

[f] (Sup. 1893)

A fraudulent grantor cannot set up an after-acquired right of exemption as a defense to an action to set aside a conveyance; his rights being determined by the conditions existing at the time of the conveyance.—*Phenix Ins. Co. v. Fielder*, 33 N. E. 270, 133 Ind. 557.

[g] (Sup. 1897)

The interest of a wife in her husband's land, to the extent of one-third its value, is not the subject of a fraudulent conveyance.—*Isgrigg v. Pauley*, 47 N. E. 821, 148 Ind. 436.

[h] (Sup. 1898)

Property conveyed by a husband to his wife, though with intention, known to her, to defraud his creditors, cannot be reached by them, he being a householder, and the value of his wife's inchoate interest therein, and his exemption of \$600, and liens on the property senior to such creditors, being equal to the value thereof.—*Marmon v. White*, 51 N. E. 930, 151 Ind. 445.

[i] (Sup. 1907)

The owner of exempt property has the absolute right to transfer the same, and in doing so cannot legally be charged with defrauding his creditors, or with intent to do so.—*Stark v. Lamb*, 167 Ind. 642, 78 N. E. 668, 79 N. E. 895.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 114-117; 28 Cent. Dig. Insolv. § 83.  
See, also, 20 Cyc. p. 377.

## § 52. Homestead.

[a] (Sup. 1886)

As a general rule a voluntary conveyance made by an insolvent debtor who has not sufficient other property subject to execution to pay his debts, is constructively fraudulent, as against existing creditors; but this is true only where the property so disposed of was not at the time exempt from execution, but such as the creditor might have reached in the hands of the debtor.—*Faurote v. Carr*, 108 Ind. 123, 9 N. E. 350.

[b] (Sup. 1887)

As a debtor's homestead is not subject to the demands of his creditors, a conveyance thereof, whether made with or without consideration, and irrespective of the intent of the parties, cannot be set aside as fraudulent as to creditors.—*Taylor v. Duesterberg*, 109 Ind. 165, 9 N. E. 907.

[c] (Sup. 1891)

A conveyance is not fraudulent where the value of the property conveyed, after deducting valid liens, does not exceed the amount of the grantor's statutory exemption.—*Nichols, Shepherd & Co. v. Burch*, 128 Ind. 324, 27 N. E. 737.

[d] (Sup. 1893)

Where defendant seeks to defeat an action to set aside a conveyance by her as fraudulent by showing that the property conveyed was exempt, she must show that the right of exemption existed at the time the alleged fraudulent conveyance was made, and an allegation that such right existed at the time the answer was filed is not sufficient.—*Phenix Ins. Co. v. Fielder*, 133 Ind. 557, 33 N. E. 270.

[e] (Sup. 1900)

Where the value of an interest in land does not exceed \$600, which is exempt from execution by statute, a conveyance thereof will not be held fraudulent as to the grantor's creditors.—*Hedrick v. Hall*, 58 N. E. 257, 155 Ind. 371.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 118-127.  
See, also, 20 Cyc. pp. 381-389.

## § 53. Property in other state or county.

[a] (Sup. 1875)

A conveyance by the judgment defendant, after the rendition of the judgment, of lands belonging to him in another county than that in which the judgment is rendered, is not a fraud on the judgment plaintiff as the judgment is not a lien on such lands.—*Baker v. Chandler*, 51 Ind. 85.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. § 101.  
See, also, 20 Cyc. p. 352.

**(D) INDEBTEDNESS, INSOLVENCY, AND INTENT OF GRANTOR.**

Pleadings, see post, § 261.

Proof, see post, §§ 271-273, 286, 288, 289, 297, 298.

Question for jury, see post, § 308.

Special verdict, see post, § 310.

**§ 54. Indebtedness element of fraud.**

Admissibility of evidence, see post, § 286.

**[a] (Sup. 1845)**

That a person was deeply involved in debt when he executed a voluntary conveyance of land is strong evidence that the conveyance was made to defraud subsequent purchasers.—*Paine v. Doe ex dem. Griffin*, 7 Blackf. 485.

**[b] (Sup. 1845)**

A voluntary conveyance of real estate is not void as to subsequent creditors merely because the grantor was indebted \$25 or \$30 at the date of the deed.—*Doe ex dem. Abbott v. Hurd*, 7 Blackf. 510.

**[c] (Sup. 1853)**

A voluntary conveyance of lands made by father to son, to prevent their being subjected to the payment of his debts—whether he is indebted as principal or surety—may be set aside by his creditors, and the land may be subjected to the payment of their debts.—*Law v. Smith*, 4 Ind. 56.

**[d] (Sup. 1853)**

Mere indebtedness of the grantor at the time of making a voluntary conveyance will not render it fraudulent as to creditors.—*Hubbs v. Bancroft*, 4 Ind. 388.

Indebtedness on the part of a grantor at the time of the conveyance is a badge of fraud.—*Id.*

**[e] (Sup. 1886)**

Where the good faith of a sale or conveyance of property is in issue, it is competent to show that the vendor or grantor was embarrassed financially when the sale or conveyance was made.—*Geisendorff v. Eagles*, 106 Ind. 38, 5 N. E. 743.

**[f] (Sup. 1889)**

A conveyance by a surety on a guardian's bond may be set aside as fraudulent, though there was no breach of the bond when the conveyance was made.—*Bowen v. State ex rel. Bradbury*, 121 Ind. 235, 23 N. E. 75.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 128-134, 136, 137.

**§ 55. Assumption of debts by grantee.****[a] (Sup. 1897)**

The fact that a debtor conveys all its property, leaving debts unpaid, will not justify the setting aside of such conveyance for fraud, where the grantee assumes the debts.—*Old Nat.*

*Bank of Evansville v. Heckman*, 47 N. E. 953, 148 Ind. 490.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. § 135.

**§ 56. Solvency of grantor.**

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 138-158.

See, also, 20 Cyc. pp. 453-455.

**§ 57. — In general.****[a] (Sup. 1876)**

Plaintiff's evidence established that the debtor, prior to his becoming indebted to plaintiff, had acquired title to land; that subsequent to the incurring of such debt the debtor and his wife conveyed the land to a third person, who conveyed the same to the debtor's wife; that, though both of said conveyances purported to be for a valuable consideration, yet no consideration for either passed between the parties thereto; that about two years afterward the plaintiff recovered a judgment against the debtor for the amount of said debt; and that, an execution on such judgment having been issued to the proper officer, the debtor had then no property subject to execution, and such writ was returned "unsatisfied." *Held*, that fraud in the execution of such conveyances was not deducible from such evidence, and could not be presumed in the absence of evidence that, at the time such alleged fraudulent conveyances were made, the debtor did not have sufficient property left to pay his debts, and the debtor had procured the making of such conveyances with the intent to defraud his creditors, that the wife had knowledge of such intent, and that no consideration had passed between her and her husband for the making of such conveyances.—*Egan v. Downing*, 55 Ind. 65.

**[b] (Sup. 1882)**

If the grantor is solvent at the time the grant was made, his subsequent insolvency will not render it invalid.—*Dunn v. Dunn*, 82 Ind. 42; *Barkley v. Tapp*, 87 Ind. 25.

**[c] (Sup. 1884)**

Where the grantor is solvent when the conveyance is made, his subsequent insolvency does not affect the validity of the conveyance.—*Masters v. Templeton*, 92 Ind. 447.

**[d] (Sup. 1888)**

Where a husband whose remaining property subject to execution is amply sufficient to pay his debts makes a gift of money to his wife, immediately borrowing it from her, and securing its payment by note, and thereafter suffers judgment on the note, and seizure of his property on execution, with intent to defraud his creditors, the wife is not liable to a creditor of the husband for the goods seized, although she had notice of her husband's fraudulent intent in suffering judgment and seizure of the goods.—*Phelps v. Smith*, 116 Ind. 387, 17 N. E. 602, 19 N. E. 156.

[e] (Sup. 1892)

A solvent person is not guilty of fraud in making a voluntary conveyance of his property.—*Bright v. Bright*, 31 N. E. 470, 132 Ind. 56.

[f] (Sup. 1894)

Defendant's father-in-law paid part of the price of land bought by defendant, on condition that defendant should convey it, with other land, to his wife, and defendant conveyed it according to the agreement. At that time, defendant was surety on a note for \$500, which had matured, but which was not put to judgment till several years later. At the time of the conveyance the principal debtor was worth over \$15,000, and defendant was worth \$1,000, besides the land conveyed. *Held*, that the conveyance was not fraudulent.—*Boyd v. Vickery*, 138 Ind. 276, 37 N. E. 972.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 138-142, 148, 150-158.

### § 58. — Retention of property sufficient to pay debts.

Element of fraud in general, see ante, § 8. Presumptions and burden of proof, see post, § 272.

[a] (Sup. 1871)

To sustain an action to set aside a conveyance alleged to be fraudulent and subject the property for payment of the creditor's claim, it must be alleged and proved that the judgment debtor does not possess other property subject to sale for the payment of the claim.—*Ewing v. Patterson*, 35 Ind. 326.

[aa] (Sup. 1872)

A voluntary conveyance to a wife cannot be impeached by the creditors of the grantor merely upon the ground of his indebtedness at the time of the conveyance, if he retains sufficient property with which to discharge his debts.—*Brookbank v. Kennard*, 41 Ind. 339.

[b] A creditor of a grantor attacking as fraudulent a conveyance by the latter must aver and prove that at the time of making the same, as well as when suit was brought, such grantor did not have sufficient other property subject to execution to pay all his debts.—(Sup. 1876) *Sherman v. Hogland*, 54 Ind. 578; (1883) *Eve v. Louis*, 91 Ind. 457; (1891) *McConnell v. Citizens' State Bank of Petersburg*, 27 N. E. 616, 130 Ind. 127; (1894) *Nevers v. Hack*, 37 N. E. 791, 138 Ind. 260, 46 Am. St. Rep. 380; (1894) *Boyd v. Vickery*, 37 N. E. 972, 138 Ind. 276.

[c] Courts will not interfere to set aside a conveyance, as fraudulent against creditors, if it appear that there is property other than that conveyed out of which their claims can be satisfied.—(Sup. 1877) *Bentley v. Dunkle*, 57 Ind. 374; (1894) *Emerson v. Opp*, 139 Ind. 27, 38 N. E. 330.

[d] (Sup. 1877)

The act of a debtor in surrendering a policy of insurance on his life payable to himself, and taking another payable to his mother, it not being shown that he did not have at the time sufficient property to pay all of his debts, is not fraudulent as to creditors on the part of either the debtor or the mother.—*Langford v. Freeman*, 60 Ind. 46.

[e] (Sup. 1878)

Where a debtor conveys property without consideration during the pendency of an action against him, and the property is afterwards levied on and sold under execution issued on the judgment recovered in such action, the purchaser cannot recover the possession of the property without showing that at the time of the conveyance the debtor had no other property subject to execution.—*Holman v. Elliott*, 65 Ind. 78.

[f] (Sup. 1880)

To entitle a creditor to set aside his debtor's conveyance as fraudulent, it must appear that the debtor did not have other property at the time of making the conveyance, sufficient to satisfy the creditors' claims, since a debtor has a right to make whatever disposition he pleases of property, so long as in doing so he works no injury to his creditors.—*Noble v. Hines*, 72 Ind. 12.

[g] (Sup. 1881)

A debtor's fraudulent conveyance cannot be set aside at the instance of creditors, unless it appears that at the time of making it he had no other property out of which creditors' claims could have been satisfied.—*McCole v. Loehr*, 79 Ind. 430.

[h] (Sup. 1881)

In a suit to set aside a conveyance by plaintiff's debtor on the ground that it was without consideration, it must be shown that the grantor had not enough property left subject to execution to pay all his debts.—*Jennings v. Howard*, 80 Ind. 214.

[i] (Sup. 1882)

A creditor must show that the grantor, when he made the conveyance attacked as fraudulent and at the time suit was brought, had no other property sufficient to set aside his debts.—*Bishop v. State ex rel. Lord*, 83 Ind. 67.

[j] (Sup. 1882)

Where a conveyance is charged to have been made with fraudulent intent as against creditors, it need not be shown that after the conveyance the debtor did not have sufficient property to pay his debts.—*Flannagan v. Donaldson*, 85 Ind. 517.

[k] (Sup. 1883)

Where a judgment creditor purchases lands fraudulently conveyed and then brings an action of ejectment or a suit to quiet title, he must show the fraudulent character of the conveyance, and show that at the time of the execution of the conveyance and sale on execution

the judgment debtor did not have other property subject to execution sufficient to pay his debts.—*Eve v. Louis*, 91 Ind. 457.

[l] (Sup. 1887)

When a debtor purchases property with money which might have been subjected to the payment of his debts, and takes title in the name of a volunteer for the purpose of defrauding his creditors, such creditors may subject it to the payment of their claims, unless at the time of the conveyance or the bringing of the suit, the debtor had other property subject to execution sufficient to enable the debt to be collected by ordinary process.—*Eiler v. Crull*, 112 Ind. 318, 14 N. E. 79.

A conveyance in fraud of his creditors is subject to the payment of their claims, unless at the time of the conveyance, or the bringing of the suit, the debtor had other property sufficient to enable the debt to be collected by ordinary process; but if the debtor has other property which cannot be reached by execution and which he refuses to apply to the satisfaction of the debt, so that the creditor is required to resort to an extraordinary remedy, he may proceed against property fraudulently conveyed, and it is no defense for the debtor to show that he had property, not subject to execution, out of which he might have paid the debt, if he had chosen so to do.—*Id.*

[m] (Sup. 1888)

The complaint is fatally defective, unless it show, not only that the grantor had no other property subject to execution at the time of the conveyance, but also that he had no such property at the commencement of the action.—*Taylor v. Johnson*, 113 Ind. 164, 15 N. E. 238.

[n] (Sup. 1889)

Though a debtor's conveyance is made for the purpose of defeating creditors, yet if, after its execution, the debtor still has sufficient property to satisfy his liabilities, the conveyance will be sustained, since it has worked no injury to his creditors.—*Sell v. Bailey*, 119 Ind. 51, 21 N. E. 338.

[o] (Sup. 1895)

Plaintiff's debtor made a conveyance of property without consideration, and with the admitted intention of defrauding creditors other than plaintiff, and thereafter was without sufficient property to satisfy plaintiff's claim. *Held*, that plaintiff was within Rev. St. 1881, § 4920 (Rev. St. 1894, § 6645), providing that conveyances made in fraud of creditors are void as to the "person sought to be defrauded."—*Personette v. Cronkhite*, 140 Ind. 586, 40 N. E. 59.

[p] (App. 1905)

A suit to set aside a mortgage as fraudulent is governed by the same rules which obtain in actions to set aside fraudulent conveyances, and plaintiff therein must show that at the time of the execution of the mortgage and at the time suit was brought the mortgagor

did not have enough property subject to execution to pay his debts, or to pay plaintiff's judgment, after satisfying the mortgage.—*Dinius v. Lahr*, 74 N. E. 1033, 36 Ind. App. 425.

[q] (App. 1905)

A distributee assigned his interest in the estate of his intestate without any valuable consideration. The assignment was made for the purpose of defrauding the distributee's creditors. There was nothing to show that the distributee did not have other property sufficient to satisfy a judgment against him, nor did it appear that any attempt had been made to collect the judgment by ordinary processes of law, nor that the distributee was insolvent. *Held*, that the assignee acquired the distributee's interest in the estate as against the judgment creditor.—*Ritchey v. McKay*, 75 N. E. 161, 1090, 36 Ind. App. 539.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 138, 140, 144-147, 158.

**§ 60. Solvency of debtor liable primarily or jointly with grantor.**

[a] (Sup. 1897)

The solvency of the sureties on a bond is immaterial to the right of the person secured thereby to have a fraudulent conveyance of land by the principal set aside, so as to subject such land to payment for the breach of the bond.—*State ex rel. Little v. Parsons*, 47 N. E. 17, 147 Ind. 579, 62 Am. St. Rep. 430.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud Conv. § 143.  
See, also, 20 Cyc. p. 461.

**§ 61. Insolvency element of fraud.**

[a] A conveyance will not be set aside as fraudulent merely on the ground of the insolvency of the grantor at the time of its execution.—(Sup. 1857) *Frank v. Peters*, 9 Ind. 343; (1881) *Wooters v. Osborn*, 77 Ind. 513; (1881) *Evans v. Pence*, 78 Ind. 439.

[b] (Sup. 1860)

The insolvency of the owner does not invalidate a sale, if no liens have attached.—*McTaggart v. Rose*, 14 Ind. 230.

[c] (Sup. 1881)

In an action to set aside an alleged fraudulent conveyance, the mere fact that at the time of the conveyance the debtor had not enough unincumbered property to pay his debts *held* not to be conclusive evidence of fraud.—*Wooters v. Osborn*, 77 Ind. 513.

[d] (Sup. 1884)

One who attacks a conveyance on the ground of fraud must prove the insolvency of the grantor.—*Pennington v. Flock*, 93 Ind. 378.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 138-158; 43 CENT. DIG. Sales, § 25.  
See, also, 20 Cyc. pp. 449, 455-461.

**§ 63. Intent to defraud pre-existing creditors.**

Intent to defeat other creditors by preference, see post, § 117.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. FRAUD. CONV. §§ 159-177.

See, also, 20 Cyc. p. 461.

**§ 64. — In general.**

[a] (Sup. 1882)

Where land was given to a husband with which to buy land for his wife, and, without her knowledge, he placed the title in his own name, he became a trustee for his wife; and the fact that she delayed to enforce the trust for 20 years, during which time the husband paid the taxes on it and improved it, does not show that a deed made by him to her at the end of such time was fraudulent as to his creditors.—*Bishop v. State ex rel. Lord*, 83 Ind. 67.

[b] (Sup. 1885)

A joinder by a husband in a conveyance to a trustee for his wife, made for the purpose of clearing her title and correcting a mistake, is valid as against his creditors.—*Bremmerman v. Jennings*, 101 Ind. 253.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. FRAUD. CONV. §§ 159-161, 164, 165.

**§ 65. — One or more creditors.**

[a] (Sup. 1895)

Plaintiff's debtor made a conveyance of property without consideration, and with the admitted intention of defrauding creditors other than plaintiff, and thereafter was without sufficient property to satisfy plaintiff's claim. *Held*, that plaintiff was within Rev. St. 1881, § 4920 (Rev. St. 1894, § 6645), providing that conveyances made in fraud of creditors are void as to the "person sought to be defrauded."—*Personette v. Cronkhite*, 140 Ind. 586, 40 N. E. 59.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. FRAUD. CONV. § 162.

**§ 66. — Pending actions or other proceedings.**

[a] (Sup. 1849)

A conveyance made pending a suit against the grantor, for the purpose of preventing the collection of such damages as might be recovered, and with knowledge of the purchaser that it was so made, may be set aside at the instance of the plaintiff in such suit, after judgment for him therein, whether made with or without adequate consideration.—*Wright v. Brandis*, 1 Ind. 336.

[b] (Sup. 1853)

A conveyance made by a vendor during the pendency of a suit against him, by fraud with the vendee, to prevent the collection of a judgment, will be set aside in equity; and the fact that the vendee paid a full consideration for the land will make no difference. He must show, in addition, that he purchased in good faith, innocent of any knowledge of or participation in, the fraudulent designs of the vendor.—*Rogers v. Evans*, 3 Ind. 574, 56 Am. Dec. 537.

[c] (Sup. 1853)

A debtor who held title to land by title bond, and who had paid the purchase money, being sued at law for a debt, in order to prevent the land from being sold for the payment of the judgment, caused it to be conveyed without consideration during the pendency of the suit to his son, who had knowledge of the suit and received the conveyance in order to prevent a sale of the land to satisfy the expected judgment. The debtor continued in possession of the property. *Held*, that the land was subject to the claim of the judgment creditor.—*Corwin v. Reddington*, 4 Ind. 198.

[d] (Sup. 1871)

Where, at the time of a conveyance of a debtor's land, an attachment had been delivered to the sheriff, but had not been levied, of which the grantee had no knowledge, and the attachment was not levied, but was thereafter dismissed, the conveyance is not affected or rendered fraudulent by the pendency of the attachment.—*Lowry v. Howard*, 35 Ind. 170, 9 Am. Rep. 670.

More pendency of suit against him will not preclude a debtor from conveying his property in good faith for a good consideration.—*Id.*

[e] (Sup. 1873)

An action was commenced on November 26th for the recovery of damages for the speaking of slanderous words on August 1st preceding. The defendants, to avoid liability for damages, had on November 17th fraudulently conveyed their real estate to their children without valuable consideration; the grantees having notice of such fraudulent intent. *Held*, that these facts were sufficient to subject the property to the judgment against the defendants obtained in the action, and it was unimportant whether the deed was delivered before or after the commencement of the action.—*Shean v. Shay*, 42 Ind. 375, 13 Am. Rep. 366.

[f] (Sup. 1882)

The debt for costs in a cause adjudged to the defendant accrues at the time that the judgment is rendered, and not before.—*Stevens v. Works*, 81 Ind. 445.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. FRAUD. CONV. §§ 166-177.

**§ 68. Intent to defraud subsequent creditors.**

Weight of evidence, see post, § 298.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 178-183.

**§ 69. — In general.**

[a] (Sup. 1829)

A conveyance of real estate pending an action against the grantor does not of itself render such conveyance void as to a subsequent creditor.—*Ray v. Roe ex dem. Brown*, 2 Blackf. 258.

[b] An intent to defraud existing creditors also shows an intent to defraud future creditors.—(Sup. 1859) *Ruffing v. Tilton*, 12 Ind. 259; (1861) *Dart v. Stewart*, 17 Ind. 221.

[c] (Sup. 1888)

Under Rev. St. 1881, § 4924, providing that "the question of fraudulent intent in all cases arising under the provisions of this act shall be deemed a question of fact, nor shall such a conveyance be adjudged fraudulent as against creditors or purchasers solely on the ground that it was not founded on a valuable consideration," where a husband whose remaining property subject to execution is amply sufficient to pay his debts conveys land without consideration so as to place it beyond the reach of creditors, the grantee immediately reconveying to him and his wife as tenants by entireties, such conveyances are not fraudulent as to subsequent creditors; no actual fraud on the part of either the husband or wife having been found.—*Phelps v. Smith*, 116 Ind. 387, 17 N. E. 602, 19 N. E. 156.

[d] (Sup. 1895)

A deed may be set aside as fraudulent where it was executed for the purpose of preventing the property from becoming subject to the payment of the grantor's debts whenever they may accrue.—*Gable v. Columbus Cigar Co.*, 38 N. E. 474, 140 Ind. 563.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 178-180, 182, 183.

**(E) CONSIDERATION.**

Affecting necessity for change of possession, see post, § 132.

Effect of good faith of grantee, see post, §§ 168, 169.

Element of fraud in general, see ante, § 8.

Instructions, see post, § 309.

Payment and recovery of consideration, see post, § 177.

Payment of consideration by grantee after notice of fraud, see post, § 160.

Pleading, see post, §§ 263, 266, 269.

Proof, see post, §§ 277, 291, 300.

Purchaser from grantee as bona fide purchaser, see post, § 200.

Purchaser from grantor as bona fide purchaser, see post, § 192.

Questions for jury, see post, § 308.

Reimbursement of grantee, see post, § 183.

Verdict and findings, see post, § 310.

**§ 73. Want or insufficiency element of fraud.**

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 186-191.

See, also, 20 Cyc. p. 441.

**§ 74. — As to creditors.**

[a] A debtor may sell his property to pay his debts for such consideration as he may agree to accept, and, if there is nothing illegal in the transaction, it will be good as against his creditors.—(Sup. 1853) *Hubbs v. Bancroft*, 4 Ind. 388; (1857) *Frank v. Peters*, 9 Ind. 343; (1871) *Lowry v. Howard*, 35 Ind. 170, 9 Am. Rep. 676.

[b] (Sup. 1853)

Inadequacy of consideration is a badge of fraud.—*Hubbs v. Bancroft*, 4 Ind. 388.

[c] (Sup. 1856)

The payment of a full price for land does not purify a fraudulent transaction; but yet such payment is entitled to great weight, where the proof of fraud is not clear.—*Kittering v. Parker*, 8 Ind. 44.

[d] A conveyance without consideration is not necessarily fraudulent as to an existing creditor.—(Sup. 1872) *Parton v. Yates*, 41 Ind. 456; (1882) *Dunn v. Dunn*, 82 Ind. 42.

[e] (Sup. 1879)

A conveyance is not fraudulent merely because it is voluntary.—*Hardy v. Mitchell*, 67 Ind. 485.

[f] (Sup. 1881)

Fraud in the sale of goods will not be inferred from inadequacy of consideration, unless such inadequacy is so great as to impress every person with its grossness.—*Cagney v. Cuson*, 77 Ind. 494.

[g] (Sup. 1881)

A man cannot make a gift of his property, and thus take it from his creditors.—*McCole v. Loehr*, 79 Ind. 430.

[h] (Sup. 1882)

Want of a valuable consideration alone does not raise a presumption of fraud.—*Bishop v. State ex rel. Lord*, 83 Ind. 67.

[i] A conveyance made without consideration, for the purpose of defrauding creditors of the grantor, is void as to such creditors.—(Sup. 1882) *Iles v. Cox*, 83 Ind. 577; (1883) *Meredith v. Citizens' Nat. Bank*, 92 Ind. 343; (1892) *York v. Rockwood*, 132 Ind. 358, 31 N. E. 1110; (1896) *Gilliland v. Jones*, 144 Ind. 662, 43 N. E. 930, 55 Am. St. Rep. 210.

## [j] (Sup. 1882)

A voluntary conveyance of land is fraudulent in law, as against the mortgagor's creditors who are thereby prejudiced, even though there may have been no fraudulent motive on the part of the grantor or grantee, or they may have been ignorant of the claim of the defrauded creditor.—*Cavanaugh v. Smith*, 84 Ind. 380.

## [k] (Sup. 1884)

A voluntary conveyance by a debtor, who at the time had no other property subject to execution, may be avoided by his creditors as fraudulent.—*Williams v. Osborne*, 95 Ind. 347.

## [l] (Sup. 1886)

Subsequent creditors can impeach a voluntary deed only by proving the existence of an actual intent in the minds of the parties at the time of the execution of the conveyance to hinder, delay, or defraud creditors by means thereof.—*Barrow v. Barrow*, 108 Ind. 345, 9 N. E. 371.

## [m] (Sup. 1888)

A voluntary conveyance is void as to existing creditors of a grantor, though there was no fraudulent intent in making it.—*Heaton v. Shanklin*, 115 Ind. 595, 18 N. E. 172.

## FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 186-190.

See, also, 20 Cyc. pp. 511-517; note, 5 L. R. A. (N. S.) 395; note, 14 Am. St. Rep. 739.

## § 75. — As to subsequent purchasers.

## [a] (Sup. 1832)

A voluntary deed of conveyance, though not recorded, is valid against any subsequent voluntary conveyance of the same land by the grantor.—*Way v. Lyon*, 3 Blackf. 76.

## FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. § 191.

## § 76. Nature and adequacy.

## [a] (Sup. 1853)

A conveyance of land to a husband, in satisfaction of a claim for damages for the seduction of his wife, is valid; there being no fraud on the part of the grantee against the creditors of the grantor.—*Carlisle v. Gaskill*, 4 Ind. 219.

## [b] (Sup. 1871)

Where it is charged that a conveyance is fraudulent as to the grantor's creditors, the nature and amount of the consideration are important evidence with reference to the good faith of the transaction.—*Lowry v. Howard*, 35 Ind. 170, 9 Am. Rep. 676.

## [c] (Sup. 1875)

Under 1 Gav. & H. St. p. 353, § 21, a conveyance of real estate or charge on the same cannot be adjudged fraudulent as against creditors or purchasers solely on the ground of there having been no valuable consideration for the same.—*Pence v. Croan*, 51 Ind. 336.

## [d] (Sup. 1886)

Where there is an equitable consideration, a debtor may, notwithstanding the objections of his creditors, perform his contract.—*Wright v. Jones*, 4 N. E. 281, 105 Ind. 17.

## [e] (App. 1901)

To render a conveyance subject to attack by creditors of the grantor, where it is shown that it was made with intent to defraud them, it will not be necessary to show that there was no consideration of value whatever, but it will avail the attacking creditors to show that the consideration, though valuable was so inadequate that the conveyance, if permitted to stand in full force, will manifestly result in appreciable injury to the creditors, and that they will be appreciably benefited by subjecting it to the payment of their claims without material injury to the innocent purchaser.—*Jameson v. Dille*, 61 N. E. 601, 27 Ind. App. 429.

## FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 192-196; 9 CENT. DIG. Chat. Mtg. § 193.

See, also, 20 Cyc. pp. 489-508.

## § 77. Sufficiency in general.

## [a] (Sup. 1849)

The seduction of an innocent woman by a pretended marriage, the seducer having a wife at the time living, entitles the injured woman to compensation, and will be deemed a valuable consideration for a grant; and so though the intention of the grantor in making the grant for such consideration was to defraud his creditors.—*Doe ex dem. Hutchinson v. Horn*, 1 Ind. 363, *Smith*, 242, 50 Am. Dec. 470.

## [b] (Sup. 1888)

A member of an insolvent firm conveyed individual land in consideration of the grantee assuming and paying the individual creditors of the grantor, who accepted the grantee as their debtor. The highest value put on the land by any witness was \$4,600, while \$3,500 was paid by the grantee, who had no actual knowledge of fraud on the part of the grantor in making the conveyance. *Held*, that the conveyance was on sufficient consideration.—*Smith v. Selz*, 114 Ind. 229, 16 N. E. 524.

## FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 197-199, 202; 11 CENT. DIG. Contracts, § 235.

See, also, 20 Cyc. p. 489.

## § 80. Future support.

## [a] (Sup. 1868)

A. assigned to B. a judgment recovered by him, payable in annual installments, in consideration that B. should support him for a certain number of years, and pay a certain judgment theretofore recovered against him. Soon afterwards another judgment was recovered against A. *Held*, that the facts were not sufficient to show that the assignment of the judgment was

fraudulent.—*Mahony v. Hunter's Ex'r*, 30 Ind. 246.

[b] (Sup. 1839)

Where a conveyance is made in consideration of the future support of the grantor, and is fully executed, the consideration becomes a valuable one, and the conveyance cannot be set aside as fraudulent and void as to creditors, unless it was made with the actual intent to delay and defraud creditors, and the grantee at the time of the conveyance had notice of such intent.—*Hays v. Montgomery*, 118 Ind. 91, 20 N. E. 646.

[c] (App. 1901)

A conveyance upon the nominal consideration of one dollar and an agreement for the support of the grantor for life, burial, etc., is fraudulent as against creditors.—*Spiers v. Whitesell*, 61 N. E. 28, 27 Ind. App. 204.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. FRAUD. CONV. §§ 206-209.

See, also, 20 Cyc. p. 493.

§ 84. Assumption of liability.

[a] (Sup. 1840)

A conveyance by an insolvent debtor in consideration of the grantee's assumption of certain debts is valid.—*Anderson v. Smith*, 5 Blackf. 395.

[b] (Sup. 1882)

Where trustees of a lodge sold its property to a stranger on his agreeing to pay their notes given for its debt, the fact that they afterwards repurchased the property as individuals, agreeing, as the sole consideration, to pay the notes assumed by the stranger, does not render the sale fraudulent as to creditors of the lodge.—*Miller v. Lebanon Lodge No. 48*, 1 O. O. F., 88 Ind. 286.

[c] (Sup. 1882)

Where, in consideration of the assumption by a surety of his principal's debt and the mortgaging of the surety's land to secure it, the principal transfers personal property to the surety, the sale is upon a valuable consideration.—*Powell v. Stickney*, 88 Ind. 310.

[d] (App. 1901)

Defendant conveyed land to his mother, she assuming to pay a certain mortgage thereon. She conveyed to defendant's brother, reserving a life interest, he assuming a mortgage thereon given for borrowed money, with which the mortgage assumed by the mother had been paid. The mother paid defendant no cash at the time of the conveyance to her, and he continued to reside on the property with her, paying her for his board. Her grantee lived in another state, visiting his mother occasionally. After the conveyance to the mother, she invested no money in the property. Held, that the conveyances would be set aside, subject to the lien of the mortgage assumed in

the second conveyance.—*Jameson v. Dilley*, 61 N. E. 601, 27 Ind. App. 429.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. FRAUD. CONV. §§ 214-218.

See, also, 20 Cyc. pp. 495-497.

§ 85. Pre-existing liability.

Between parent and child, see post, § 96. Preferences to creditors, see post, § 121.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. FRAUD. CONV. §§ 212, 219-235.

See, also, 20 Cyc. pp. 497-504.

§ 86. — In general.

[a] (Sup. 1858)

A pre-existing debt is good consideration for a conveyance by a debtor.—*Jones v. Gott*, 10 Ind. 240.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. FRAUD. CONV. §§ 219, 220.

See, also, 20 Cyc. p. 497.

§ 87. — Payment or satisfaction.

[a] (Sup. 1858)

Where a debtor who held property as trustee under a will appropriates the proceeds thereof to his own use, he may, when in failing circumstances, lawfully prefer the beneficiary by a conveyance of his property in trust for her; the beneficiary's claim being a good consideration for the transfer.—*Jones v. Gott*, 10 Ind. 240.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. FRAUD. CONV. §§ 221-229.

See, also, note, 36 L. R. A. 335.

§ 88. — Security.

[a] A conveyance by a debtor to secure a pre-existing debt is on good consideration, both as against creditors and purchasers.—(Sup. 1863) *Aiken v. Bruen*, 21 Ind. 137; (1881) *McLaughlin v. Ward*, 77 Ind. 383.

[b] The mere fact that a mortgage given by an insolvent secures a greater sum than is actually due is not conclusive of fraud.—(Sup. 1880) *Goff v. Rogers*, 71 Ind. 459; (1896) *Adams v. Laugel*, 144 Ind. 608, 42 N. E. 1017.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. FRAUD. CONV. §§ 230-233.

See, also, 20 Cyc. p. 504; note, 33 L. R. A. 305.

§ 90. — Invalidity of original transaction.

[a] (Sup. 1884)

On complaint to set aside a deed as fraudulent, defendant answered that he took the deed in satisfaction of a bona fide mortgage,

and plaintiff replied by general denial and allegation that the mortgage was in fraud of creditors, and both these and the issues on the complaint were found for plaintiff. *Held*, that a decree setting aside the deed and ordering a sale free from any claim of the grantee was proper.—*Hadley v. Hood*, 94 Ind. 119.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. FRAUD. CONV. § 234.

See, also, 20 Cyc. p. 491.

**§ 94. Marriage and marriage settlements.**

Marriage of daughter as consideration of conveyance by parent, see post, § 96.

[a] (Sup. 1831)

The rule that marriage constitutes a good and valuable consideration does not apply where a father makes a voluntary conveyance to his daughters, who afterwards marry,—the father continuing in possession of the property after the conveyance, contracting debts, and dying insolvent,—so as to enable the daughters to hold the property against creditors of the father.—*O'Brien v. Coulter*, 2 Blackf. 421.

[b] (Sup. 1867)

A promise of marriage is regarded as a valuable consideration, and will support a grant. Such contracts are favored in law.—*Bunnell v. Witherow*, 29 Ind. 123.

Where B., pending the suit of W. against him for a breach of a promise of marriage, conveyed to C. certain real and personal estate in consideration of a contract that she (C.) would marry him, after which marriage of C. and B. W. obtained a judgment against him on which an execution was returned nulla bona, in a proceeding by W. against B. and wife to set aside said conveyance, it was *held* to be valid; it not appearing that C., prior to the marriage, had any notice of B.'s fraudulent intent.—*Id.*

[c] (Sup. 1896)

Marriage is a valuable consideration, sufficient to sustain a conveyance made with intent on the part of the grantor to defraud his creditors, unless knowledge on the part of the grantee of such fraudulent intent is alleged and proven.—*State ex rel. Harrison v. Osborn*, 143 Ind. 671, 42 N. E. 921.

[d] (Sup. 1898)

A conveyance of property to one's wife, pursuant to agreement, made before marriage, to convey it to her in consideration of her marrying him, has a valuable consideration to support it against attacks of his creditors.—*Marmon v. White*, 51 N. E. 930, 151 Ind. 445.

[e] (App. 1904)

Where an antenuptial contract between husband and wife provided that the parties mutually agreed to renounce any and all rights of inheritance which each might have by reason of the marriage in the property of the other, and that, if the affianced wife should survive her affianced husband, on his death she should

be paid the sum of \$10,000 in consideration of her waiver of all interest in his estate, the wife's subsequent consent to the abrogation of such contract as an inducement to the execution of a postnuptial conveyance to her by her husband constituted a sufficient consideration for such conveyance, as against the husband's creditors.—*Clow v. Brown*, 72 N. E. 534, 37 Ind. App. 172.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. FRAUD. CONV. §§ 230-242; 23 CENT. DIG. FRDS., ST. OF, §§ 4, 5.

See, also, 20 Cyc. pp. 504-507.

**§ 95. Transactions between husband and wife.**

Presumptions and burden of proof, see post, § 277.

[a] (Sup. 1861)

In suit to set aside a conveyance of real estate made to A. & B. and their wives, by creditors of A. & B., A. and his wife answered that he had managed and made divers investments of \$900 received by him from his wife's estate; that he had invested it in goods for the firm of A. & B., where it had remained, as his wife's separate money, until these goods were sold to the grantor of the lands in question, the conveyance of which was made and accepted in payment and discharge of said debt. B. and his wife answered that her father had advanced to them \$1,500, for which he held their joint note; that, when the goods aforementioned were sold, B. and his father-in-law agreed that the latter should take one-half of the land to be conveyed in discharge of said note; and that it was by his (the father-in-law's) direction that the conveyance of this half was made to his daughter, as an advancement. *Held*, that in each case a sufficient and valid consideration for the conveyance to the wives was shown.—*Schaeffer v. Fithian*, 17 Ind. 463.

[b] (Sup. 1863)

A relinquishment of her contingent interest in her husband's real estate, by the wife, her husband being alive, is a valuable and sufficient consideration for a conveyance by her husband, or procured by him, to her, of property which may be considered but a fair equivalent for such interest; and such conveyance will be deemed valid or invalid, as it may be shown to be fair or fraudulent, and the comparative value of the respective estates may be taken into consideration.—*Hollowell v. Simonson*, 21 Ind. 398.

[c] (Sup. 1870)

Where a married woman loaned her husband a sum of money belonging to her in her own right, and three years later her husband traded a stock of goods to a third person in part payment for a tract of land, and the deed was taken in the wife's name, who executed notes and a mortgage for the residue of the

purchase money, the conveyance being procured for her, and received by her, in payment of the original loan, the wife will be regarded as a purchaser for valuable consideration, in the absence of actual fraud, and will be entitled to hold the land as against the husband's attaching creditors.—*Kyger v. F. Hull Skirt Co.*, 34 Ind. 249.

[d] (Sup. 1872)

A deed by a husband directly to his wife, in good faith, in consideration of money of the separate estate used by the husband in the purchase of the land, is valid.—*Thompson v. Mills*, 39 Ind. 528.

[e] (Sup. 1872)

Where a husband has, with property belonging to his wife, partly paid for property conveyed to him, giving his note for a remaining one-third of the entire consideration, such note being secured by mortgage on the property conveyed, it is not fraudulent for the husband and wife, while the note is unpaid, to convey the property to a third person, who reconveys it to the wife, in order to vest the title in her; she never having consented to the title being vested in her husband.—*Parton v. Yates*, 41 Ind. 456.

[f] (Sup. 1873)

A husband, at the time of purchasing certain real estate, arranged with his wife's father to pay the purchase money, agreeing to convey the land to the wife. In pursuance of this agreement, the father paid for the land, but, without his consent or that of the wife, the deed was taken in the husband's name. Subsequently, being in failing circumstances, the husband, in pursuance of his previous promise, conveyed the land to the wife through the father as her trustee. *Held*, that the conveyance was founded on good consideration, and was not fraudulent.—*Summers v. Hoover*, 42 Ind. 153.

[g] Where a conveyance is obtained in the wife's name by fraud on the part of the husband, she having paid no consideration therefor, although not a party to the fraud, is nevertheless affected by all the equities which the vendor might enforce against her husband, and both will be compelled to reconvey the land.—(Sup. 1873) *Mendenhall v. Treadway*, 44 Ind. 131, distinguishing *Lippperd v. Edwards* (1872) 39 Ind. 165.

[h] (Sup. 1875)

A conveyance from the husband to the wife, without consideration, is a fraud upon the creditors of the husband, even in the absence of an actual fraudulent intention.—*Spinner v. Weick*, 50 Ind. 213.

[i] (Sup. 1876)

Where a husband and wife united in conveying real estate, which was the separate property of the latter, in exchange for other real estate, under an agreement that the title to that received should be taken in her name, and,

without her knowledge or consent, the title was taken in the name of the husband, and the real estate so received was exchanged by the husband and wife, with money belonging to the husband, or other real estate, the title of which was taken in the names of the husband and wife jointly, *held*, that the real estate last transferred by them could not be regarded as the property of the husband, in considering the question whether or not the title of the real estate for which it was exchanged was taken in the names of the husband and wife for the purpose of defrauding creditors of the husband.—*McConnell v. Martin*, 52 Ind. 434; *Snyder v. Same*, *Id.* 439.

[j] (Sup. 1876)

To a complaint by a judgment creditor to set aside an alleged fraudulent conveyance of the lands of his judgment debtor to the wife of the latter, and to subject the same to execution, it is a sufficient answer by the wife to allege that such lands had been purchased from a third person, and wholly paid for, by her, through her husband as her agent, out of her own separate estate, but that, without her knowledge or consent, said lands had been conveyed to her husband, such judgment debtor, who had, on her demand, made the conveyance sought to be set aside.—*Eagan v. Downing*, 55 Ind. 65.

[k] (Sup. 1876)

Lands purchased with the means of a judgment debtor having no property subject to execution, and by him procured to be conveyed to himself and wife jointly, with the right of survivorship, for the purpose of defrauding his creditors, or where such conveyance has first been so procured and made to the debtor himself, and afterwards changed by inserting the name of his wife, with a clause of survivorship, may be subjected to an execution upon such judgment, in an action for that purpose against such grantees.—*Wilds v. Bogan*, 55 Ind. 331.

[l] (Sup. 1880)

Where a man purchases land with the separate means of his wife, and takes the title in his own name, without her consent, his subsequent conveyance of the land to his wife cannot be assailed by his creditors.—*Leonard v. Barnett*, 70 Ind. 367.

[m] The relinquishment by a wife of her inchoate interest in the lands of her husband is a sufficient consideration to support a conveyance to her by him of a part of his lands.—(Sup. 1880) *Brown v. Rawlings*, 72 Ind. 505; (1889) *Citizens' Bank v. Bolen*, 121 Ind. 301, 23 N. E. 146.

[n] (Sup. 1881)

Where property is in the possession of the husband, and he and his wife agree to buy an outstanding title, the consideration for which is to be paid out of her separate estate and the title conveyed to her, and the title is conveyed to him instead, an instruction that

he holds the property simply as a trustee for her, and that it is not subject to the payment of his debts, is properly refused.—*Sherman v. Hogland*, 73 Ind. 472.

[o] (Sup. 1881)

A husband, being indebted to his wife for money received by him from her father's estate under circumstances which created an obligation on his part to repay it, gave her a deed of real estate for a consideration not inadequate, intending to create a preference in her favor. *Held*, that as the wife had no knowledge of such intention on his part, or of his indebtedness, the conveyance would be upheld, though the debt was an old one, and the wife had made no effort to collect it.—*Brookville Nat. Bank v. Kimble*, 76 Ind. 195.

[oo] (Sup. 1882)

Where, in an action to set aside a conveyance to the wife as in fraud of the husband's creditors, on the ground that the wife paid nothing for the property, it appears that the wife paid part of the price with her own money, plaintiffs are entitled to no relief.—*Bragg v. Stanford*, 82 Ind. 234.

[p] (Sup. 1882)

A's wife paid most of the purchase money for a tract of land. The title was taken by A., who verbally agreed to hold the land as trustee for his wife. This land was sold, and with the proceeds was purchased another tract, which the husband verbally agreed to hold upon a similar trust. He was not then in debt, but afterwards, when in debt, he conveyed the land through a third person to his wife, who had expended her own money in improving it. *Held*, that A.'s creditors could not subject the land to the satisfaction of their debts.—*Heaton v. White*, 85 Ind. 376.

[pp] (Sup. 1882)

Where a partnership consisted of three persons, two of whom were husband and wife, and the husband overdrew his account, and the wife, in order to restore the equality of the distribution of the profits of the firm, permitted her husband to be credited with the amount of his overdraft and her own account to be charged therewith, in consideration of which the husband transferred property to the wife for the benefit of herself and a daughter, the conveyance was based on a sufficient consideration as against a creditor of the husband.—*Huffman v. Copeland*, 86 Ind. 224.

[q] (Sup. 1883)

A wife released her inchoate interest in valuable lands belonging to her husband in consideration of his promise to pay her. Afterwards, when he was insolvent, his share of certain lands was conveyed, at his request, by his co-heirs, to himself and his wife, in entirety. *Held*, that such conveyance, as to the wife, was valid, and that her interest was beyond the reach of his creditors.—*Sedgwick v. Tucker*, 90 Ind. 271.

[qq] (Sup. 1883)

The fact that a wife destroyed a note given her by her father, which had been given him by her husband for money advanced him by her father to pay for certain land, does not create such an indebtedness from her husband to her as to justify his conveying the land to her as against his creditors.—*Meredith v. Citizens' Nat. Bank*, 92 Ind. 343.

[r] (Sup. 1884)

A conveyance by a debtor to his wife for full value of money borrowed from her, with no knowledge by her of fraudulent intent on his part, is good against other creditors.—*Hogan v. Robinson*, 94 Ind. 138.

[rr] (Sup. 1884)

The redemption by a husband of lands from foreclosure against his wife of a mortgage existing at the time of the marriage is a sufficient consideration for a conveyance to him.—*Secor v. Souder*, 95 Ind. 95.

[s] (Sup. 1886)

Although a husband, with fraudulent intent, shared in by both grantor and grantee, obtains a conveyance of property to his wife, joining her in a note therefor, such conveyance cannot be set aside by his other creditors as fraudulent, nor the property subjected to their claims, where none of his money or property goes to pay for it, but only that of the wife.—*McLean v. Hess*, 106 Ind. 555, 7 N. E. 567.

[ss] (Sup. 1887)

Where a husband who has taken the title to property in his own name, without the consent of his wife and children, who furnished the entire purchase money, borrows money thereon to improve it, without using any of his own funds, and afterwards voluntarily, and without other consideration, transfers it to his wife, his creditors cannot have such conveyance set aside as fraudulent.—*Taylor v. Duësterberg*, 109 Ind. 165, 9 N. E. 907.

[t] (Sup. 1887)

Neither the statute of limitations nor the presumption of payment arising from lapse of time applies to a loan made by a wife to her husband, so as to render fraudulent a conveyance by the husband preferring her.—*Dice v. Irvin*, 110 Ind. 561, 11 N. E. 488.

[tt] (Sup. 1888)

In an action to subject lands conveyed by a husband to his wife to the payment of a debt of the husband, where the uncontradicted testimony is that the conveyance was made to the wife in consideration of a pre-existing debt due her from the husband, and there is no evidence that the conveyance was for the purpose of defrauding plaintiff, or any of the husband's creditors, a verdict for plaintiff should be set aside, and a new trial granted.—*Cornell v. Gibson*, 114 Ind. 144, 16 N. E. 130, 5 Am. St. Rep. 605.

[u] (Sup. 1888)

To ascertain how much property was attempted to be placed beyond reach of his creditors by a conveyance from husband to wife, the value of the wife's one-third interest in the property, and the value of the husband's exemption, should be deducted from the total value; and where the value thus reduced does not exceed the price paid by the wife, the conveyance will not be set aside.—*Brigham v. Hubbard*, 115 Ind. 474, 17 N. E. 920.

[uu] (Sup. 1889)

Rev. St. 1881, § 2975, providing that every conveyance, the consideration of which is paid by a third person, shall be presumed fraudulent as against his creditors, does not apply where the evidence shows that the consideration was in effect paid by the grantee, the wife of the debtor, he having used her money under an agreement to restore it, and that the deed was given in pursuance of that agreement.—*Jones v. Snyder*, 117 Ind. 229, 20 N. E. 140.

[v] (Sup. 1889)

In an action to set aside, as fraudulent, conveyances of land by an insolvent debtor to one who reconveys to the debtor's wife, it is not necessary to allege fraud, or knowledge of the fraud, or knowledge that the debtor was insolvent, on the part of those taking the voluntary conveyances without consideration.—*McAninch v. Dennis*, 123 Ind. 21, 22 N. E. 881.

[vv] (Sup. 1890)

Property purchased by a husband in the name of the wife, but paid for with his money, is subject to levy and sale under execution against him.—*Laird v. Davidson*, 124 Ind. 412, 25 N. E. 7.

[w] (Sup. 1892)

A husband gave his wife \$1,000 when he was solvent, which she kept in her possession for months, and finally loaned the same to her husband, under an agreement that he would repay it. He afterwards invested the money in a farm, taking the title in his wife's name, and became insolvent. *Held*, in an action by his creditors to subject the farm to the payment of his debts, that the wife was entitled to protection to the extent of her interest therein.—*Dillen v. Johnson*, 132 Ind. 75, 30 N. E. 786.

[ww] (Sup. 1894)

A conveyance of land by a husband to his wife, in consideration of money loaned to him by her many years before, part of which she received from her father, and part of which she earned in keeping boarders, and with which he purchased the land so conveyed, is supported by a sufficient consideration as against his creditors.—*Fulp v. Beaver*, 136 Ind. 319, 36 N. E. 250.

[x] (Sup. 1894)

The fact that a wife was indebted to her husband does not show that a conveyance by her to him was not fraudulent.—*Bunch v. Hart*, 138 Ind. 1, 37 N. E. 537.

[xx] (Sup. 1894)

A mere joinder by the wife, for the purpose of conveying her inchoate interest, in a fraudulent conveyance of real property by the husband, through a trustee, to himself and wife to hold by entireties, does not form such a consideration as will support the conveyance.—*Phillips v. Kennedy*, 139 Ind. 419, 38 N. E. 410, 39 N. E. 147.

[y] (Sup. 1895)

A husband, soon after engaging in business and contracting debts, deeded land worth \$4,300 to his wife, to satisfy a pretended debt of \$1,600. He then had no other property subject to execution. He also gave her a mortgage for \$1,000, which she claimed she loaned him, and most of which was money saved from funds he let her have for housekeeping purposes. *Held*, that such deed was fraudulent as to existing and subsequent creditors of the husband.—*Gable v. Columbus Cigar Co.*, 140 Ind. 563, 38 N. E. 474.

[yy] (Sup. 1896)

The furnishing of money by a wife to her husband by way of gift, or which was not treated or considered by the parties as creating an indebtedness, will not constitute a consideration for a subsequent conveyance of property by the husband to the wife, as against the husband's creditors.—*Hoffman v. Henderson*, 145 Ind. 613, 44 N. E. 629.

[z] (Sup. 1899)

An agreement between a farmer and his wife that she should have for her own the proceeds of dairy and poultry products sold, under which she received such proceeds, a portion of which was expended for groceries and clothing for the family, and a part used by the husband, did not constitute the production and sale of such articles the sole and separate business of the wife, within the meaning of *Burns' Rev. St. 1894*, § 6975, so as to render the husband her debtor for the sums so used by him; and notes and mortgages executed by him to his wife for such sums 27 years after the arrangement was made are without consideration, and void as against his creditors.—*Kedey v. Petty*, 54 N. E. 798, 153 Ind. 179.

[zz] (Sup. 1900)

In an action by creditors to set aside a transfer of land to defendant's wife as fraudulent, where such land had been received by defendant in exchange for other realty, and the title taken in her name as compensation for her inchoate dower interest in the original tract, the value of her interest should be determined on the basis of the real value of the property, and not on the fictitious value at which the exchange was made.—*Baldwin v. Heil*, 58 N. E. 200, 155 Ind. 682.

Defendant, who was insolvent, exchanged land in which his wife had an inchoate dower interest, worth \$9,320, subject to a mortgage of \$4,500, for other realty worth \$3,106, and the deed was executed to defendant's wife in con-

sideration that she release her dower interest in the original tract. *Held*, that such conveyance was not fraudulent as to defendant's creditors, since her inchoate dower constituted a valuable interest, which she had a right to protect, and also because creditors were not damaged by the transaction.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 243-288.

See, also, 20 Cyc. pp. 522-530.

### § 96. Transactions between parent and child.

[a] (Sup. 1831)

The rule that marriage constitutes a good and valuable consideration does not apply where a father makes a voluntary conveyance to his daughters, who afterwards marry, the father continuing in possession of the property after the conveyance, contracting debts, and dying insolvent, so as to enable the daughters to hold the property against creditors of the father.—*O'Brien v. Coulter*, 2 Blackf. 421.

[b] Where one purchases real estate with his own money, and to defraud his creditors causes the conveyance to be made to his son, it is a fraudulent transfer.—(Sup. 1832) *Demaree v. Driskill*, 3 Blackf. 115; (1882) *Bushnell v. Bushnell*, 88 Ind. 403.

[c] (Sup. 1848)

A conveyance by a father to his son, in consideration of an agreement by the latter to support his father and mother, is invalid as to creditors.—*Tyner v. Somerville*, 1 Ind. 175, *Smith*, 149.

[d] (Sup. 1851)

A conveyance of land by a father to his son without consideration and for the purpose of defrauding his creditors is void as to the creditors.—*Burtch v. Elliott*, 3 Ind. 99.

[e] (Sup. 1880)

In a suit against a party, charging him with mortgaging his land to his children for the purpose of defrauding his creditors, he answered, setting up a contract between himself and wife that he would pay to his children, and secure to them the payment of, money advanced by her to him for the purchase of land. *Held* a good answer, and also that he had a right to pay interest to the children on such advancements, in preference to the claims of creditors.—*Goff v. Rogers*, 71 Ind. 459.

[f] (Sup. 1886)

A son may, without being guilty of maintenance, assist his father in conducting an action, and the promise of the father to repay the sum advanced is a valid one, and the creditors of the father cannot set aside the assignment of a note founded upon the contract of the father without showing that the father and son were both guilty of fraud.—*Proctor v. Cole*, 104 Ind. 373, 3 N. E. 106, 4 N. E. 303.

[g] (Sup. 1889)

A conveyance is not fraudulent because the purchaser, in addition to consideration paid in money and notes to a third person, agreed to support his father and mother during their lifetime.—*Scott v. Davis*, 20 N. E. 139, 117 Ind. 232.

[h] (Sup. 1890)

Where a father advances money with which to purchase land in the name of his son, without any contemporaneous understanding or agreement as to repayment of the purchase money, a mortgage afterwards given by the son to the father, to secure the repayment of the purchase money, is void as to the son's creditors, for want of consideration.—*Iligham v. Vanosdol*, 125 Ind. 74, 25 N. E. 140.

[i] (Sup. 1891)

In an action to set aside a deed as fraudulent, an answer stating that the deed was given in pursuance of an agreement to support the grantor, which agreement was made before the grantor became indebted, and had been partly performed, and that the deed was given without fraudulent intent, at a time when it was supposed that the indebtedness to plaintiff was amply secured by mortgage, is good.—*Nichols, Shepard & Co. v. Burch*, 128 Ind. 324, 27 N. E. 737.

[j] (App. 1903)

A conveyance made by a husband, while heavily indebted, to his wife, without consideration, and a subsequent conveyance of the same land from the husband and wife to their son without consideration, were fraudulent as to creditors of the husband.—*Farmers' Bank of Frankfort v. First Nat. Bank*, 60 N. E. 503, 30 Ind. App. 520.

[k] (App. 1904)

Where a father executed a deed of certain land to his daughter as security for a bona fide pre-existing debt, such conveyance was not fraudulent as against the father's creditors, and constituted a prior lien on the land.—*Clow v. Brown*, 72 N. E. 534, 37 Ind. App. 172.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 280-322.

See, also, 20 Cyc. pp. 531-535.

### § 97. Family settlements.

[a] (Sup. 1842)

If a father with his own money purchase real estate in the name of his children, and the purchase is an advancement to the children, it is not within the statute against fraudulent conveyances, but valid as against subsequent purchasers from the father.—*Stanley v. Bran-non*, 6 Blackf. 193.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 320-322.

**§ 99. Partial insufficiency or failure.**[a] (*Sup.* 1857)

R., T., and C. were partners, and dissolved partnership. T. and C. sued R., and M. as co-defendant, alleging that R. had got possession of the effects of the firm, and had assigned a large amount thereof to M., ostensibly to secure payment of a pretended debt of the firm, evidenced by notes executed by R., but really in pursuance of a conspiracy between him and M. to cheat, and defraud T. and C. The court instructed, "If the jury find that the whole or any part of M.'s claim against R. & Co. is not sustained by evidence, you should find the assignments of the notes, &c., of R. & Co. to M. fraudulent; and the defendants are responsible in this action for the amount thus assigned." *Held*, that the instruction was erroneous. *Held*, also, that an instruction "that, if they found any part of the claim of M. against R. & Co. correct, and that R. assigned the notes, &c., as collateral security, and the amount of the security was not excessive, they might find said assignment to be bona fide, notwithstanding some part of M.'s claim had not been fully proven," was correct, if the addition, "if the assignment were not otherwise fraudulent," were added.—*Reed v. Thayer*, 9 Ind. 157.

[b] (*Sup.* 1892)

Where a chattel mortgage is executed to secure the notes of several creditors, given for separate and divisible claims, the mortgage is not invalid as a whole because one of the notes was executed for a fraudulent consideration; and the security under such mortgage is valid as to a bona fide creditor, who does not participate in, or is not cognizant of, the fraudulent intent of the debtor.—*Morgan v. Worden*, 145 Ind. 600, 32 N. E. 783.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 323, 325-328.

**(F) CONFIDENTIAL RELATIONS OF PARTIES.**

Effect of good faith of grantee, see post, § 170.

Knowledge of grantee implied from relation between parties, see post, § 157.

Preference as creditors of persons in confidential relations, see post, § 118.

Presumptions and burden of proof, see post, § 278.

Property transferred, see ante, § 46.

**§ 101. Element or evidence of fraud.**[a] (*Sup.* 1849)

The relationship of parties, though calculated to awaken suspicion, is of itself no evidence of a fraud in a conveyance of property.—*Bayre v. Daniel*, 1 Ind. 378, Smith, 252.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. § 320.

See, also, 20 Cyc. p. 451.

**§ 103. Husband and wife.**

Admissibility of evidence, see post, § 286.

Bona fide purchasers from grantee, see post, § 199.

Consideration for conveyance, see ante, § 95.

Indebtedness of grantor as element of fraud, see ante, § 54.

Instructions. see post, § 309.

Intent to defraud pre-existing creditor, see ante, § 64.

Knowledge and intent of grantee, see post, §§ 155, 157, 159, 162, 163, 168, 169.

Motion for judgment, see post, § 312.

Particular estate or interest transferred. see ante, § 49.

Possession by husband or wife of property transferred, see post, § 146.

Preference as creditor, of husband or wife, see post, § 118.

Presumptions and burden of proof as to consideration, see post, § 277.

Purchase by wife from fraudulent grantee of husband, see post, § 198.

Question for jury, see post, § 308.

Right of wife to proceeds of insurance, see INSURANCE. § 580.

Rights and liabilities of grantee as to creditors. see post, § 181.

Solvency of grantor, see ante, § 55.

Sufficiency of marriage or marriage settlement as consideration, see ante, § 94.

Weight and sufficiency of evidence, see post, § 295.

**FOR CASES FROM OTHER STATES.**

SEE 24 CENT. DIG. Fraud. Conv. §§ 337-346.

See, also, 20 Cyc. pp. 603-606; note, 56 L. R. A. 817; notes, 19 Am. St. Rep. 657, 20 Am. St. Rep. 715, 90 Am. St. Rep. 497.

**§ 104. — Transactions in general.**[a] (*Sup.* 1859)

If, at a sheriff's sale, the defendant's wife buy the land with her own and her husband's money, for the purpose of defrauding his creditors, this fraudulent intent being proved, the creditors will take the whole, and she lose what she had put in of her own.—*Ewing v. Gray*, 12 Ind. 64.

[b] (*Sup.* 1871)

A conveyance from a husband to his wife will not be sustained, in equity, when it interferes with the rights of creditors.—*Sims v. Ricketts*, 35 Ind. 181, 9 Am. Rep. 679.

[c] (*Sup.* 1875)

A. bought certain real estate with a mill thereon of B., and caused it to be conveyed to the wife of A. Certain real estate of the wife of A. was given in part payment to B., and the notes of A. and wife secured by mortgage were given for the residue of the purchase money. Before the notes were paid, the mill was burned, and thereafter the real estate was reconveyed to B., who accepted it as part pay-

ment of the notes. A. and wife had no money or property wherewith to pay the balance. C., a brother of A., had assisted him in running the mill before it was burned, and on contingencies was to have become the owner of a part of it. The citizens and neighbors raised some money to aid in starting another mill. C. procured another tract of real estate on his own credit, and, on the suggestion of those proposing to aid in the erection of the mill, conveyed one-half of it to the wife of A., and the two brothers, with the assistance given them and on their credit, erected a mill, each of them working in the erection and running of the same. *Held*, that B. could not subject the latter real estate to the payment of the balance due on his notes.—*Cooper v. Ham*, 49 Ind. 393.

A wife may employ her husband to act as her agent in operating a mill owned by her, and such employment is not proof of an attempt on her part to defraud his creditors.—*Id.*

[d] (Sup. 1881)

In an action to set aside a conveyance by a husband to the wife as in fraud of the husband's creditors, the existence of the confidential relationship between grantor and grantee, and the pendency of an action against the former by a creditor, may be considered by the jury on the issue of fraud.—*Sherman v. Hogland*, 73 Ind. 472.

[e] (Sup. 1893)

Where a wife allows the title to land paid for by her to be taken in the name of her husband, persons who give him credit without notice of the wife's claim may subject the land to their debts.—*Minnich v. Shaffer*, 135 Ind. 634, 34 N. E. 987.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. FRAUD. CONV. §§ 337-344.

See, also, 20 Cyc. p. 603.

#### § 105. — Procuring conveyances from third persons.

[a] (Sup. 1888)

A debtor conveyed land incumbered to the full value to B., who had furnished money for redeeming a part from execution, and who agreed to reconvey on payment by a day named, the agreement to be otherwise void. After forfeiture the debtor's mother paid B. a large sum, and caused him to convey to the debtor's wife, who, in consideration thereof, agreed to support the mother for life. A part was afterwards sold on foreclosure, and the purchaser conveyed to the wife. By means of money furnished by the wife's father, and of mortgages, and crops raised by the joint labor of the debtor, his wife, and children, the title became vested in the wife, without depriving creditors of anything available for the payment of their debts. *Held*, that the wife's title was good as against the husband's creditors even though the purpose was to place the property beyond their

reach.—*Stone v. Brown*, 116 Ind. 78, 18 N. E. 392.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. FRAUD. CONV. § 345.

See, also, 20 Cyc. p. 605.

#### § 106. — Making improvements on real property.

[a] (Sup. 1881)

It seems that even the active participation by a wife in accomplishing her husband's attempt to defraud his creditors by expending his means in the improvement of her property will furnish his creditors no ground of relief either against her or her property.—*Moore v. Lampton*, 80 Ind. 301.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. FRAUD. CONV. § 346.

#### § 107. Parent and child.

Consideration for conveyance, see ante, § 96.

Indebtedness of grantor as element of fraud, see ante, § 54.

Presumptions and burden of proof, see post, § 278.

Right of other heirs to attack conveyance in fraud of creditors, see post, § 179.

Rights and liabilities of subsequent purchasers from grantor, see post, § 189.

Validity as between parties, see post, § 172.

[a] (Sup. 1893)

The owner of a farm of 160 acres, being in debt at the time, conveyed the same to his son for an expressed consideration of \$5,000. The son was worth at the time about \$400, but claimed the transfer was in payment of a debt due from the father. The son had never filed with the assessor any statement of such debt. After the conveyance he allowed the property to be sold for taxes. The father also continued to rent the farm and collect the rent, and exercise acts of ownership. *Held*, that the conveyance was in fraud of creditors.—*Milburn v. Phillips*, 136 Ind. 690, 34 N. E. 983, 36 N. E. 360.

[b] (Sup. 1894)

A father had sold and conveyed land to his son for \$8,000, not as advancement, but to be paid on request, \$300 a year to be paid meantime as rent. The son also owed his father \$2,000, and interest, for money lent to build a house, and back rent and other debts, the whole amounting to \$11,000. The son having killed a man and been arrested, desiring to secure his father, reconveyed him the land. The father had no idea that deceased's estate had any claim for damages for the homicide. *Held*, that the conveyance was not in fraud of said estate.—*Snyder v. Jetton*, 137 Ind. 449, 37 N. E. 143.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. FRAUD. CONV. §§ 347-350.

See, also, 20 Cyc. pp. 607, 608.

**(G) RESERVATIONS AND TRUSTS FOR GRANTOR.**

In assignment for benefit of creditors, see **ASSIGNMENTS FOR BENEFIT OF CREDITORS**, §§ 95-96.

Reservation of power of disposition or use of property, see post, § 142.

**§ 110. Benefits reserved to grantor.**

[a] (**Sup.** 1882)

A conveyance by an insolvent debtor of all his property in trust to pay certain creditors to the exclusion of others, with a reservation of the surplus, is fraudulent and void as to the creditors excluded.—*Thompson v. Parker*, 83 Ind. 96.

[b] (**Sup.** 1890)

A conveyance of land by an insolvent debtor to trustees for the benefit of certain creditors, to the exclusion of others, with a reservation of the surplus to the debtor's wife, is not fraudulent.—*Hays v. Hostetter*, 125 Ind. 60, 25 N. E. 134.

[c] (**Sup.** 1900)

Where a deed conveying realty in fee and reserving a life estate is held fraudulent as to creditors, it cannot be upheld as to the reservation of the life estate to the extent of requiring that the land be sold subject to the life interest as an incumbrance.—*McNally v. White*, 54 N. E. 794, 56 N. E. 214, 154 Ind. 163.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. §§ 352-359.

**§ 111. Conveyances in trust for grantor.**

[a] (**Sup.** 1888)

Under the creditor's general right to reach property held for his debtor's use, and Rev. St. 1881, § 4921, providing that all transfers of goods or other things in action, made in trust for the use of the person making the same, shall be void against creditors, antecedent or subsequent, a wife, alleging that her husband has conveyed his land to a third person to hold for his benefit, in fraud of his creditors, may subject it to a judgment obtained by her after his conveyance, without alleging intent on his part to defraud his subsequent creditors; that section including, also, conveyances of land in trust for the grantor.—*Plunkett v. Plunkett*, 114 Ind. 484, 16 N. E. 612, 17 N. E. 562.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. §§ 361-363.

See, also, 20 Cyc. p. 557.

**§ 113. Secret reservations or trusts.**

[a] (**Sup.** 1858)

A conveyance on secret trust is a continuing fraud, and therefore void in favor of all

creditors during its continuance.—*Pennington v. Clifton*, 11 Ind. 162.

[b] (**Sup.** 1889)

Where a purchaser, in addition to the consideration paid in money to a third person, agreed to support his father and mother during their lifetime, such an agreement did not constitute a secret trust invalidating the conveyance which was otherwise supported by a valid consideration, and the grantee was not guilty of fraud.—*Scott v. Davis*, 20 N. E. 139, 117 Ind. 232.

[c] (**App.** 1900)

A debtor cannot convey property to another to be held either wholly or in part upon secret trust for his own benefit.—*Stout v. Price*, 24 Ind. App. 360, 55 N. E. 964, 56 N. E. 857.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. §§ 364-368.

See, also, 20 Cyc. pp. 562-571.

**(H) PREFERENCES TO CREDITORS.**

By corporations to creditors in general when insolvent or in contemplation of insolvency, see **CORPORATIONS**, § 544.

By corporations to officers or stockholders when insolvent or in contemplation of insolvency, see **CORPORATIONS**, § 545.

Effect of knowledge of grantee, see post, § 159. In assignment for benefit of creditors, see **ASSIGNMENTS FOR BENEFIT OF CREDITORS**, §§ 111-118.

Instructions, see post, § 309.

**§ 115. Right of debtor to prefer creditor.**

[a] A debtor in failing circumstances, or insolvent, may bona fide prefer one creditor to another.—(*Sup.* 1858) *Jones v. Gott*, 10 Ind. 240; (1861) *Wynne v. Glidewell*, 17 Ind. 446; (1881) *O'Connor v. Coats*, 79 Ind. 596; (1882) *O'Donald v. Constant*, 82 Ind. 212.

[b] (**Sup.** 1882)

A failing debtor may use property bought on credit of one to pay another.—*O'Donald v. Constant*, 82 Ind. 212.

[c] (**Sup.** 1888)

In an action by a creditor to recover the amount of a note due the insolvent, it having been fraudulently transferred, a cross-complaint by another creditor, alleging a loan to the insolvent, and that, when the note in question was executed, it was agreed that complainant should have an interest therein to the amount of her loan, is good so far as the creditors of the insolvent are concerned.—*Cooper v. Perdue*, 114 Ind. 207, 16 N. E. 140.

[d] A debtor in failing circumstances, or insolvent, may bona fide prefer one creditor to another.—(*Sup.* 1889) *Harshman v. Armstrong*, 21 N. E. 662, 119 Ind. 224; (1894) *Rockland Co.*

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

v. Summerville, 39 N. E. 307, 139 Ind. 695; (App. 1895) *Levi v. Bray*, 39 N. E. 754, 12 Ind. App. 9; (1895) *Holmes v. Henderson*, 40 N. E. 151, 12 Ind. App. 698; (1899) *West v. Graff*, 55 N. E. 506, 23 Ind. App. 410.

[e] (App. 1905)

A debtor has a right to prefer creditors on insolvency.—*Schreeder v. Werry*, 73 N. E. 832, 35 Ind. App. 84.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 370, 375-377.

### § 117. Intent to defeat other creditors.

[a] (Sup. 1861)

A debtor in failing circumstances has a right to prefer his creditors. He may assign all his property for the benefit of a single one only, or he may distribute it in unequal proportions among some or all of them; but he must act in good faith, with no purpose of defrauding those who are not preferred.—*Wynne v. Glidewell*, 17 Ind. 446.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 373, 374.

### § 118. Preference of husband, wife, or other relatives.

[a] A husband may, on becoming insolvent, by conveying his property still under his control, prefer his wife the same as any other creditor.—(1882) *Bragg v. Stanford*, 82 Ind. 234; (1886) *Hoes v. Boyer*, 108 Ind. 494, 9 N. E. 427; (1887) *Dice v. Irvin*, 110 Ind. 561, 11 N. E. 488.

[b] (Sup. 1887)

A debtor, where there is no fraud, may lawfully prefer his wife as a creditor; and neither the statute of limitations, nor the presumption of payment arising from lapse of time, applies to a loan made by the wife to the husband, so as to render a preference of such debt by him fraudulent.—*Dice v. Irvin*, 110 Ind. 561, 11 N. E. 488.

[c] (Sup. 1888)

An insolvent debtor has a right to give a preference to some of his creditors, including his wife, as against others, and such preferences will be upheld if untainted with fraud.—*Brigham v. Hubbard*, 17 N. E. 920, 115 Ind. 474.

A husband, at the time he conveyed property to his wife, was indebted in the sum of \$8,700, excluding his debt to her, which was \$700. The value of his property, above incumbrances, was \$8,000. In the conveyance to his wife, and in other conveyances, he preferred some of his creditors, but he was attempting to pay his debts, and was not shown to have done anything dishonest. His wife supposed he had ample means to pay his debts. *Held*, that the conveyance was not fraudulent.—*Id.*

[d] (Sup. 1890)

Money given by the husband to the wife is her property, and if she lends it to him, and takes his note therefor, it is valid; and he may, when in failing circumstances pay it in preference to his other debts.—*Laird v. Davidson*, 124 Ind. 412, 25 N. E. 7.

[e] (Sup. 1890)

Where a son owed his father a bona fide debt, he was entitled to prefer his father and secure such debt by the execution of a chattel mortgage without a demand therefor on the part of his father; he having in good faith accepted and had the mortgage recorded when informed thereof.—*McFadden v. Ross*, 26 N. E. 78, 126 Ind. 341.

Where a son was bona fide indebted to his father, the fact that he secured an extension of time on such indebtedness by giving a chattel mortgage to secure the same in preference over debts owed by him to other creditors did not render such mortgage fraudulent.—*Id.*

A son was indebted to his father, and executed a note payable in three years, and a mortgage on a retail stock of liquors, and other property. The father lived in another state, and had not demanded payment, and knew nothing of the note and mortgage until notified that they had been executed. He accepted the note, and had the mortgage recorded. The property included all the son had not exempt from execution, and most of it had been bought on credit, and had not been paid for. The mortgage provided that the son should retain possession until the note became due, and that he should not remove, sell, or assign the goods without the father's consent. The son sold part of the property, and did not apply the proceeds on the debt. He intended to use the mortgage to cover up his property, so as to delay creditors. The father accepted it as written, extended the time of payment of his debt, and permitted the son to retain possession without supervision. The property was seized on execution against the son, and the father's administrator replevied it within three months after the mortgage was executed. These facts having been found specially, *held*, that the mortgage was valid against creditors, and that a conclusion of law from the facts found that the mortgage was fraudulent and void could not be sustained.—*Id.*

[f] (Sup. 1897)

Where an insolvent husband conveyed lands to his wife on an adequate consideration in satisfaction of her debt, no inference of fraud arises.—*Heiney v. Lontz*, 46 N. E. 665, 147 Ind. 417.

[g] (App. 1904)

A husband's obligation to pay his wife \$10,000 in case she survived him, as provided by an antenuptial contract, though a contingent liability, is one which may be preferred by the husband in failing circumstances.—*Clow v. Brown*, 72 N. E. 534, 37 Ind. App. 172.

**[h] (App. 1905)**

A debtor in failing circumstances may prefer his wife as a creditor, if there is a bona fide debt and the conveyance is in good faith.—*Schreeder v. Werry*, 73 N. E. 832, 35 Ind. App. 84.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. §§ 379–381.

See, also, 20 Cyc. pp. 597–599.

**§ 121. Payment or satisfaction of debts.****[a] (Sup. 1864)**

Where a creditor buys goods of his debtor, who is in failing circumstances, and pays full value for them, and the consideration is applied or secured to the payment of the debts of the vendor, with no purpose to delay other creditors, there can be no fraud in the transaction; and the fact that the creditor, by purchasing the goods and assuming liabilities which he is pecuniarily able to meet, in securing his debt, as an incident, pays also debts of creditors, preferred by the vendor above other creditors, cannot impeach the contract.—*Wilcoxon v. Annesley*, 23 Ind. 285.

Our assignment law does not change the rule allowing a debtor in failing circumstances to make an actual bona fide sale of his property, and apply the proceeds in payment of his debts, or any portion of them.—*Id.*

**[b] (Sup. 1894)**

A preferential conveyance by plaintiff's judgment debtor to another bona fide judgment creditor, of land of less value than either judgment, is not fraudulent as against plaintiff.—*Thomas v. Johnson*, 137 Ind. 244, 36 N. E. 803.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. §§ 385–391.

See, also, 20 Cyc. p. 596.

**§ 122. Mortgages and other transfers as security.****[a] (Sup. 1882)**

A failing debtor may prefer one creditor to another by giving him a mortgage to secure an existing indebtedness, where it is accepted in good faith by the creditor for the sole purpose of such security.—*Ayers v. Adams*, 82 Ind. 109.

**[b] (Sup. 1897)**

Where security is given for an honest debt and is in a bona fide manner accepted for that purpose, the fact that it may result in defeating the claims of other creditors of the mortgagor affords no grounds for complaint on their part.—*Levering v. Bimel*, 146 Ind. 545, 45 N. E. 775.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. §§ 392–398.

**§ 123. Confession of judgment.****[a] (Sup. 1862)**

D. and S. were indebted to the defendant, and, being in failing circumstances, contemplated an assignment. The defendant, knowing these facts, procured an arrangement by which D. and S. confessed judgment in his favor, on which execution issued and was levied on property of D. and S., who, "a few days afterwards" voluntarily assigned their property in trust to pay their debts. No fraudulent intent was charged. *Held*, that the transaction was legal, and the defendant's execution lien valid.—*Lord v. Fisher*, 19 Ind. 7.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. §§ 399, 400.

**§ 124. Suffering judgment by default.****[a] (Sup. 1880)**

Default judgments taken against an insolvent on notes executed by him while insolvent are not void as to creditors of the insolvent in the absence of evidence that the acts of the insolvent in the premises were done with intent to hinder, delay, or defraud his creditors.—*Luce v. Shoff*, 70 Ind. 152.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. § 401.

**§ 128. Preference of sureties.****[a] (Sup. 1900)**

An insolvent may prefer his surety on a note by executing a bill of sale to him of a portion of his property, unless such sale is made with intent to defraud, hinder, or delay his creditors, and the vendee has knowledge thereof.—*Owens v. Gascho*, 56 N. E. 224, 154 Ind. 225.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. § 404.

**(I) RETENTION OF POSSESSION OR APPARENT TITLE BY GRANTOR.**

Admissibility of evidence, see post, § 286.  
Bulk stock laws as denial of due process of law, see CONSTITUTIONAL LAW, § 296.  
Bulk stock laws as denial of equal protection of laws, see CONSTITUTIONAL LAW, § 240.  
In assignment for benefit of creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, § 45.  
Presumptions and burden of proof, see post, §§ 271–281.  
Retention of possession by chattel mortgagor, effect as to mortgagor's creditors, see CHATTEL MORTGAGES, §§ 184–191.

**§ 131. Element or evidence of fraud in general.****FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. §§ 407–425.

See, also, 20 Cyc. pp. 450, 536, 537.

**§ 132. — As to creditors.**

[a] A transfer of personal property, not accompanied by a change of possession of the property transferred, is prima facie fraudulent and void as against creditors.—(Sup. 1857) *Blystone v. Burgett*, 10 Ind. 28, 68 Am. Dec. 658; (1866) *Kane v. Drake*, 27 Ind. 29; (1881) *Rose v. Colter*, 76 Ind. 590.

**[b] (Sup. 1864)**

When a purchase from a debtor in failing circumstances is of a stock of goods in a store and an established trade, the fact that the debtor is hired at a fair salary to continue in charge of the business does not of itself prove the transaction fraudulent.—*Wilcoxon v. Annesley*, 23 Ind. 285.

**[c] (Sup. 1877)**

The continued possession of real estate by the grantor after a transfer thereof is evidence of fraud.—*Tedrowe v. Esher*, 56 Ind. 443.

**[d] (Sup. 1881)**

Payment of an adequate and valuable consideration renders a change of possession of property transferred unnecessary.—*Rose v. Colter*, 76 Ind. 590.

**[e] (Sup. 1882)**

Ordinarily, to establish fraud as to subsequent creditors, it must appear that the grantor held himself out as the owner of the property, or that he occupied the same apparently as such owner, and that the credit was given upon such supposed ownership.—*Stevens v. Works*, 81 Ind. 445.

**[f] (Sup. 1882)**

A transfer of personal property, unaccompanied by a corresponding change of possession, is not fraudulent per se, and void as to creditors.—*Powell v. Stickney*, 88 Ind. 310.

**[g] (App. 1894)**

On an issue as to whether there was a change in the possession of goods alleged to have been conveyed in fraud of creditors, testimony of the vendor that he remained in possession only as an employé of his vendee is admissible.—*Benjamin v. McElwaine-Richards Co.*, 10 Ind. App. 76, 37 N. E. 302.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 407-424.

**§ 134. Statutory provisions.**

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 426-431.

**§ 136. — Record or filing of written instrument.****[a] (Sup. 1884)**

Rev. St. 1881, § 2931, which provides that every conveyance of land shall be recorded in the recorder's office within 45 days from the execution thereof or the same shall be fraudu-

lent as against subsequent purchasers, lessees, or mortgagees in good faith and for valuable consideration, does not render an unrecorded conveyance for value void as against any one other than a subsequent purchaser, lessee, or mortgagee, and, so far as this statute applies, an unrecorded conveyance for value is valid, not only against the vendor, but also against his subsequent judgment-creditors, but it is invalid as against bona fide purchasers under execution, whether such purchaser be the execution creditor or a third person.—*Pierce v. Spear*, 94 Ind. 127.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 428-431.

**§ 137. Nature of property transferred.****[a] (Sup. 1877)**

The fact that a grantor, after executing a conveyance of land, remains in possession, is a circumstance proper to be considered as tending to show fraud.—*Tedrowe v. Esher*, 56 Ind. 443.

**[b] (Sup. 1884)**

A debtor's conveyance of real estate, duly executed and recorded, is not fraudulent per se against his creditors, because he remained in possession of the lands conveyed.—*Pennington v. Flock*, 93 Ind. 378.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 432-437.

See, also, 20 Cyc. pp. 545, 546.

**§ 138. Nature and form of transaction in general.**

[a] Where a vendor of personal property remains in possession, the sale is presumptively fraudulent as to creditors, unless such possession be explained.—(Sup. 1866) *Kane v. Drake*, 27 Ind. 29; (1881) *Rose v. Colter*, 76 Ind. 590.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 438, 443, 448-452.

**§ 139. Absolute sales and conveyances.****[a] (Sup. 1880)**

The presumption of fraud as against creditors which arises under 1 Rev. St. 1876, p. 505, by the sale of goods, unaccompanied by immediate delivery and actual change of possession thereof, is sufficient to sustain a finding that the sale, made without the required change of possession, was void.—*Geisendorff v. Eagles*, 70 Ind. 418.

**[b] (Sup. 1882)**

A sale of personal property, unaccompanied with a change of possession, is not per se fraudulent as against the seller's creditors.—*Powell v. Stickney*, 88 Ind. 310.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 439-442, 445-447.

### § 142. Reservation of power of disposition or use.

[a] (Sup. 1874)

A mortgage executed to indemnify the mortgagees provided that, whenever any part of the land should be sold by the mortgagor for adequate consideration, the mortgagees should release that part, reserving sufficient to secure them for any amount of actual loss they might sustain. One-half of the land was subject to elder liens, and the amount for which the mortgagees were liable was not ascertained at the time the mortgage was made. *Held*, there being nothing to show that the mortgagees attempted to hold a lien for more than might be justly due them, or that the mortgagor ever attempted to derive any benefit from the right to sell, or that any of the parties intended that the proceeds of such sale, if any, should be applied to any other purpose than the payment of the mortgage debts, that the mortgage could not be held to be fraudulent by reason of the clause in reference to the sale of the land.—*O'Brien v. O'Brien*, Wils. 558.

[b] (Sup. 1879)

Where security is given upon a safe, show-cases, and other fixtures in a store, and also upon merchandise, and it is provided that the debtor may remain in possession until default in payment, and enjoy the use of the property, held to be void, so far as it covered the merchandise, against creditors.—*Davenport v. Foulke*, 68 Ind. 382, 34 Am. Rep. 265.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 449, 450.

### § 145. Possession as agent or employé.

[a] (Sup. 1852)

A sold B. corn at a fixed price with a warranty that there were in the cribs 2,500 bushels. The cribs were left with A. as agent of B. to take care of for him. *Held*, that if there was no such change of possession as contemplated by the statute providing that a sale if not followed by change of possession will be presumed fraudulent as to subsequent bona fide holders, unless it appears that the sale was not made with fraudulent intent, that the sale and delivery as between B. and a subsequent purchaser from A. was valid.—*Sloan v. Kingore*, 3 Ind. 549.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 423, 453, 479.

See, also, 20 Cyc. p. 544.

### § 146. Possession by husband, wife, or other relatives.

[a] (Sup. 1858)

Where a debtor in failing circumstances conveyed property by an absolute bill of sale to his sister, who resided in his family, in trust for a creditor, and after the conveyance depart-

ed from home, leaving his wife and the sister in the occupancy of his house and possession of the property conveyed, there was not such a retention of possession by the debtor as would render the transfer fraudulent as to other creditors, under 1 Rev. St. p. 301, § 8, providing that every sale of goods in possession, not accompanied by immediate delivery and followed by actual change of possession, shall be presumed fraudulent as against creditors.—*Jones v. Gott*, 10 Ind. 240.

[b] (Sup. 1884)

The fact that property purchased by a wife from her husband in good faith is allowed to remain in his possession as her agent to sell it does not invalidate the sale.—*Rinn v. Rhodes*, 93 Ind. 389.

[c] (Sup. 1896)

A prima facie case of a sale in fraud of creditors is shown by proof that a husband, after selling property to his wife, continued in full possession and management thereof, as her agent.—*Higgins v. Spahr*, 145 Ind. 167, 43 N. E. 11.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 454-456, 471, 472, 482-484.

### § 147. Sufficiency of transfer of possession.

[a] (Sup. 1886)

Authority given to an employé of a vendor to take possession and control of the goods sold in the name of the vendee amounts to no more than a constructive change of possession, which, as against creditors, is not a sufficient compliance with Rev. St. 1881, § 4911, requiring an immediate delivery and actual change of possession, as against creditors of the vendor and others.—*Seavey v. Walker*, 108 Ind. 78, 9 N. E. 347.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 457-470, 473-478, 481-484.

See, also, 20 Cyc. pp. 541-551; note, 97 Am. Dec. 340.

### § 150. — Actual and substantial change of possession.

[a] (Sup. 1857)

To prevent a sale from being fraudulent as to creditors, the change of possession required by the statute must be an actual and substantial change of possession.—*Nutter v. Harris*, 9 Ind. 88.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. § 464.

### § 151. — Visible and notorious possession.

[a] (Sup. 1857)

The change of possession required to uphold a transfer of a debtor's property as against creditors must be open and notorious, render-

ing such change of possession evident and visible.—*Nutter v. Harris*, 9 Ind. 88.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. § 473.

### § 153. — Continued change of possession.

[a] (Sup. 1857)

In order to make a sale or mortgage of chattels valid as against creditors of the vendor or mortgagor, the change of possession must be continued.—*Nutter v. Harris*, 9 Ind. 88.

[b] (Sup. 1872)

The mere delay in filing or recording a conveyance will not render it void as to creditors, but is a circumstance which may be considered in determining the question of fraud.—*Brookbank v. Kennard*, 41 Ind. 339.

[c] (Sup. 1886)

On demurrer to a bill by a mortgagee of chattels, whose mortgage was not recorded within 10 days after its execution, for equitable relief against a subsequent fraudulent mortgage on the chattels, which was recorded within 10 days, and a judgment foreclosing the same, it cannot be objected, on the theory that the diligent and not the negligent are entitled to equitable relief, that because of plaintiff's failure to have his mortgage first recorded within 10 days his bill was without equity.—*McCormick v. Hartley*, 107 Ind. 248, 6 N. E. 357.

[d] (Sup. 1892)

The mere fact that a mortgagee withholds the mortgage from record under an agreement with the mortgagor, though a badge of fraud, does not make such mortgage fraudulent as to existing or subsequent creditors.—*Hutchinson v. First Nat. Bank of Michigan City*, 133 Ind. 271, 30 N. E. 952, 36 Am. St. Rep. 537.

[e] (Sup. 1894)

Where a conveyance from husband to wife was kept unrecorded for several months, during which time he used his apparent title to the land for the purpose of obtaining credit, a decree finding the conveyance fraudulent as to creditors whose claims accrued during that time will not be reversed, though the wife swears that the land was originally bought by the husband for her, and paid for with her own money.—*Adams v. Curtis*, 137 Ind. 175, 36 N. E. 1005.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 476-478.

See, also, 20 Cyc. pp. 543, 544.

### § 154. Failure to record or file instrument.

Bill of sale to indemnify surety, see PRINCIPAL AND SURETY, § 175.

Mortgages, see CHATTEL MORTGAGES, §§ 175, 193-197.

[a] (Sup. 1901)

Concealing and keeping a mortgage from the records, under an agreement, for some definite time, or till the happening of a contingency, for the purpose, or which has the effect, of giving the debtor a fictitious financial standing, is fraudulent as to persons giving credit to the debtor in ignorance of the mortgage.—*National State Bank of Terre Haute v. Sandford Fork & Tool Co.*, 60 N. E. 699, 157 Ind. 10.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 483-492.

See, also, 20 Cyc. p. 552.

### (J) KNOWLEDGE AND INTENT OF GRANTEE.

Element of fraud in general, see ante, § 8.

Instructions, see post, § 309.

Intent of grantor, see ante, §§ 63-66, 68, 69.

Pleading, see post, § 263.

Proof, see post, §§ 281, 292.

### § 155. Elements of fraud in general.

[a] A sale by a debtor with intent to defraud his creditors is not fraudulent, where the purchaser pays a valuable consideration, unless the purchaser has notice of such intent, or has knowledge which would put an ordinarily prudent man upon inquiry.—(Sup. 1849) *Doe ex dem. Hutchinson v. Horn*, 1 Ind. 363, Smith, 242, 50 Am. Dec. 470; (1870) *McCormick v. Hyatt*, 33 Ind. 546; (1870) *Kyger v. F. Hull Skirt Co.*, 34 Ind. 249; (1878) *Spaulding v. Myers*, 64 Ind. 264; (1880) *Brown v. Rawlings*, 72 Ind. 505.

[b] In order to vitiate a conveyance based upon a valuable consideration, it must be shown that the grantee participated in the fraudulent intent.—(Sup. 1855) *Stewart v. English*, 6 Ind. 176; (1878) *Johnston v. Field*, 62 Ind. 377; (1890) *Straight v. Roberts*, 126 Ind. 383, 26 N. E. 73.

[c] (Sup. 1867)

In order to avoid a sale or conveyance on the ground of fraud, the vendee must have had notice of the vendor's fraudulent design.—*Bunuel v. Witherow*, 29 Ind. 123.

[d] (Sup. 1872)

In a complaint to subject real estate held by a wife to the payment of a debt of the husband, it must be clearly shown that the wife knew of the alleged fraudulent intent of the husband in causing the real estate to be conveyed to her, and that she took the conveyance in order to cheat, delay, or defraud the creditors.—*Lippard v. Edwards*, 39 Ind. 165.

[e] (Sup. 1877)

In an action to set aside an alleged fraudulent conveyance, it was in evidence that at the time it was made the grantor was indebted to plaintiff and insolvent, and there was also

evidence of fraud on the part of the grantor. *Held*, on demurrer to the evidence, that, in absence of anything tending to show fraud on the part of the grantee, the demurrer should be sustained.—*Pinnell v. Stringer*, 59 Ind. 535.

[f] (Sup. 1889)

To render a conveyance void as to creditors, on the ground that it was made with intent to defraud them, the grantee must have knowledge of, and participate in, the fraud of the grantor.—*Scott v. Davis*, 117 Ind. 232, 20 N. E. 139.

FOR CASES FROM OTHER STATES.

SEE 24 CENT. DIG. Fraud. Conv. § 493.

### § 157. Knowledge or notice implied from relation between parties.

[a] (Sup. 1894)

Where a wife, for the purpose of conveying her inchoate interest in her husband's land, joins in a fraudulent conveyance thereof, made by him through a trustee and without consideration, to himself and wife, to hold by entireties, the wife is affected by the fraud of her husband, whether she had knowledge of it or not.—*Phillips v. Kennedy*, 139 Ind. 419, 38 N. E. 410, 39 N. E. 147.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 497-499.

See, also, 20 Cyc. p. 487.

### § 158. Constructive notice, and facts putting on inquiry.

[a] (Sup. 1829)

The pendency of an action is constructive notice of the matter involved therein as to one who purchases property from the defendant in such action.—*Ray v. Roe ex dem. Brown*, 2 Blackf. 238, 18 Am. Dec. 159.

[b] (Sup. 1902)

A corporation executed a mortgage in favor of its creditors at a time when none of them were pressing their claims for payment. Its attorney immediately went to the domicile of a foreign corporation, arrived there at night, and at once informed the president thereof of the mortgage, securing its acceptance. Another attorney went to a second foreign creditor, and performed like services. Other beneficiaries were present at the execution of the mortgage, and knew the circumstances thereof. The mortgage was not recorded. *Held*, that these facts were sufficient to put such individual creditors on inquiry as to the solvency of the mortgagor.—*Reagan v. First Nat. Bank of Chicago*, 157 Ind. 623, 61 N. E. 575, 62 N. E. 701.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 500-503.

See, also, 20 Cyc. pp. 481-487.

### § 159. Operation and effect of knowledge or notice.

[a] (Sup. 1833)

A judgment creditor may, by bill, subject to the satisfaction of his debt land sold on an execution against the debtor, which was issued on a judgment confessed by the debtor for the purpose of defrauding his creditors, where the purchaser had notice of the fraud.—*Platt v. Judson*, 3 Blackf. 235.

[b] (Sup. 1836)

Where the grantee knew of the indebtedness of the grantor, and therefore took the transfer for the purpose of defrauding grantor's creditors, the conveyance being without consideration, it should be set aside as fraudulent.—*Ewing v. Harris*, 4 Blackf. 71.

[c] (Sup. 1848)

A conveyance made by a debtor with the intention of delaying, hindering, or defrauding creditors, such intention being known to the party taking such conveyance, is void.—*Tyner v. Somerville*, 1 Ind. 175, Smith, 149.

[d] (Sup. 1849)

A sale of real or personal property made to hinder or delay creditors, though an adequate consideration be paid, is void if the purchaser has knowledge of the intention of the seller in making the sale.—*Johnson v. Brandis Smith*, 263.

[e] (Sup. 1855)

The fact that the vendee knew at the time of the conveyance that a suit was pending against the grantor to recover judgment for a debt is not of itself proof of the vendee's fraudulent intent.—*Stewart v. English*, 6 Ind. 176.

[f] (Sup. 1865)

A sale of land for a little over half its value to a brother-in-law who knows that a suit is pending against the grantor, and is told by the latter that he does not intend to pay any judgment that may be obtained in such suit, may be set aside as fraudulent at the suit of the judgment creditor.—*Bray v. Hussey*, 24 Ind. 228.

[g] (Sup. 1890)

A creditor has a right to obtain a preference from his debtor, and knowledge that a verdict had been returned against the latter, which he was unable to pay, is not of itself sufficient to avoid a mortgage taken by the creditor, though he is the debtor's brother.—*Straight v. Roberts*, 126 Ind. 383, 26 N. E. 73.

[h] (Sup. 1894)

A complaint in an action to set aside a conveyance by a debtor through a third person to his wife alleged that the conveyances were made to defraud creditors, and that the wife was party to that fraud with full notice and knowledge thereof. *Held* to show that the conveyance was fraudulent and would be set aside, even if there was a valuable consideration.—*Roberts v. Farmers' & Merchants' Bank of Attica*, 36 N. E. 128, 136 Ind. 154.

## [1] (Sup. 1904)

The fact that a seller is known by the buyer to be deeply indebted or insolvent is not of itself enough to charge the buyer with a want of good faith in making the purchase.—*Sellers v. Hayes*, 72 N. E. 119, 163 Ind. 422.

## [J] (App. 1904)

Where land was conveyed without consideration in fraud of creditors, the conveyance may be set aside as against the grantee, who had knowledge of the fraudulent intent.—*Trent v. Edmonds*, 70 N. E. 169, 32 Ind. App. 432.

## FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 506-517.

See, also, 20 Cyc. pp. 470-480.

## § 160. Payment of consideration after notice.

## [a] (Sup. 1845)

A conveyance of real estate made to defraud creditors will, on their application, be set aside in chancery, if the grantee, before payment of the purchase money, have notice of the fraud.—*Parkinson v. Hanna*, 7 Blackf. 400.

## [b] (Sup. 1871)

An action may be brought by creditors to set aside a conveyance as fraudulent, and subject lands to the payment of debts to the extent of the unpaid purchase money, where they have been conveyed to an innocent purchaser, who has, however, notice of the fraud, while the purchase money or a part thereof still remains due and unpaid. The creditors are not limited to proceedings supplemental to execution.—*Rhodes v. Green*, 36 Ind. 7.

## [c] (Sup. 1884)

Where a vendor fraudulently conveys his property for value, and notice of such fraudulent intent is given the purchaser before payment of the purchase money, such purchaser is chargeable with the fraudulent intent of his vendor, and such transaction is deemed fraudulent at least to the extent of the unpaid purchase money.—*Seager v. Aughe*, 97 Ind. 285.

## [d] (Sup. 1887)

A person who pays the purchase money after knowledge of his grantor's fraudulent purpose is not a bona fide purchaser.—*Hunsinger v. Hofer*, 110 Ind. 390, 11 N. E. 463.

## FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 512-514.

See, also, 20 Cyc. pp. 487, 488.

## § 161. Participation in fraudulent intent.

## FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 504, 505, 510, 517.

See, also, notes, 31 L. R. A. 609, 32 L. R. A. 33.

## § 162. — In general.

[a] In order to establish fraud on the part of the purchaser, participation, on his part, in the fraudulent design must be shown.—(Sup. 1855) *Stewart v. English*, 6 Ind. 176; (1878) *Johnston v. Field*, 62 Ind. 377.

## [b] (Sup. 1881)

To sustain an action by a creditor to charge the land of his debtor's wife to the extent of improvements made thereon by the debtor, as made in fraud of creditors, it is essential that the wife should participate, or at least voluntarily acquiesce, in the fraudulent purpose of her husband.—*Moore v. Lampton*, 80 Ind. 301.

## [c] (Sup. 1888)

A wife purchased the interest of plaintiff, her husband's partner, in the firm property, knowing that the property was incumbered, but did not assume the mortgage. The husband acted as her agent in the transaction, and agreed to pay the firm debts. The same day he assigned his interest to his wife, in consideration of a former debt, leaving himself without property, as the wife knew. She continued the business through her husband, and, the property having been burned, invested the insurance money with other money of her own, in real estate. All the firm debts except the mortgage were paid, but no firm property remained to satisfy that, and plaintiff was obliged to pay part of it. *Held*, that as fraud in taking title to the real estate in the wife was not found, and as by Rev. St. 1881, § 4924, the question of fraud is one of fact, which cannot be presumed, plaintiff could not subject the real estate to his claim.—*Neisler v. Harris*, 115 Ind. 560, 18 N. E. 39.

## [d] (Sup. 1898)

Where a vendor testified that he had received from the vendee several items of cash and personal property; that these had not supplied the consideration for the conveyance, but had been paid for or secured by the assignment of a judgment; that the vendee "gave nothing for the deed"; that he told vendee of his debt to plaintiffs, but he "said he would do them up,"—the evidence is sufficient to justify a setting aside of the conveyance as fraudulent as to creditors.—*Hay v. Marsh*, 51 N. E. 1033, 152 Ind. 651.

## FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 504, 505.

## § 163. — Operation and effect.

[a] A sale of either real or personal property, made with the intention of hindering or preventing creditors from collecting their demands of the vendor, if the vendee participate in the fraudulent intent, is voidable at the suit of such creditors, notwithstanding the vendee may have paid a valuable and adequate consideration.—(Sup. 1849) *Johnson v. Brandis, Smith*, 263;

(1882) *Bishop v. Redmond*, 83 Ind. 157; (1883) *Buck v. Voreis*, 89 Ind. 116.

[b] (Sup. 1867)

Where a conveyance was made with intent to defraud the grantor's creditors, and the grantee participated in the fraud, the fact that he paid a full consideration for the property was not sufficient to sustain the same as against the grantor's creditors defrauded.—*Harrison v. Jaquess*, 29 Ind. 208.

[c] (Sup. 1894)

Where it appears, in an action to set aside a conveyance by a debtor through a third person to his wife, that the wife was a party to the fraud, it is immaterial that the conveyance to her was without consideration.—*Roberts v. Farmers' & Merchants' Bank of Attica*, 136 Ind. 154, 36 N. E. 128; *Id.*, 137 Ind. 697, 36 N. E. 1001.

[d] (Sup. 1894)

In an action to set aside a conveyance made by a woman to a trustee, who then conveyed it to herself and her husband as an estate by entireties, the husband testified that during eight years in which his wife was in business he had given her over \$6,000, and it appeared that the profits of her business probably amounted to \$8,000. Both were insolvent, and the husband had been so for 15 years; what business he had done having been done in his wife's name, and he had long known that an estate by entireties placed the property beyond the reach of creditors. *Held*, that a finding that the conveyance was fraudulent was sustained.—*Bunch v. Hart*, 138 Ind. 1, 37 N. E. 537.

[e] (Sup. 1895)

An allegation, in a complaint to set aside a deed from a husband to his wife, that, at the time of the conveyance, the wife knew of her husband's indebtedness, and of his purpose to defraud his creditors, and that she received the deed with such knowledge, and with the purpose to aid him in the perpetration of the fraud, is sufficient, without averring want of consideration.—*Pierce v. Hower*, 142 Ind. 626, 42 N. E. 223.

[f] (Sup. 1896)

Where a wife has knowledge that a conveyance made to her by her husband is intended to defraud his creditors, and accept it for the purpose of protecting the property from their demands, the conveyance will not be protected, though a full consideration is paid.—*Hoffman v. Henderson*, 44 N. E. 629, 145 Ind. 613.

[g] (Sup. 1898)

Where one of two sureties secured from his principal notes and a mortgage to both sureties jointly, either knowing that the mortgage was intended to defraud creditors, or participating in such fraudulent intent, the other surety, in accepting the same, takes the mortgage with all the infirmities affecting it in the hands

of his co-surety, though he might, by paying the debt for which they were sureties, alone maintain an action against their principal.—*Rownd v. State*, 51 N. E. 914, 52 N. E. 395, 152 Ind. 39.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 510, 517.

#### § 164. Effect of good faith of grantee.

Rights of grantees as bona fide purchasers, see post, §§ 185-186.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 494, 518-522.

#### § 165. — In general.

[a] (Sup. 1869)

A. purchased at a sheriff's sale against B., and conveyed to B.'s wife. There was evidence that A. purchased with B.'s money. *Held*, however, that B.'s wife's title was good unless she were proved to be a party to the transaction, which was fraudulent as against B.'s creditors.—*Ewing v. Gray*, 12 Ind. 64.

[b] Where the grantee has shown good faith, the validity of the conveyance is not affected by the fraudulent intent of the grantor.—(Sup. 1863) *Palmer v. Henderson*, 20 Ind. 297; (1870) *McCormick v. Hyatt*, 33 Ind. 546; (1880) *Brown v. Rawlings*, 72 Ind. 505; (1889) *Scott v. Davis*, 117 Ind. 232, 20 N. E. 139.

[c] (Sup. 1876)

In an action by a judgment plaintiff to set aside as fraudulent a conveyance of certain real estate, made by the judgment defendant to a trustee in trust for the grantor, after the accruing of the indebtedness and before judgment, and a conveyance by the trustee to the wife of the judgment defendant, executed after the rendition of the judgment, and to subject the real estate to sale, etc., an answer admitting the conveyances as alleged, but alleging that the first conveyance was in trust for the wife, and averring the payment of a consideration by the wife by the conveyance of her separate real estate, and denying notice of the indebtedness of her husband to plaintiff, and denying fraud, is sufficient.—*Wynne v. Cornelison*, 52 Ind. 312.

[d] (Sup. 1881)

In an action to set aside a conveyance for fraud, where there was evidence that the grantee paid no consideration for the property, it was proper to refuse to charge that, unless the grantee had notice of the fraudulent intent of the grantor, plaintiff could not recover.—*Sherman v. Hogland*, 73 Ind. 472.

[e] In order to avoid a voluntary conveyance as fraudulent against creditors it is not necessary that the grantee should have been cognizant of the fraud.—(Sup. 1881) *McCole v. Loehr*, 79 Ind. 430; (1883) *Wright v. Nipple*, 92 Ind. 310; (1892) *York v. Rockwood*, 132 Ind.

358, 31 N. E. 1110; (1896) *Gilleland v. Jones*, 144 Ind. 662, 43 N. E. 939, 55 Am. St. Rep. 210.

[f] (Sup. 1882)

Where the conveyance is voluntary, it is not necessary that the grantee should actually participate with the grantor in his fraudulent purpose, or the privy to it.—*Cavanaugh v. Smith*, 84 Ind. 380.

[g] (Sup. 1882)

A. and B., partners, were in debt. A. sold his interest to B., who agreed to pay the debts. B. sold the interest thus bought from A. to C., who bought the same in good faith, and without fraudulent intent, though B., in selling it, intended to defraud the creditors of the firm. *Held*, that the creditors of the firm could not take the property from C.,—that they had no lien thereon.—*Trentman v. Swartzell*, 85 Ind. 443.

[h] (Sup. 1883)

Creditors of an insolvent husband who, with intent to defraud his creditors, induced his wife's uncle to buy his land, worth \$12,000, at a sale under an execution against him for \$1,600, cannot subject the land to the payment of their demands as against the wife, where the uncle, in ignorance of the husband's fraudulent design, made it a condition that the land should be conveyed by him to the debtor's wife, who, as well as the uncle, acted throughout in good faith.—*First Nat. Bank of Crawfordsville v. Carter*, 89 Ind. 317.

[i] (Sup. 1883)

In an action to set aside a sale of property as in fraud of the seller's creditors, an instruction which requires plaintiff to prove that the purchaser had notice of the seller's fraudulent design is properly refused, where there is evidence that the purchaser was a mere volunteer, and paid no valuable consideration.—*Meredith v. Citizens' Nat. Bank*, 92 Ind. 343.

[j] (App. 1891)

A merchant's stock having been seized on execution, the plaintiffs, one of whom was his brother-in-law, agreed with him to purchase the stock and assume certain debts. They had no knowledge of the business, and the sale was made after a day's negotiation. No price was then fixed. Two days afterwards the merchant conveyed to them a house and lot, in payment for which, and for the goods they gave him their notes for equal sums, payable in one, two, three, four, five, and six years. This was all the property the merchant had, and the price was a fair one. The plaintiffs paid the debts they assumed, and he had assured them that there were no others. *Held*, that a judgment that the conveyance was not fraudulent as to creditors should not be disturbed, as against the evidence.—*Wilson v. Clark*, 1 Ind. App. 182, 27 N. E. 310; *South Bend Iron-Works Co. v. Dudleyson*, 27 N. E. 312.

[k] (Sup. 1892)

A conveyance of realty as in fraud of creditors cannot be set aside without any evidence of fraud of the grantee.—*Old Nat. Bank of Evansville v. Findley*, 31 N. E. 62, 131 Ind. 225.

[l] (Sup. 1900)

Where land is conveyed by a debtor for a valuable consideration, and the grantee has no knowledge of any intended fraud, the conveyance will not be set aside as being in fraud of creditors.—*Hedrick v. Hall*, 58 N. E. 257, 155 Ind. 371.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 494, 518; 48 CENT. DIG. Ven. & Pur. § 588.

### § 168. — Nature and amount of consideration.

[a] A conveyance by a debtor to his wife, with intent to defraud his creditors and without consideration, will be set aside, though she had no knowledge of the fraudulent intent.—(Sup. 1875) *Spinner v. Weick*, 50 Ind. 213; (1881) *McCole v. Loehr*, 79 Ind. 430.

[b] (Sup. 1898)

When one, to defraud his creditors, divested himself of all his property, and, among other deeds, executed a deed to his wife of certain land, for a grossly inadequate consideration, though there was no evidence that the wife participated in or was aware of her husband's fraud, the conveyance to the wife will be set aside, upon such conditions as will protect her equities in the land.—*First Nat. Bank of Frankfort v. Smith*, 49 N. E. 376, 149 Ind. 443.

[c] (App. 1901)

*Burns' Rev. St. 1901, §§ 6645, 6648* (*Hornor's Rev. St. 1897, §§ 4920, 4923*), provide that a conveyance to defraud creditors is void as to the latter if the conveyance be without a valuable consideration, but the title of a purchaser for a valuable consideration is not invalid unless he had notice of his grantor's fraudulent intent. A complaint did not allege notice of fraud on the part of the grantee, but did allege an absence of consideration. The proof showed that the conveyance was partially voluntary, and that the consideration was inadequate. *Held*, that a recovery was not precluded, notwithstanding the grantee had no notice of fraud, where the creditors would be benefited by subjecting the property, subject to the lien of a valid mortgage assumed by the grantee, to the payment of their claims.—*Jameson v. Dillely*, 61 N. E. 601, 27 Ind. App. 429.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 494, 520.

### § 169. — Voluntary conveyances.

[a] Where the conveyance is voluntary, the good faith of the grantee does not render it valid.—(Sup. 1892) *York v. Rockwood*, 132 Ind. 358, 31 N. E. 110; (1896) *Gilliland v. Jones*,

144 Ind. 662, 43 N. E. 939, 55 Am. St. Rep. 210.

[b] A conveyance by husband to wife in fraud of creditors may be set aside, where no consideration was paid, whether the wife had knowledge of the fraud or not.—(Sup. 1894) *Roberts v. Farmers' & Merchants' Bank of Attica*, 36 N. E. 128, 136 Ind. 154; (1905) *Borror v. Carrier*, 73 N. E. 123, 34 Ind. App. 353.

[c] (Sup. 1896)

In an action to set aside, as fraudulent against creditors, a voluntary grant of land, since it is the intent of the grantor, and not the knowledge of the intent by the grantee, which determines the fraud, it is immaterial whether the creditors as to whom the fraudulent character of the conveyance is alleged became such prior or subsequent to the grant.—*Gilliland v. Jones*, 144 Ind. 662, 43 N. E. 939, 55 Am. St. Rep. 210.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 494, 520.

#### § 170. — Confidential relations of parties.

[a] (Sup. 1894)

There can be no reversal of a finding for the grantee on the facts, where he has testified that the grantor, his brother-in-law, owed him a certain amount for money loaned; that, when grantee first learned that grantor was neglecting his farm and was speculating in produce, he tried to obtain payment; that he accepted the deed in payment; that then he did not know of the other claims against grantor; that the deed was absolute, without reservation in grantor's favor; that grantee, in taking it, purposed merely to collect his claim, not to defraud or assist grantor to defraud other creditors, and did not know or believe that grantor so intended.—*Fleming v. Yost*, 137 Ind. 95, 36 N. E. 705.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. § 521.

### II. RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS.

Heirs of fraudulent grantee, see DESCENT AND DISTRIBUTION, § 125.

Remedies of creditor of deceased vendor, see EXECUTORS AND ADMINISTRATORS, § 423.

#### (A) ORIGINAL PARTIES.

#### § 172. Validity of transaction as between parties.

[a] A transfer of property made to defraud creditors is valid between the parties.—(Sup. 1823) *Findley v. Cooley*, 1 Blackf. 262; (1843) *Scott v. Purcell*, 7 Blackf. 66, 39 Am. Dec. 453; (1863) *Moore v. Meek*, 20 Ind. 484; (1863) *Welby v. Armstrong*, 21 Ind. 489; (1873) *O'Neil*

*v. Chandler*, 42 Ind. 471; (1876) *Edwards v. Haverstick*, 53 Ind. 348; (1876) *Garner v. Graves*, 54 Ind. 188; (1881) *Stout v. Stout*, 77 Ind. 537; (1886) *Henry v. Stevens*, 108 Ind. 281, 9 N. E. 356.

[b] (Sup. 1823)

The circumstances of a defendant's selling real estate, pending an action of trespass against him, in order to defraud the plaintiff, does not affect the title of a bona fide purchaser, without notice of the suit, nor afford him any defense against an action on the note given for the purchase money.—*Findley v. Cooley*, 1 Blackf. 262.

[c] A transfer of property made to defraud creditors is valid as between the parties and their heirs.—(Sup. 1850) *Laney v. Laney*, 2 Ind. 196; (1876) *Edwards v. Haverstick*, 53 Ind. 348.

[d] (Sup. 1851)

A deed from parent to child, though fraudulent as to creditors, is good between the parties.—*Burtch v. Elliott*, 3 Ind. 99.

[e] (Sup. 1863)

An executed contract cannot be avoided, as between the parties, by showing that it was made with an intent to defraud creditors.—*Welby v. Armstrong*, 21 Ind. 489.

[f] (Sup. 1870)

When a fraudulent conveyance of goods is made, the fraudulent vendee takes the title of the vendor, although the sale is absolutely void as to the creditors of the vendor.—*Springer v. Drosch*, 32 Ind. 486, 2 Am. Rep. 356; overruling *Welby v. Armstrong*, 21 Ind. 489.

[g] (Sup. 1875)

A note and mortgage made for the purpose of cheating and defrauding creditors are obligatory upon the parties, and are only voidable at the instance of the creditors.—*Van Wy v. Clark*, 50 Ind. 259.

[h] (Sup. 1876)

A written instrument giving one creditor a lien is not invalidated between the parties by the facts that the creditor intended, by obtaining it, to gain a preference over other creditors, and that the debtor executed it negligently, and in reliance on the creditor's assurance that it was "all right."—*Steele v. Moore*, 54 Ind. 52.

[i] A voluntary conveyance, though fraudulent as to existing creditors, is valid between the parties and their privies.—(Sup. 1881) *Sharpe v. Davis*, 76 Ind. 17; (1885) *Anderson v. Etter*, 102 Ind. 115, 26 N. E. 218.

[j] An executed contract of conveyance is valid, as between the parties, although executed for the purpose of defrauding the grantor's creditors.—(Sup. 1881) *Dobson v. Markle*, 77 Ind. 53; (1881) *Stout v. Stout*, Id. 537; (1883) *Wilson v. Murray*, 90 Ind. 477; (1883) *Eve v. Louis*, 91 Ind. 457; (1893) *Phenix Ins. Co. v. Fielder*, 33 N. E. 270, 133 Ind. 557.

[k] A conveyance in fraud of creditors is void only to the extent to which it may be necessary to deal with the conveyed estate for their satisfaction.—(Sup. 1881) *Stout v. Stout*, 77 Ind. 537; (1883) *Wilson v. Murray*, 90 Ind. 477; (1893) *Phenix Ins. Co. v. Fielder*, 33 N. E. 270, 133 Ind. 557; (1895) *Kitts v. Willson*, 39 N. E. 313, 140 Ind. 604.

[l] (Sup. 1886)

A voluntary conveyance to defraud creditors is valid against the grantor and his privies, the conveyance not being made wholly void by Rev. St. 1881, § 2156, declaring it a misdemeanor to give or receive a conveyance to defraud creditors.—*Anderson v. Etter*, 102 Ind. 115, 26 N. E. 218.

[m] (Sup. 1891)

The heirs of a fraudulent grantor stand in no better position than he with respect to a right to declare an absolute conveyance in form a mortgage in effect.—*Kitts v. Willson*, 130 Ind. 492, 29 N. E. 401.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 523-529, 542; 8 CENT. DIG. Can. of Inst. § 45.

See, also, 20 Cyc. pp. 608-611; note, 15 Am. Dec. 599.

### § 173. Mutual rights and liabilities of parties.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 530-548.

See, also, 20 Cyc. pp. 612-624.

### § 174. — Title and rights to property.

[a] (Sup. 1845)

A transfer of property will convey the legal title, though made to defraud creditors.—*Doe ex dem. Abbott v. Hurd*, 7 Blackf. 510.

[b] (Sup. 1851)

Where a conveyance of land is made by a father to his son without consideration and for the purpose of defrauding his creditors, and the lands have descended to the heirs of the grantee, the court will, upon the application of creditors, set aside the sale as to them; and decree the land to be sold to pay their claims and costs, and the heirs of the grantee will be entitled to any surplus remaining.—*Burtch v. Elliott*, 3 Ind. 99.

[c] (Sup. 1864)

A. owned a tract of land, and, with intent to defraud his creditors, conveyed it, without consideration, to B., who, to aid A. in accomplishing his fraud, conveyed it, without consideration, to C. C. mortgaged the land to the sinking fund for a loan of \$500, which he received. C. was a party to the purpose of A. to defraud his creditors. The state received the mortgage made to the sinking fund, and made the loan in good faith. All of said conveyances, except the mortgage to the sinking fund,

were set aside by a decree of the proper court, and the land ordered to be sold, subject to said mortgage, for the benefit of the creditors of A. The land did not sell for enough to pay them. Suit was then brought against C. to compel him to account for and pay over to A.'s creditors the \$500 obtained by the said mortgage. Held, that C. was entitled to the money as against A., but held it in trust for the creditors of A., to whom he was liable to account and pay it over.—*Jones v. Reeder*, 22 Ind. 111.

[d] (Sup. 1886)

In an action for rent accruing on a lease, and a defense of want of title in the lessor, a reply by the lessor that a deed of lessor to lessee was void because in fraud of creditors, and that no title passed thereby, is not good as a denial of the title set up by the lessee, since, as between the parties to such a deed, the conveyance is valid.—*Henry v. Stevens*, 108 Ind. 231, 9 N. E. 356.

[e] (Sup. 1891)

Where a debtor executes an absolute conveyance of lands to his creditor to secure a debt to the latter, and at the same time to hinder and delay other creditors, an oral agreement of the grantee to reconvey the land to the grantor on payment of the debt will not be enforced in equity.—*Kitts v. Willson*, 130 Ind. 492, 29 N. E. 401.

[f] (Sup. 1909)

That a husband had a dishonest purpose in changing the style of his bank account, which he maintained from the proceeds of his business from his own name to that of his wife, followed by the word "special," without intending to give the wife any interest therein and without parting with the right to the money, did not create a right in the wife to the account, and on her death the husband might establish a claim against her estate for the amount of such deposits.—*Leimgruber v. Leimgruber*, 172 Ind. 370, 86 N. E. 73, 88 N. E. 593.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 530, 531, 533-536, 542.

See, also, 20 Cyc. pp. 615-617; notes, 67 L. R. A. 865, 1 L. R. A. (N. S.) 1007.

### § 176. — Enforcement of executory contract.

[a] (Sup. 1863)

A party to an executory agreement, made to defraud creditors, can maintain no suit to coerce its execution.—*Welby v. Armstrong*, 21 Ind. 489.

[b] (Sup. 1896)

The holder of a note and mortgage given to and received by him for the purpose of defrauding the mortgagor's creditors cannot enforce the same, whether executed for a valuable con-

sideration or not.—*O'Kane v. Terrell*, 144 Ind. 509, 43 N. E. 869.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. §§ 537-541; 44 CENT. DIG. Spec. Perf. § 176.  
See, also, 20 Cyc. p. 620.

**§ 177. — Payment and recovery of consideration.**

[a] (Sup. 1823)

The maker of a note given as consideration of a bill of sale executed to defraud the creditors of the vendor cannot set up the alleged fraud as a defense to the note.—*Findley v. Cooley*, 1 Blackf. 262.

[b] (Sup. 1860)

Where A. gives his note to B. for property bought of C., he is estopped from setting up as a defense to a suit on the note that the note really belongs to C. and is fraudulent as against the latter's creditors.—*Stevens v. Songer*, 14 Ind. 342.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. §§ 543-546; 48 CENT. DIG. Ven. & Pur. § 630.  
See, also, note, 30 Am. Rep. § 517.

**§ 179. Rights and liabilities as to third persons in general.**

[a] (Sup. 1863)

A conveyance, fraudulent as to creditors, may be valid between the parties, and enforced as to them, and especially in favor of a third person, to whom a promise growing out of such transaction had been made.—*Moore v. Meek*, 20 Ind. 484.

[b] Third persons cannot take advantage of a conveyance as fraudulent against creditors.—(Sup. 1876) *Edwards v. Haverstick*, 53 Ind. 348.

[c] A conveyance in fraud of creditors can be attacked only by creditors. It is valid as to all others.—(Sup. 1873) *O'Neil v. Chandler*, 42 Ind. 471; (1877) *Bentley v. Dunkle*, 57 Ind. 374; (1882) *Etter v. Anderson*, 84 Ind. 333.

[d] (Sup. 1876)

Where real estate has been conveyed for the purpose of hindering and delaying creditors of the grantor, the property is subject to levy and sale under an execution against the grantee, and a subsequent conveyance thereof, made by the grantor, passes no title.—*Edwards v. Haverstick*, 53 Ind. 348.

A conveyance of real estate in fraud of the grantor's creditors, being valid as between the parties and as to all others than creditors, the land is subject to levy and sale under an execution against the grantee.—*Id.*

[e] (Sup. 1889)

In a suit to enjoin trespass on land, defendant alleged that E. obtained judgment against C., who was then the owner of the

land; that execution was by mistake levied on an entirely different tract of land, which was conveyed by the purchasers to defendant; that while the judgment was a lien on the land in controversy, C. conveyed the same to his wife, and she to plaintiff, without consideration, and for the purpose of defrauding creditors; and that plaintiff had notice of defendant's claim. Held that, it not appearing that defendant was at any time a creditor of C., defendant had no standing to question the intent with which the deeds to C.'s wife and to plaintiff were made.—*Clendening v. Ohl*, 118 Ind. 46, 20 N. E. 639.

[f] (Sup. 1889)

An agreement whereby a father gives lands to his son, who takes possession and subsequently claims by prescription, cannot be attacked by other heirs as in fraud of creditors.—*Wilson v. Campbell*, 21 N. E. 893, 119 Ind. 286.

[g] (App. 1904)

Where plaintiff extended credit to the defendant's son, relying on a representation, made with defendant's consent, that the son owned a certain tract of land, the validity of a subsequent conveyance of the land without consideration to the defendant cannot, as against plaintiff, be sustained on the ground that a previous conveyance of it by defendant to his son was without consideration, to defraud creditors.—*Trent v. Edmonds*, 70 N. E. 160, 32 Ind. App. 432.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. §§ 549-553, 624, 990.  
See, also, 20 Cyc. pp. 624, 625.

**§ 180. Rights and liabilities of grantees as to creditors.**

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. §§ 554-588, 695.  
See, also, 20 Cyc. pp. 626-644; note, 67 L. R. A. 590.

**§ 181. — Property and proceeds thereof.**

[a] (Sup. 1888)

Where a husband, having no property subject to execution, invests his funds in his wife's land, colluding with her to defraud his creditors thereby, and his wife afterwards sells the land, and retains the proceeds, she will be regarded in equity as trustee for the husband's judgment creditors.—*Blair v. Smith*, 114 Ind. 114, 15 N. E. 817, 5 Am. St. Rep. 593.

[b] (Sup. 1888)

Where one gives a note without consideration and suffers judgment and execution thereon in fraud of his creditors, the payee, knowing of such fraud, is liable to the creditors for the property seized.—*Phelps v. Smith*, 116 Ind. 387, 17 N. E. 602, 19 N. E. 156.

One who enters into a conspiracy to defraud the creditors of a co-conspirator, and, pursuant to such purpose, obtains a judgment, and a sale under an execution thereon, may be compelled to account for the proceeds of the sale to the creditors of the co-conspirator.—*Id.*

[c] (Sup. 1895)

Where, in a suit by a judgment creditor to set aside a sale of the debtor's land for value, as in fraud of his judgment, the court decrees the sale "void as to the judgment," and renders judgment for the creditor for the amount due, the grantee, by paying such amount, frees his title as against the decree.—*Kitts v. Willson*, 140 Ind. 604, 39 N. E. 313.

[d] (Sup. 1900)

In an action by an executor to set aside a conveyance of 80 acres of land by his testator, and for a decree that the land be sold to pay testator's debts, defendant's cross complaint alleged that the 80 acres was part of 241 acres owned by the testator, which testator conveyed in different parcels, at the same time and without consideration to several beneficiaries, of which defendant was one. *Held* sufficient to entitle defendant to a decree that the testator's indebtedness was chargeable ratably, according to value, against all the parcels conveyed.—*Kaufman v. Elder*, 56 N. E. 215, 154 Ind. 157.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 554-559, 561-567.

See, also, 20 Cyc. pp. 626-630.

### § 182. — Personal liabilities.

[a] (Sup. 1831)

Where a third person has placed goods of a judgment debtor out of the reach of execution, he may be compelled to account for them to the plaintiff in equity.—*Jenison v. Graves*, 2 Blackf. 440.

[b] (Sup. 1864)

A. owned a tract of land, and, with intent to defraud his creditors, conveyed it, without consideration, to B., who, to aid A. in accomplishing his fraud, conveyed it without consideration to C. C. mortgaged the land to the sinking fund for a loan of \$500, which he received. C. was a party to the purpose of A. to defraud his creditors. The state received the mortgage made to the sinking fund, and made the loan in good faith. All of said conveyances, except the mortgage to the sinking fund, were set aside by a decree of the proper court, and the land ordered to be sold, subject to said mortgage, for the benefit of the creditors of A. The land did not sell for enough to pay them. Suit was then brought against C. to compel him to account for and pay over to A.'s creditors the \$500 obtained by the said mortgage. *Held*, that C., though entitled to the money as against A., held it in trust for the creditors of A., to whom he was liable to account and pay it over.—*Jones v. Reeder*, 22 Ind. 111.

[c] (Sup. 1881)

Under a conveyance of property made with intent to defraud creditors of the grantor, the grantee will be treated as a trustee for the creditors.—*Stout v. Stout*, 77 Ind. 537.

[d] (Sup. 1882)

Where the purchaser of land causes a conveyance to be made to his wife with an intent to defraud his creditors, the land is subject to the execution of any creditor under Rev. St. 1881, §§ 752, 2974, 2975, providing that, where a conveyance is made to one person and the consideration paid by another, "a trust shall result in favor of prior creditors."—*Hanna v. Aebker*, 84 Ind. 411.

[e] (Sup. 1883)

When a conveyance for a valuable consideration is made to one person and the consideration therefor is paid by another, and the conveyance is made with the consent of the person paying the consideration and at his instance, and not upon an agreement, without any fraudulent intent that the land, or some interest therein, shall be held in trust for the person paying the consideration, but it is for the purpose of defrauding his creditors, a trust results not in his favor, but in favor of his creditors.—*Eve v. Louis*, 91 Ind. 457.

[f] (Sup. 1887)

Where property was purchased and the consideration paid by a debtor out of money a portion of which might have been subjected to the payment of his debt, and the conveyance was taken in the name of another, the transaction was presumptively fraudulent as to prior creditors of such debtor and a trust resulted in their favor under Rev. St. 1881, § 2975, providing that every conveyance taken in the name of a third person shall be deemed fraudulent as against creditors of the person paying the consideration, and that, unless a fraudulent intent is disproved, a trust shall result in favor of the prior creditors.—*Eiler v. Crull*, 14 N. E. 79, 112 Ind. 318.

[g] (Sup. 1888)

Where specific property which a creditor might have subjected to the payment of his claim is transferred by a debtor for the purpose of delaying and defrauding his creditors, the person accepting the transfer with knowledge of and participating in the fraud takes no title as against creditors, but the transfer is void at common law, as well as under the statute, and he holds the property in trust, and, like any other trustee, is liable to be called to account in a court of equity.—*Chamberlin v. Jones*, 16 N. E. 178, 114 Ind. 458.

[h] (Sup. 1889)

In an action by judgment creditors to set aside a mortgage as fraudulent, and subject the mortgagor's property to plaintiffs' judgment, a personal judgment cannot be rendered against the mortgagee; nor can the property conveyed be ordered to be sold without relief from valuation or appraisal law, under

Rev. St. 1881, § 743, where there is no finding of fraud.—*Levy v. Chittenden*, 120 Ind. 37, 22 N. E. 92.

[I] (Sup. 1889)

A fraudulent vendee, who paid the full price for the property sold, is not thereby rendered liable to garnishment, as he is not indebted to the debtor.—*Jaseph v. Kronenberger*, 120 Ind. 495, 22 N. E. 301.

[J] (Sup. 1894)

A grantee of property, conveyed by a debtor to defraud creditors, on accepting a conveyance, becomes a trustee for the creditor, and is directly liable for the value of the property so conveyed, where he actively participates in the fraud, and subsequently disposes of the property.—*Doherty v. Holliday*, 137 Ind. 282, 32 N. E. 315, 36 N. E. 907.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. FRAUD. CONV. §§ 568-577.

See, also, 20 Cyc. pp. 630-636.

§ 183. — Reimbursement of consideration and expenditures.

[a] (Sup. 1885)

The amount paid by a fraudulent vendee of an insolvent debtor cannot be recovered by him on the conveyance being set aside, even though it went to bona fide creditors.—*Seivers v. Dickover*, 101 Ind. 495.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. FRAUD. CONV. §§ 578-582, 695.

See, also, 20 Cyc. pp. 636-638.

§ 184. — Claims and liens acquired by grantee.

[a] (Sup. 1870)

A vendee bought mortgaged land for the purpose of delaying the creditors of his vendor, under an agreement to reconvey, whenever such vendor's relations with his creditors would permit him to hold title with safety, on being reimbursed for interest paid on the mortgage. *Held*, that the creditors were entitled to subject the land to the payment of their claims, without accounting to the vendee for interest paid by him.—*Musselman v. Kent*, 33 Ind. 452.

[b] (Sup. 1882)

Where a mortgagor conveys property to the mortgagee to defraud other creditors, and the conveyance is set aside as fraudulent at the instance of creditors, the mortgage is not lost.—*First Nat. Bank of Lebanon v. Essex*, 84 Ind. 144.

[c] (Sup. 1888)

A wife who has expended money on the house of her husband, on his agreement to have it conveyed through a trustee to himself and her, as tenants by entireties, not knowing that such conveyance was to defraud creditors, is entitled, as against them, to a lien for such

sum.—*Marmon v. White*, 51 N. E. 930, 151 Ind. 445.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. FRAUD. CONV. §§ 583-588.

§ 185. Rights of grantees as bona fide purchasers.

Bona fide purchasers from grantee, see post, §§ 198-204.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. FRAUD. CONV. §§ 590-595.

See, also, 20 Cyc. pp. 642-644.

§ 186. — In general.

[a] (Sup. 1849)

A bona fide grantee of land for a valuable and adequate consideration will obtain a good title, through the intention of the grantor in making the conveyance was to defraud his creditors.—*Doe ex dem. Hutchinson v. Horn*, 1 Ind. 363, Smith, 242, 50 Am. Dec. 470.

[b] The owner of property can sell it and give a good title to a bona fide purchaser without regard to creditors until they obtain some lien upon it.—(Sup. 1861) *McMahan v. Morrison*, 16 Ind. 172, 79 Am. Dec. 418; (1862) *Dillon v. Dorne*, 19 Ind. 203.

[c] (Sup. 1881)

Where, after a new trial was awarded to a grantor and refused to the grantee in an alleged fraudulent conveyance, a general verdict having been obtained against both of them in a suit by a creditor of the grantor to set such conveyance aside, and at a subsequent term the cause was heard by the court and judgment rendered in favor of the grantor, *held* error to render a judgment against the grantee upon the verdict obtained against him.—*Love v. Geyer*, 74 Ind. 12.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. FRAUD. CONV. §§ 590-592, 594.

See, also, 20 Cyc. p. 642.

(B) PURCHASERS FROM GRANTOR.

Rights and liabilities of purchasers from grantee as to purchasers from grantor, see post, § 204.

§ 189. Subsequent purchasers in general.

[a] (Sup. 1832)

Where a father made a voluntary conveyance of land to his son, which deed was not recorded, and afterwards conveyed the same land voluntarily to the children of the son, it was *held* that a purchaser of the land at a sale on execution issued on a judgment rendered against the son after the second voluntary conveyance by the father was entitled to hold

the same against the grandchildren.—*Way v. Lyon*, 3 Blackf. 76.

[b] (Sup. 1843)

A subsequent purchaser with notice cannot impeach a prior conveyance as fraudulent, though he paid consideration.—*McNeely v. Rucker*, 6 Blackf. 391.

[c] (Sup. 1845)

A subsequent purchaser or incumbrancer with notice cannot defeat a voluntary conveyance made in good faith.—*Paine v. Doe ex dem. Griffin*, 7 Blackf. 485.

[d] (Sup. 1885)

A voluntary conveyance was made to S., and by him to plaintiff, in pursuance of a scheme to defraud the creditors of S.'s grantor. There was no actual intent to defraud subsequent purchasers. S. conveyed to defendant, who purchased for value, and without notice of the conveyance to plaintiff, which had not been recorded. The grantor of S. was then in possession under a lease from S. The deed to defendant misdescribed the land, and he obtained a decree reforming his deed, and quieting his title against S. and plaintiff, which decree was afterwards reversed on appeal. Pending the appeal, defendant recovered the land from plaintiff in ejectment. A mortgage, which was prior to the conveyance to S., was foreclosed, and the land bid in by defendant. The time for redemption expired before the reversal of the decree quieting defendant's title. Plaintiff then sued to quiet his title, and to be relieved from the judgment in ejectment, and admitted to redeem from the sale on foreclosure. *Held*, that plaintiff's participation in the scheme to defraud creditors precluded him from obtaining the relief asked.—*Anderson v. Etter*, 102 Ind. 115, 26 N. E. 218.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 589, 598-600.

See, also, 20 Cyc. pp. 644, 645.

§ 191. Mortgagees and pledgees.

[a] (Sup. 1883)

A judgment creditor became the purchaser on execution of land fraudulently conveyed by the debtor, before the return of the execution was made, and the return recorded in the execution docket, as required by statute. Before the time of redemption expired, the purchaser, holding the legal title mortgaged the land for a loan of money; the mortgagee having no actual notice of the fact that the conveyance to the mortgagor was made to defraud creditors. *Held*, that the record on the execution docket was constructive notice to the mortgagee.—*Sanders v. Muegge*, 91 Ind. 214.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. § 601.

§ 192. Bona fide purchasers.

[a] (Sup. 1843)

The record of a voluntary conveyance is sufficient notice to a subsequent purchaser, so as to preclude him from attacking it as fraudulent.—*McNeely v. Rucker*, 6 Blackf. 391.

[b] (Sup. 1885)

A volunteer who has taken a conveyance to defraud creditors cannot be heard in a court of equity to say, as against a purchaser in good faith and without notice, that the fraud intended was aimed at creditors, and not at purchasers; *Rev. St. 1881, § 4924*, providing that no conveyance shall be adjudged fraudulent, as against subsequent purchasers, "solely on the ground that it was not founded on a valuable consideration," and sections 4915, 4916, that a conveyance made to defraud purchasers shall be void as against a purchaser for value, and without actual or legal notice, and that, if the grantee was privy to the fraud intended, the conveyance shall be void as to purchasers for value with notice.—*Anderson v. Etter*, 102 Ind. 115, 26 N. E. 218.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 589, 602-604.

See, also, 20 Cyc. pp. 644, 645.

(C) PURCHASERS FROM GRANTEE IN GENERAL.

§ 194. Rights and liabilities as to creditors of original grantor.

[a] (Sup. 1853)

Where a debtor, holding title to land by title bond, fraudulently caused the legal title to be conveyed to his son, in order to defeat a judgment against him expected in a pending litigation, and the son thereupon conveyed to a third person, both of the successive grantees taking the conveyance with the knowledge of the suit against the debtor and to prevent a sale of the land to satisfy the expected judgment, the land was liable in equity for the payment of the judgment.—*Corwin v. Reddington*, 4 Ind. 198.

[b] (Sup. 1881)

One who, as a bona fide purchaser, has acquired as against the grantor's creditors a good title to land, could convey a good title to one who had notice, and hence the fact that the latter purchased after an execution against the debtor had been levied would not defeat his title.—*Studabaker v. Langard*, 79 Ind. 320.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 608-610.

See, also, 20 Cyc. p. 646.

**(D) BONA FIDE PURCHASERS FROM GRANTEE.****§ 198. Good faith in general.****[a]** (Sup. 1879)

The grantee of real estate, who purchased for a valuable consideration and in good faith, conveyed the same to the wife of the grantor. *Held*, that she took title thereto freed from the claims of her husband's creditors, although she might have notice of the fraud charged against him; there being no evidence that any of his money went into the purchase.—*Evans v. Nealis*, 69 Ind. 148.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. § 612.

**§ 199. Notice.****[a]** (Sup. 1881)

A purchaser of land conveyed by his vendor's grantor in fraud of creditors is not affected with notice of the fraud by the levy of an execution, previous to the purchase, under a judgment rendered after the sale to his grantor, who was himself an innocent purchaser for value.—*Studabaker v. Langard*, 79 Ind. 320.

**[b]** (App. 1903)

A husband conveyed land to his wife, and she conveyed it to their son. Pending appeal from a decision that the conveyances were not in fraud of creditors, a third party took a conveyance of the land from the son. *Held*, that knowledge of the fraud on the part of such third party was shown by proof that he had formerly prosecuted an action similar to this against the husband, wife, and son, in which the same fraud was directly charged in his complaint.—*Farmers' Bank of Frankfort v. First Nat. Bank*, 66 N. E. 503, 30 Ind. App. 520.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. §§ 616, 617.

See, also, 20 Cyc. p. 648.

**§ 200. Consideration.****[a]** (Sup. 1884)

A purchaser who has acquired title to real estate without being affected by the fraudulent conduct of another may convey the title similarly unaffected, though the conveyance is without any valuable consideration.—*Moore v. Trimble*, 94 Ind. 153.

**FOR CASES FROM OTHER STATES,**SEE 24 CENT. DIG. Fraud. Conv. § 618.  
See, also, 20 Cyc. p. 650.**§ 201. Rights and liabilities.****FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. §§ 619-623.

See, also, 20 Cyc. pp. 650-654.

**§ 202. — As to original parties.****[a]** (Sup. 1885)

The heirs of a grantor in a deed of land, procured by fraud are not entitled to recover the premises from a purchaser without notice of the fraud and for a valuable consideration.—*Somers v. Pumphrey*, 24 Ind. 231.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. § 619.

See, also, 20 Cyc. p. 650.

**§ 203. — As to creditors of original grantor.**

**[a]** A bona fide purchaser from a fraudulent vendee takes a good title.—(Sup. 1833) *Dugan v. Vattier*, 3 Blackf. 245, 25 Am. Dec. 105; (1843) *Scott v. Purcell*, 7 Blackf. 66, 39 Am. Dec. 453.

**[b]** (Sup. 1838)

Where a deed absolute in form is given as security, it is a mortgage; but the debtor may waive his right to redeem, and authorize the mortgagee to sell; and, if he does, a bona fide purchaser will be protected in his title, though the conveyance was in fact made to hinder and delay creditors of the mortgagor.—*Blair v. Bass*, 4 Blackf. 539.

**[c]** (Sup. 1843)

The title of bona fide purchasers from a fraudulent grantee, acquired before a sheriff's sale of the land under a judgment against the fraudulent grantor, is superior to that of the purchaser at the sheriff's sale.—*Scott v. Purcell*, 7 Blackf. 66, 39 Am. Dec. 453.

**[d]** (Sup. 1882)

The vendee of a fraudulent seller may have the legal and beneficial ownership, and may pass the same to a bona fide purchaser under him at any time before the seller's creditors seek to divest him of the property.—*Sharp v. Jones*, 18 Ind. 314, 81 Am. Dec. 350.

**[e]** (Sup. 1881)

A. purchased land of B. for \$7,000 of which he paid \$1,000, and subsequently, to avoid certain of his debts, he and his wife re-conveyed to B., who gave the wife a title bond conditioned to convey to her on payment of the original purchase price, and credited her with the \$1,000, but paid nothing for the conveyance to himself, and A. furnished his wife \$300 with which to make payments, but all other payments made by her, amounting to \$500, were out of her own money. *Held*, that she was a bona fide purchaser as against a judgment creditor who did not obtain judgment till after the giving of the title bond.—*Studabaker v. Langard*, 79 Ind. 320.

**[f]** (Sup. 1883)

If, before the creditor of a fraudulent grantor takes proper steps to avoid the fraudulent conveyance, the rights of innocent gran-

tees or mortgagees intervene, they are to be protected.—*Sanders v. Muegge*, 91 Ind. 214.

[g] (Sup. 1888)

Under Rev. St. 1881, § 2970, declaring that no trust shall defeat the title of a purchaser for value without notice, where a debtor procures the conveyance of land to his wife in exchange for lands owned by him, and, after judgment recovered against him, the wife conveys to an innocent purchaser for value without notice, the latter's title cannot be subjected to the claims of the husband's creditors. Section 2975, providing that a conveyance to one, for a consideration paid by another, shall be presumed fraudulent as against the latter's creditors, and that, where a fraudulent intent is not disproved, a trust shall result in their favor, does not apply.—*Carnahan v. McCord*, 116 Ind. 67, 18 N. E. 177.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 620-622; 43 CENT. DIG. Sales, § 664.  
See, also, 20 Cyc. pp. 651-654.

§ 204. — As to purchasers from original grantor.

[a] (Sup. 1863)

A voluntary mortgage is good against a subsequent grantee of the mortgagor with notice, especially where the voluntary mortgagee has transferred the mortgage notes to a bona fide purchaser.—*Aiken v. Bruen*, 21 Ind. 137.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. § 623.  
See, also, 20 Cyc. p. 654.

III. REMEDIES OF CREDITORS AND PURCHASERS.

Creditors of deceased vendors, see EXECUTORS AND ADMINISTRATORS, § 423.

Relief against fraudulent conveyance in action to foreclose mechanic's lien, see MECHANICS' LIENS, § 245.

Right of assignee for benefit of creditors to avoid fraudulent conveyance by assignor, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, § 228.

Rights and remedies of creditors of assignor for benefit of creditors, as to property fraudulently conveyed, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, § 290.

(A) PERSONS ENTITLED TO ASSERT INVALIDITY.

As affected by statute of frauds, see FRAUDS, STATUTE OF, § 143.

Parties plaintiff, see post, §§ 250-253.

Receivers, see RECEIVERS, §§ 68, 167.

§ 205. Necessity of prejudice.

[a] (Sup. 1891)

A creditor cannot maintain an action to set aside a conveyance as fraudulent, unless

he shows that he has been injured thereby.—*Brumbaugh v. Richcreek*, 127 Ind. 240, 26 N. E. 664, 22 Am. St. Rep. 649.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 624-628.  
See, also, 20 Cyc. pp. 419-420.

§ 206. Pre-existing creditors.

[a] (Sup. 1871)

Where the grantee of a warranty deed of real estate incumbered by judgments against former owners is evicted by the purchaser at sheriff's sale under such prior judgments, he is a creditor of his grantor, and is such from the date of the deed, and may sue to set aside conveyances made by his grantor to defraud creditors.—*Rhodes v. Green*, 36 Ind. 7.

[b] (Sup. 1881)

The right of a pre-existing creditor to impeach a conveyance is not affected by a renewal of the evidence of the debt, although such renewal was made subsequently to the conveyance.—*Stout v. Stout*, 77 Ind. 537.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 629, 630.  
See, also, 20 Cyc. pp. 420-423.

§ 207. Subsequent creditors.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 631-634.  
See, also, 20 Cyc. pp. 423-427.

§ 208. — In general.

[a] (Sup. 1882)

Subsequent, as well as existing, creditors, may attack their debtor's conveyance if fraud against them was intended.—*Bishop v. Redmond*, 83 Ind. 157.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 631, 633.  
See, also, 20 Cyc. p. 423.

§ 209. — Effect of fraud as to pre-existing creditors.

[a] A conveyance actually intended as a fraud on existing creditors may be impeached by a subsequent creditor.—(Sup. 1859) *Ruffing v. Tilton*, 12 Ind. 259; (1861) *Dart v. Stewart*, 17 Ind. 221.

[b] (Sup. 1883)

Subsequent creditors cannot set aside a conveyance made for the purpose of defrauding existing creditors, under Rev. St. 1881, § 2975, if there was no secret trust or intent to defraud subsequent creditors.—*Stumph v. Bruner*, 89 Ind. 556.

[c] (Sup. 1888)

A divorced wife's judgment for alimony makes her a subsequent creditor of her divorced

husband within the legal meaning of that term.—*Plunkett v. Plunkett*, 16 N. E. 612, 17 N. E. 562, 114 Ind. 484.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. §§ 632, 633.

See, also, 20 Cyc. p. 426.

**§ 210. — Knowledge or notice of fraudulent transaction.**

[a] (Sup. 1891)

The holders of paid-up stock of a corporation conveyed their stock and deed to the corporate property to the president thereof, who assumed all liabilities, and executed mortgages on the corporate property to secure the purchase price of the stock, and borrowed money, which mortgages and the deed were duly recorded. Stockholders who had full knowledge of the transaction were also stockholders in another corporation, which subsequently became a creditor of the former one. *Held*, that the conveyances and mortgages were not fraudulent as against such creditor corporation.—*Parke County Coal Co. v. Terre Haute Paper Co.*, 129 Ind. 73, 26 N. E. 884.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. § 634.

See, also, 20 Cyc. p. 427.

**§ 212. Nature of claims of creditors.**

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. §§ 635, 636, 638-645, 650.

See, also, 20 Cyc. pp. 429-431; note, 52 Am. Dec. 113.

**§ 213. — In general.**

[a] (Sup. 1869)

Officers of court holding claims for costs are such creditors as may set aside their debtor's conveyance as fraudulent.—*Chapman v. Chapman*, 13 Ind. 396.

[b] (Sup. 1891)

A creditor cannot sue to set aside a fraudulent conveyance made by his debtor, where the latter has afterwards assigned all his property for the benefit of his creditors, where the trust has been executed and the assignee discharged, though neither the assignee nor the creditor had any knowledge of the fraudulent conveyance till after the assignee's discharge.—*Voorhees v. Carpenter*, 127 Ind. 300, 26 N. E. 838.

[c] (App. 1906)

A conveyance to the grantor's sister, made without consideration, to prevent a husband whose money the grantor had won at gambling from recovering his money, is fraudulent as to the wife, who is the beneficiary of a judgment in an action by the state for the recovery of such money.—*Tyler v. Davis*, 37 Ind. App. 557, 75 N. E. 3.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. §§ 635, 636, 638.

See, also, 20 Cyc. p. 429.

**§ 215. — For torts.**

[a] (Sup. 1858)

One having a right to damages for a tort is a creditor, within 2 Rev. St. p. 154, § 526, enacting that lands fraudulently conveyed with intent to delay creditors shall be subject to execution.—*Pennington v. Clifton*, 11 Ind. 162.

[b] (Sup. 1873)

One having a cause of action for slander is a creditor within the intent of the statute against fraudulent conveyances.—*Shean v. Shay*, 42 Ind. 375, 13 Am. Rep. 306.

[c] (Sup. 1882)

One who has a legal claim to damages, capable of enforcement by judicial process, is such a creditor as may attack a debtor's fraudulent conveyance; and a claim for the maintenance of an illegitimate child, or for seduction, will constitute the holder thereof such a creditor.—*Bishop v. Redmond*, 83 Ind. 157.

[d] (Sup. 1887)

In determining whether a conveyance is in fraud of creditors, one who has a legal right to damages for the seduction of his wife is to be held a creditor, whether he has instituted a suit or not.—*Hunsinger v. Hofer*, 110 Ind. 390, 11 N. E. 463.

[e] (Sup. 1893)

A person having a cause of action against another for damages for a tort becomes a creditor of such person when the cause of action accrues, and can maintain an action to set aside a fraudulent conveyance by such person.—*Petree v. Brotherton*, 133 Ind. 692, 32 N. E. 300.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. §§ 641, 642.

See, also, 20 Cyc. p. 430.

**§ 217. — On demands not matured.**

[a] (Sup. 1881)

The holders of a promissory note not due cannot subject to its payment land fraudulently conveyed by the maker, which they fear may pass into the hands of an innocent third person.—*Evans v. Thornburg*, 77 Ind. 106.

[b] (Sup. 1881)

Suit attacking a conveyance as in fraud of creditors cannot be maintained by creditors whose claims are not due.—*Collins v. Nelson*, 81 Ind. 75.

[c] (Sup. 1886)

A mortgagee of chattels may sue for equitable relief against a subsequent fraudulent mortgage of the chattels, and a judgment foreclosing the same, although the debt secured is not

yet due him.—*McCormick v. Hartley*, 107 Ind. 248, 6 N. E. 357.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. § 640.

See, also, 20 Cyc. p. 430.

**§ 218. — On contingent liabilities.**

[a] (Sup. 1881)

An administrator of a surety had an equitable right to have the property of the principal exhausted before resort was had to her intestate's estate; and hence could maintain an action to set aside fraudulent conveyances for that purpose, notwithstanding she had paid nothing on the claim growing out of the principal's default, and which had been allowed against the estate.—*Strong v. Taylor School Tp.*, 79 Ind. 208.

[b] (Sup. 1883)

A grantee with covenant of warranty, who is ejected, has a sufficient claim against the grantor to maintain an action to set aside a fraudulent deed made by him, though, at the time the deed was executed, the grantee had not been evicted.—*Wright v. Nipple*, 92 Ind. 310.

[c] (Sup. 1889)

A conveyance of real estate by the surety on a guardian's bond may be set aside as fraudulent, though there was no breach of the conditions of the bond at the time conveyance was made.—*Bowen v. State ex rel. Bradbury*, 121 Ind. 235, 23 N. E. 75.

[d] (Sup. 1891)

The surety who has not yet been compelled to pay the debt cannot maintain a suit in equity to set aside a fraudulent conveyance of land by the maker, and have the land declared subject to the payment of the debt.—*Barnes v. Sammons*, 128 Ind. 596, 27 N. E. 747.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. §§ 643–645, 650.

**§ 223. Creditors purchasing at execution sales.**

[a] (Sup. 1830)

A purchaser at a judicial sale has the right to attack a prior conveyance made by the judgment debtor as being fraudulent as against creditors.—*Frakes v. Brown*, 2 Blackf. 295.

[b] (Sup. 1846)

After a conveyance, the grantor contracted a debt, for which judgment was obtained before the conveyance was recorded. Subsequent to recording the conveyance, which was not recorded in time, the land was sold under an execution on said judgment. *Held*, that the purchaser, having notice by the record of the prior deed, took nothing by his purchase.—*Doe ex dem. Abbott v. Hurd*, 7 Blackf. 510.

[c] (Sup. 1881)

Where a creditor is estopped, by participation in a fraudulent conveyance, from afterwards questioning it, a purchaser at execution sale under such creditor's judgment is likewise precluded from doing so.—*Sharpe v. Davis*, 76 Ind. 17.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. § 651.

See, also, 20 Cyc. p. 433; note, 110 Am. St. Rep. 81.

**§ 225. Estoppel and waiver.**

Estoppel of purchaser at execution sale, see ante, § 223.

[a] (Sup. 1871)

A complainant, in an action to set aside a conveyance of land as fraudulent, is not estopped, as to the grantee in such a conveyance, from subjecting the land to the payment of his judgment by the fact that he had already executed a conveyance of it, since his purpose in subjecting it to sale may be to perfect the title of his grantees.—*New v. New*, 127 Ind. 576, 27 N. E. 154.

[b] (Sup. 1881)

A. and B., as tenants in common by descent from their father, owned two farms, one in X. county, the other in Y. county; and it was agreed that A. should take one of the farms and B. the other. A.'s mother was a judgment creditor of his, and had filed a transcript of her judgment in X. county. A. and his wife gave B. a deed of an undivided half of the Y. farm, while at the same time B. and his wife gave to A.'s wife and daughter C. a deed for all the X. land, at the request of A.'s mother; and all the deeds were duly recorded. *Held*, that A.'s mother could not question C.'s title.—*Sharpe v. Davis*, 76 Ind. 17.

[c] (Sup. 1881)

A creditor, joining in a deed of partition after his debtor had made a fraudulent conveyance of his interest in the land partitioned, does not thereby waive his right to maintain a bill to subject his debtor's interest in the land to the payment of his debt, where the partition deed recited that it should in nowise prejudice the creditor from maintaining such bill.—*Stout v. Stout*, 77 Ind. 537.

[d] (Sup. 1882)

In an action to set aside conveyances as fraudulent to creditors, plaintiff alleged that he recovered a judgment against one of the defendants; that, prior to incurring the indebtedness on which the judgment was based, defendant owned certain real estate and conveyed the same by mesne conveyances to defendant's wife; that the conveyances were made without consideration, and with intent to defraud creditors; that thereafter said husband and wife conveyed the property to another of the defendants who had previously been notified by plaintiff of the fraudulent character of the

prior conveyance. The last-named defendant answered that, after the land was conveyed to defendant's wife, plaintiff, with full knowledge of the conveyance, demanded of her that she sign certain notes, which she did; that the reason therefor was her receipt of the conveyances of the land; and that plaintiff then and there accepted her promise to pay the debt because of her ownership. *Held* insufficient to show a confirmation of the fraudulent conveyances by plaintiff; it failing to allege that plaintiff at the time of taking the notes had knowledge that the conveyances were fraudulent.—*Ileaton v. White*, 85 Ind. 376.

[e] (Sup. 1897)

A creditor who, knowing of the failing circumstances of the debtor, agrees to the giving of a mortgage by the debtor to another creditor on condition of the other extending time on his claim, he to receive no security till a certain part of the other's claim was paid, cannot attack it on the ground that it was intended to hinder and delay him in the collection of his claim.—*Smith v. Wells Mfg. Co.*, 148 Ind. 333, 46 N. E. 1000.

[f] (Sup. 1897)

Where a creditor learns that a first mortgage was fraudulent as to creditors, after he has accepted a second mortgage subject thereto, he may abandon his mortgage, and assail the first mortgage for the fraud.—*Old Nat. Bank of Evansville v. Heckman*, 47 N. E. 953, 148 Ind. 490.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 653-657; 21 CENT. DIG. Execution, § 765; 35 CENT. DIG. Mtg. §§ 772-780.

See, also, 20 Cyc. pp. 434, 435; note, 18 Am. Dec. 621.

#### (B) REMEDIES ON GROUND OF NULLITY OF TRANSFER.

Pleading fraud as defense, see post, § 267.

Sale under order of court as property of deceased vendor, see EXECUTORS AND ADMINISTRATORS, § 329.

#### § 228. Levy of attachment.

Fraudulent conveyances as ground for attachment, see ATTACHMENT, §§ 39-45.

[a] (App. 1904)

Under the express provisions of Burns' Rev. St. 1901, § 925, a creditor may attach land fraudulently conveyed, whether the debt is due or not.—*Trent v. Edmonds*, 70 N. E. 169, 32 Ind. App. 432.

In an action of attachment and to set aside a fraudulent conveyance, the attachment properly issued against the grantee with notice of the fraud.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 665-667.

See, also, 20 Cyc. pp. 661-663.

#### § 229. Garnishment.

Liabilities of grantee in general, see ante, § 182.

[a] (Sup. 1892)

The rule that the garnishee's liability to the principal defendant is the measure of his liability to a creditor of the defendant has no application to a garnishee who holds property of the defendant under a fraudulent transfer from him.—*Joseph v. People's Sav. Bank*, 132 Ind. 39, 31 N. E. 524.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 668-670.

See, also, 20 Cyc. pp. 663-665.

#### § 230. Levy of execution.

Against heirs of fraudulent grantee, see DESCENT AND DISTRIBUTION, § 125.

As notice to purchaser from fraudulent grantee, see ante, § 199.

[a] (Sup. 1851)

Rev. St. 1843, p. 453, § 1, enacts that lands, tenements, etc., fraudulently conveyed with intent to defeat, delay, or defraud creditors, and such as are holden by any one in trust for or to the use of another, shall be liable to be sold on execution. *Held*, that land procured by a judgment debtor to be conveyed to a third person, who colludes with the debtor to defraud the latter's creditors, may be seized and sold on execution on the creditors' judgments.—*Tewis v. Doe*, 3 Ind. 129.

[b] (Sup. 1882)

If a conveyance is fraudulent and void as to creditors of the grantor, a judgment creditor may levy an execution upon the property as if the conveyance did not exist.—*Stevens v. Works*, 81 Ind. 445.

[c] (Sup. 1882)

Where a purchaser of land fraudulently combines with the vendor and holder of the legal title for the purpose of the purchaser's having the possession and use of the premises with the intention to cheat, hinder, and delay the purchaser's creditors, or where the purchaser causes the land to be fraudulently conveyed to another with like intent, equity will treat the lands as having been conveyed to the purchaser and make it subject to the lien of the judgment and liable to be sold under execution without first resorting to a court of equity to have the lien declared.—*Hanna v. Aebker*, 84 Ind. 411.

[d] (Sup. 1833)

Whether land be fraudulently conveyed by the debtor himself or purchased and paid for by him, the conveyance being made to another for the purpose of defrauding the creditors of

the person paying the consideration, the land may be sold on execution in favor of the defrauded creditors.—*Eve v. Louis*, 91 Ind. 457.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. §§ 659–664.

See, also, 20 Cyc. pp. 658–660.

**(C) RIGHT OF ACTION TO SET ASIDE TRANSFER, AND DEFENSES.**

Joinder of causes of action as affected by parties, see ACTION, § 50.

Joinder of causes of action under code, see ACTION, § 45.

Joinder of legal and equitable causes, see ACTION, § 46.

Right of receiver to sue, see RECEIVERS, § 167.

**§ 237. Nature and form of remedy.**

[a] (Sup. 1877)

A mortgage upon real estate executed fraudulently or without consideration by the owner in favor of another, prior in point of time and lien to that of a judgment rendered against such owner in favor of a third person, may, in an action by the mortgagee against such owner and such judgment creditor to foreclose such mortgage, be subjected to the priority of such judgment.—*Kelly v. Lenihan*, 56 Ind. 448.

[b] (Sup. 1889)

A complaint alleged that defendant, for the purpose of assisting a certain firm in delaying and defrauding its creditors, took possession of its stock of goods, and agreed to pay 25 per cent. of the amount due each of its creditors; that defendant, knowing the firm's indebtedness to plaintiffs, agreed in consideration of such transfer to pay plaintiffs a certain sum; that he had not paid any part thereof,—and asked for a money judgment. *Held*, that the action was to recover the amount which defendant agreed to pay plaintiffs, and not to set aside a fraudulent conveyance.—*Goldman v. Biddle*, 118 Ind. 492, 21 N. E. 43.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. §§ 674–680, 684–686.

See, also, 20 Cyc. pp. 672–682.

**§ 239. Existence of other remedy.**

Pleading want or exhaustion of other remedy, see post, § 264.

[a] (Sup. 1881)

Where, in a creditors' suit for the application of the property of an alleged absconding debtor to their claims and for the appointment of a receiver, it was alleged that such property had been fraudulently conveyed, but none of the creditors had any lien on the property, the bill was not maintainable, since complainants had a plain and adequate remedy at law

by attachment against the debtor and by garnishment against his transferee.—*May v. Greenhill*, 80 Ind. 124.

[b] (Sup. 1883)

Rev. St. § 2342, provides that any creditor of a decedent, whose claim shall have been filed and allowed by the court, may file his petition showing the insufficiency of the personal estate of the decedent to pay the liabilities, and that the deceased died owning real estate liable to be made assets for the payment of his debts, and praying an order requiring the executor or administrator to proceed to sell it for the payment of such debts. *Held*, that such statute does not prevent a creditor from maintaining an action to set aside a fraudulent conveyance made by the decedent.—*Bottomf v. Covert*, 90 Ind. 508.

[c] (Sup. 1885)

A creditor is not precluded from suing to set aside a conveyance by his insolvent debtor as fraudulent by the fact that he has obtained a judgment against the debtor and had it levied upon part of the property conveyed.—*Fitch v. First Nat. Bank of Rising Sun*, 99 Ind. 443.

[d] (Sup. 1898)

Suit to set aside a conveyance made when the grantor was insolvent is an available remedy, even where proceedings supplemental to execution would have reached the notes for the purchase money for the land conveyed.—*Van-sickle v. Shenk*, 50 N. E. 381, 150 Ind. 413.

[e] (Sup. 1906)

Where one of two debtors executing a joint note to plaintiff was solvent at that time, but afterwards became insolvent, plaintiff could come into equity to set aside a conveyance of land by the other debtor; the rule that equity would not extend relief to set aside a conveyance of one joint debtor so long as a remedy existed against another debtor not applying.—*Stark v. Lamb*, 167 Ind. 642, 78 N. E. 668, 79 N. E. 895.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. §§ 681–683.

See, also, 20 Cyc. pp. 677, 680.

**§ 240. Grounds of action in general.**

[a] (Sup. 1891)

The fact that the grantor was of unsound mind when she conveyed away the land, and that the grantee took advantage of her weakness with the intent of defrauding her creditor, does not enable the latter to set aside the conveyance, unless he shows that he has been injured thereby.—*Brumbaugh v. Richcreek*, 127 Ind. 240, 26 N. E. 664, 22 Am. St. Rep. 649.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. § 687.

**§ 241. Conditions precedent.**

To suit by personal representative of grantor, see EXECUTORS AND ADMINISTRATORS, § 431.

[a] Creditors who seek to reach property of their debtor fraudulently held by third persons must have obtained a lien thereon.—(Sup. 1836) *West v. McCarty*, 4 Blackf. 244; (1882) *Tasker v. Moss*, 82 Ind. 62.

[b] (Sup. 1846)

A suit by a creditor to set aside an alleged fraudulent conveyance by his debtor cannot be sustained, unless the indebtedness has previously been established by a judgment at law.—*Shirley v. Shields*, 8 Blackf. 273.

[c] If the debtor has other property which can be reached at law, suit cannot be maintained in behalf of a creditor to set aside a conveyance as being fraudulent as against him.—(Sup. 1853) *Law v. Smith*, 4 Ind. 56; (1871) *Baugh v. Boles*, 35 Ind. 524; (1876) *Morgan v. Olvey*, 53 Ind. 6; (1881) *Lee v. Lee*, 77 Ind. 251.

[d] (Sup. 1876)

In an action to set aside as fraudulent a conveyance of real estate, and to subject the real estate to sale to satisfy a judgment against the grantor, the necessity of resorting to such real estate should be proved.—*Morgan v. Olvey*, 53 Ind. 6.

[e] (Sup. 1876)

The fact that another person indebted with the debtor as his partner, residing in another state and having no property in this state, owns property in the other state out of which the creditor could make his demand, will not prevent him from proceeding to reach property fraudulently conveyed, though he may reside in the other state and the debt may have been contracted there.—*Alford v. Baker*, 53 Ind. 279.

[f] Conveyance by a debtor to defraud his creditors cannot be attacked by them until they have first exhausted all his other property subject to execution.—(Sup. 1876) *Sherman v. Hogland*, 54 Ind. 578; (1881) *Same v. Same*, 73 Ind. 472.

[g] (Sup. 1881)

Since the adoption of the Code, a creditor may obtain judgment for his debt, and in the same suit may have that judgment enforced against property fraudulently conveyed by the debtor with intent to hinder and delay creditors, and consequently judgment and execution are no longer necessary prerequisites to an action to reach personal property so conveyed.—*Carr v. Huette*, 73 Ind. 378.

[h] The fact that the debtor has some other property subject to execution will not preclude the creditor's resort to equity to set aside a fraudulent conveyance, where such other property is insufficient to satisfy the creditor's claim.—(Sup. 1881) *Lee v. Lee*, 77 Ind. 251; (1891) *McConnell v. Citizens' State Bank of Petersburg*, 130 Ind. 127, 27 N. E. 616.

[i] (Sup. 1881)

A return on an execution of "No property found" is prima facie evidence that the debtor

has no other property aside from what he has fraudulently conveyed, and justifies the bringing of a bill to set aside such conveyance.—*Lee v. Lee*, 77 Ind. 251.

[j] (Sup. 1885)

The rule that a creditor must have obtained judgment before he can maintain a bill attacking his debtor's conveyance as fraudulent does not apply where the debtor is a nonresident of the state.—*Quarl v. Abbett*, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662.

When an attachment has been issued as authorized by the Code, the plaintiff in the action obtains such lien on the property attached as will entitle him to the intervention of the equitable jurisdiction of the court to remove or set aside all alleged fraudulent claims or transfers, or other fraudulent obstacles in the way of the realization of the lien in case he shall recover a judgment.—*Id.*

[k] An administrator d. b. n., who has obtained a judgment on the bond of his predecessor, may bring suit to set aside a fraudulent conveyance of land by such predecessor, without issuing execution against his sureties, or alleging that they were insolvent.—(Sup. 1888) *Duffy v. State ex rel. Rogers*, 115 Ind. 351, 17 N. E. 615; (1890) *Harvey v. Same*, 123 Ind. 260, 24 N. E. 239.

[l] (Sup. 1888)

In the absence of a specific lien on the property transferred, a conveyance cannot be set aside as a fraud on creditors, without proof of the grantor's insolvency.—*Towns v. Smith*, 115 Ind. 480, 16 N. E. 811.

Where it appears that a judgment debtor has no property which can be levied upon under execution, it is not necessary, in an action to subject the property conveyed by him in fraud of creditors to sale under the judgment, to show that execution was first issued and returned nulla bona.—*Id.*

[m] (Sup. 1888)

A suit by a creditor to set aside an alleged fraudulent conveyance by his debtor can be sustained, though the indebtedness has not previously been established by a judgment at law.—*Phelps v. Smith*, 116 Ind. 387, 17 N. E. 602, 19 N. E. 156.

[n] (Sup. 1889)

The general debts of a party conveying land without consideration do not constitute a lien on such land.—*Hays v. Montgomery*, 20 N. E. 646, 118 Ind. 91.

[o] (Sup. 1890)

In an action by judgment creditors to set aside a conveyance of their debtor's property, proof of the issuing of an execution by plaintiffs upon their judgment, and its return by the sheriff nulla bona, is prima facie evidence that the debtor was at that time insolvent.—*War-moth v. Dryden*, 125 Ind. 355, 25 N. E. 433.

[p] (*Sup.* 1891)

A creditor whose debt is secured by a mortgage on property insufficient to pay the debt need not foreclose and sell the property before bringing an action to set aside a fraudulent conveyance by his debtor.—*McConnell v. Citizens' State Bank of Petersburg*, 27 N. E. 616, 130 Ind. 127.

[q] (*Sup.* 1894)

A fraudulent conveyance by a joint obligor will not be set aside as long as there is a legal remedy against the other joint obligors.—*Eller v. Lacy*, 137 Ind. 436, 36 N. E. 1088.

[r] (*Sup.* 1898)

Under Rev. St. 1894, § 736 (Rev. St. 1881, § 724), making notes subject to execution where given up, it is not necessary, before bringing suit to set aside a conveyance by an insolvent debtor, to take out execution, make a demand upon it, and prove a refusal to turn out notes, in order to maintain that the debtor had no property subject to execution.—*Vansickle v. Shenk*, 50 N. E. 381, 150 Ind. 413.

[s] (*App.* 1902)

An action by a judgment creditor to set aside an alleged fraudulent conveyance cannot be maintained unless the defendant has no other property subject to execution, except that sought to be reached.—*Jackson v. Saylor*, 63 N. E. 881, 30 Ind. App. 72.

[t] (*App.* 1903)

In order to entitle the holder of joint and several notes, on which he brings a joint action, to set aside a fraudulent conveyance of land by one of the makers, he must show that the other co-obligors are insolvent.—*Geiser Mfg. Co. v. Lee*, 66 N. E. 701, 33 Ind. App. 38.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 694, 696-726.

See, also, 20 Cyc. pp. 682-708.

## § 242. Defenses.

[a] (*Super.* 1873)

An alleged fraudulent grantee of a debtor cannot attack the judgment of a creditor, except for fraud.—*Reid v. Brown*, Wils. 312.

[b] (*Sup.* 1874)

In a suit by a judgment creditor to set aside a fraudulent sale of property by the debtor, the vendee of the latter cannot call in question the judgment by setting up matters which might have been a defense to the action in which the judgment was rendered. The only question which interests him is whether the property he has purchased shall be subjected to the payment of the judgment.—*Scott v. Indianapolis Wagon Works*, 48 Ind. 75.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 689-691.

See, also, 20 Cyc. pp. 718-720.

## (D) JURISDICTION, LIMITATIONS, AND LACHES.

Exclusive or concurrent jurisdiction, see **COURTS**, § 472.

Jurisdiction of action by creditors of deceased grantor, see **EXECUTORS AND ADMINISTRATORS**, § 435.

Jurisdiction of courts of original jurisdiction in general, see **COURTS**, § 132 (2).

## § 245. Jurisdiction of cause of action.

[a] (*Sup.* 1863)

The circuit court and court of common pleas have jurisdiction to set aside a conveyance, fraudulent as to creditors, made by a decedent.—*Tyler v. Wilkerson*, 20 Ind. 473.

[b] (*Sup.* 1868)

The court of common pleas has no jurisdiction to try the title of the wife to real estate which it is alleged in the complaint is held in her name for the purpose of assisting the husband to defraud his creditors.—*Mason v. Weston*, 29 Ind. 561.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. § 727.

See, also, 20 Cyc. p. 709.

## § 246. Jurisdiction of persons and property involved.

[a] (*Sup.* 1885)

In an attachment suit of the property of a nonresident, in which service on defendant is had by publication, the court thereby acquires sufficient jurisdiction of the attached property to set aside a conveyance thereof as fraudulent, though no personal judgment can be rendered against the defendant in the action.—*Quarl v. Abbett*, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. § 728.

See, also, 20 Cyc. p. 709.

## § 248. Time to sue and limitations.

Application of general statute of limitation in respect to actions for relief on ground of fraud, see **LIMITATION OF ACTIONS**, § 37.

Estoppel to rely on limitations, see **LIMITATION OF ACTIONS**, § 13.

Limitation of action as affected by pendency of appeal from judgment in original suit against debtor, see **LIMITATION OF ACTIONS**, § 106.

Nonresidence as affecting limitations, see **LIMITATION OF ACTIONS**, § 87.

Pleading in avoidance of statute of limitations, see **LIMITATION OF ACTIONS**, § 192.

Pleading limitations, see **LIMITATION OF ACTIONS**, §§ 179, 180.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 730-734.

See, also, 20 Cyc. pp. 720-724.

**(E) PARTIES AND PROCESS.**

Publication of process, see **PROCESS**, § 86.

**§ 250. Plaintiffs.**

Parties entitled to object to misjoinder of parties plaintiff, see **PARTIES**, § 87.

Persons entitled to assert invalidity of transfer, see ante, §§ 205-225.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. §§ 738-740.

See, also, 20 Cyc. p. 711.

**§ 252. — Suing in behalf of all creditors.**

[a] (*Sup.* 1850)

A single creditor, or a few creditors, of a deceased debtor, cannot, by suit in chancery, have a conveyance made by the debtor in his lifetime set aside as fraudulent, the property sold, and the proceeds applied to the payment of their own demands, without any inquiry as to the rights of other creditors.—*Barton v. Bryant*, 2 Ind. 189.

[b] (*Sup.* 1881)

Where a creditor sues to obtain judgment on his claim, and also to subject to the payment of such judgment property fraudulently conveyed by his debtor, he may maintain such action without regard to the claims of other creditors.—*Carr v. Huette*, 73 Ind. 378.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. § 739.

See, also, 20 Cyc. p. 711.

**§ 253. — Joinder.**

[a] Several judgment creditors may join in an action to set aside a fraudulent conveyance from their common debtor.—(*Sup.* 1833) *Dugan v. Vattier*, 3 Blackf. 245, 25 Am. Dec. 105; (1859) *Rufing v. Tilton*, 12 Ind. 259.

[b] (*Sup.* 1881)

An administrator of a surety on an official bond may join in an action to set aside fraudulent conveyances of the principal, as he has a right to have the principal's property exhausted before resort is had to that of the surety.—*Strong v. Taylor School Tp.*, 79 Ind. 208.

[c] (*Sup.* 1896)

Where a complaint by several plaintiffs against several defendants, alleging and asking to have set aside separate conveyances by defendants as in fraud of creditors, shows that one of defendants is indebted on different debts to each of plaintiffs, due when he made his alleged fraudulent conveyance, a demurrer for want of sufficient facts is properly overruled.—*Armstrong v. Dunn*, 41 N. E. 540, 143 Ind. 433.

Separate creditors may maintain a joint action to set aside a fraudulent conveyance made by their common debtor and to subject

the property thus conveyed to the satisfaction of their several debts, since the joint interest they have in obtaining relief from the fraud and in subjecting the fraudulently conveyed property to the payment of the debts of the defendants gives them such a joint interest as entitles them to sue, though their claims are separate.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. § 740.

See, also, 20 Cyc. p. 711.

**§ 254. Defendants.****FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. §§ 741-752.

See, also, 20 Cyc. pp. 711-717.

**§ 255. — In general.**

[a] (*Sup.* 1854)

On a bill by a creditor to reach property held by the debtor's wife for the purpose of defeating creditors, the holder of a mortgage made by the debtor after the conveyance to the wife is a necessary party.—*Fletcher v. Mansur*, 5 Ind. 267.

[b] (*Sup.* 1877)

Under 2 Rev. St. 1876, p. 492, a creditor seeking to set aside a fraudulent conveyance alleged to have been made by a deceased debtor must have the estate represented by an administrator or executor as defendant.—*Allen v. Vestal*, 60 Ind. 245.

[c] (*Sup.* 1884)

Where a bill is filed by creditors to avoid the conveyance of a deceased debtor, his executor or administrator is a necessary party.—*Willis v. Thompson*, 93 Ind. 62; *Vestal v. Allen*, 94 Ind. 268.

[d] (*Sup.* 1889)

The administrator of a deceased debtor is an indispensable party defendant to a suit by a general creditor attacking the debtor's conveyance as fraudulent, since it is only through the personal representative of the deceased that plaintiff can collect his claim; and hence, if no administrator has been appointed, plaintiff must procure such appointment.—*Hays v. Montgomery*, 118 Ind. 91, 20 N. E. 646.

[e] (*Sup.* 1894)

One who colludes with a debtor to defraud creditors is a proper party to a suit to set aside fraudulent conveyances made by the debtor in furtherance of such collusion.—*Doherty v. Holliday*, 137 Ind. 282, 32 N. E. 315, 36 N. E. 907.

[f] (*Sup.* 1902)

On an averment in a complaint by a creditor to set aside a fraudulent conveyance that third persons named claimed some interest in or lien on the real estate which plaintiff was seeking to reach in the hands of the debtor's wife, such third persons were properly made

defendants; and there was no error in sustaining a demurrer to a plea in abatement to their cross complaint, setting up that at the date of the transaction and at the commencement of the original action the original defendants resided in another county, and that by collusion between the original plaintiff and the cross complainants the latter were made parties to the action.—*Davis v. Chase*, 64 N. E. 88, 853, 159 Ind. 242, 95 Am. St. Rep. 294.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. §§ 741-750.

See, also, 20 Cyc. p. 711.

**(F) PLEADING.**

Demurrer to pleading good in part, see PLEADING, § 204.

Filing written instruments with pleading, see PLEADING, § 308.

Judgment on pleading, see PLEADING, § 343.

Objections to evidence as not within issues, see PLEADING, § 427.

Pleading partial defenses, see PLEADING, § 80.

Surplusage, see PLEADING, § 35.

**§ 258. Bill, complaint, or petition.**

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. §§ 756-781.

See, also, 20 Cyc. pp. 726-741.

**§ 259. — Form and requisites in general.**

**[a] (Sup. 1865)**

The complaint in an action to set aside a conveyance of land as fraudulent, and to subject the same to a sale on execution to satisfy a judgment, need not contain a copy of such judgment; the foundation of the action being the fraud alleged and not the judgment.—*Bray v. Hussey*, 24 Ind. 228.

**[b] (Sup. 1867)**

In a proceeding to set aside an assignment, the complaint is not defective for not alleging that the assignment was in fraud of the plaintiff, if it alleges that it was made without consideration and to defraud creditors, and the fact appears that the plaintiff was a creditor at the date of the assignment.—*Harrison v. Jaquess*, 29 Ind. 208.

**[c] (Sup. 1880)**

A complaint to set aside an alleged fraudulent conveyance should affirmatively show a complete right to resort to the land for satisfaction of the debt, and that cannot be, unless the conveyance, when made, was fraudulent as against creditors, and unless the right of action which then accrued is shown to continue.—*Brucker v. Kelsey*, 72 Ind. 51.

**[d] (Sup. 1881)**

In a complaint by a creditor to set aside a fraudulent conveyance, a copy of the deed need not be set out.—*Stout v. Stout*, 77 Ind. 537.

**[e] (Sup. 1881)**

In an action to set aside fraudulent conveyances, made on the same day to the same parties, and constituting one cause of action, each conveyance being a part of the general purpose and action to hinder, delay, and defraud, defendant's motion to paragraph the complaint so as to set out each one of the alleged conveyances in a separate paragraph was properly overruled.—*Strong v. Taylor School Tp.*, 79 Ind. 208.

**[f] (Sup. 1886)**

In a bill by a mortgagee of chattels for equitable relief against a subsequent fraudulent mortgage on the chattels and a judgment foreclosing the same, the manner in which plaintiff will be injured by a sale of the chattels under the judgment of foreclosure sufficiently appears where it is alleged that the property is about to be sold on a judgment obtained to defraud and hinder plaintiff, and under circumstances which may and probably will result in an ultimate loss to him of his interest in the property.—*McCormick v. Hartley*, 107 Ind. 248, 6 N. E. 357.

**[g] (Sup. 1889)**

In a suit by a judgment creditor to set aside as fraudulent a conveyance made by his debtor, an allegation that the latter was mentally incapable of executing the conveyance will not, though irrelevant, vitiate the complaint.—*Rollet v. Heiman*, 22 N. E. 666, 120 Ind. 511, 16 Am. St. Rep. 340.

**[h] (Sup. 1894)**

A complaint seeking to set aside a fraudulent conveyance to satisfy a judgment, which merely alleges the recovery of judgment against defendant, without stating any facts to show the character and validity thereof, is insufficient.—*Eller v. Lacy*, 137 Ind. 436, 36 N. E. 1088.

**[i] (App. 1905)**

In an action to set aside a fraudulent conveyance and subject land to a vendor's lien, failure of the complaint to allege the value of the land is not prejudicial to defendant.—*Borror v. Carrier*, 34 Ind. App. 353, 73 N. E. 123.

In an action to declare fraudulent and void a conveyance of land and to subject the land to a vendor's lien, an allegation that defendant "had not nor has he since, nor has he now, sufficient other property subject to execution to pay his debts, and especially to pay the said amount due this plaintiff," sufficiently shows that the land described was subject to execution.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. §§ 756, 757, 764-770.

**§ 260. — Indebtedness.****[a] (Sup. 1877)**

The complaint in a suit by a creditor, attacking his debtor's conveyance as fraudulent, must allege that debtor was indebted to plaintiff at the time of the conveyance.—*Bentley v. Dunkle*, 57 Ind. 374.

**[b] (Sup. 1882)**

A complaint to set aside an alleged fraudulent conveyance by the surety on a guardian's bond, which failed to show that he was then indebted or that his principal had failed to discharge his duties, *held* bad on demurrer.—*Robinson v. Rogers*, 84 Ind. 539.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 765, 766, 775.

**§ 261. — Insolvency.****[a] (Sup. 1861)**

On a bill to set aside a conveyance as in fraud of creditors, made in 1855 and 1856, judgment was recovered in 1858. When the debt was created did not appear, nor was it shown that any debts then existed against the defrauding party, nor that his estate was insufficient to pay his debts without resorting to the lands. *Held*, that a demurrer would lie to the complaint.—*Komblieth v. Collins*, 17 Ind. 56.

**[b] (Sup. 1871)**

A complaint by a surety to compel a voluntary grantee of the principal to repay money the surety has been compelled to pay by misconduct of the principal must show that the plaintiff has exhausted his remedy against the principal, and that there is no property of the principal to which he can resort. To show that the principal is greatly involved in debt and has not sufficient means to pay the same, and that he has absconded, is not enough.—*Baugh v. Boles*, 35 Ind. 524.

**[c] (Sup. 1876)**

Where a creditor seeks to recover judgment for the amount of his claim, and to subject property fraudulently conveyed by his debtor, an allegation in the complaint that the debtor has no property left subject to execution is a sufficient allegation of the debtor's insolvency, and shows a sufficient reason for seeking to reach the property so fraudulently conveyed.—*Alford v. Baker*, 53 Ind. 279.

**[d] (Sup. 1877)**

The complaint, in an action by a creditor to set aside an alleged fraudulent conveyance of property by his debtor and to subject such property to execution, must allege that at the time of the conveyance the debtor did not have sufficient other property to pay all his debts; and an allegation that he did not have, at the time of filing the complaint, sufficient property to pay his debts, is insufficient.—*Evans v. Hamilton*, 56 Ind. 34.

[e] A complaint attacking a conveyance as intended to defraud creditors is bad, if it does not allege that the debtor did not retain sufficient property to pay his debts.—(Sup. 1877) *Bentley v. Dunkle*, 57 Ind. 374; (1878) *Wedekind v. Parsons*, 64 Ind. 290; (1889) *Sell v. Bailey*, 119 Ind. 51, 21 N. E. 338; (1894) *Wilson v. Boone*, 136 Ind. 142, 35 N. E. 1096.

**[f] (Sup. 1877)**

A complaint to set aside fraudulent conveyance by a debtor of his real estate, and to subject the same to execution, must allege that at the date of such conveyance the debtor had not sufficient other property left to satisfy his debts.—*Romine v. Romine*, 59 Ind. 346; *Deutsch v. Korsmeier*, Id. 373.

**[g] (Sup. 1877)**

An averment that the debtor has left the state, leaving no property out of which the complaining creditor can collect his debt, and that the debtor is wholly insolvent, unless the conveyance attacked is held fraudulent and void, is not a sufficient allegation that at the date of the conveyance the debtor had no other property left sufficient to pay all his debts.—*Deutsch v. Korsmeier*, 59 Ind. 373.

**[h] (Sup. 1878)**

A complaint alleging that the debtor had fraudulently conveyed to the other defendant his land without any consideration, his wife joining with the full knowledge of all the facts, intents, and purposes, for the purpose of hindering, delaying, and defrauding his creditors, and that the defendant "has no personal property or other real estate out of which the debt can be made or liable to execution," is insufficient against the defendants, other than the debtor; the allegation referring only to the time the complaint was filed, and not to the time when the alleged fraudulent conveyance was made.—*Price v. Sanders*, 60 Ind. 310.

**[i] (Sup. 1878)**

In an action by a judgment creditor to set aside a fraudulent conveyance, it must be alleged that at the time of the conveyance the debtor did not have left, subject to execution, enough of other property to pay his debts; and allegations that the debtor is insolvent at the time of filing the complaint, and that plaintiff has had divers executions issued, without stating when, are insufficient.—*Whitesel v. Hiney*, 62 Ind. 168.

**[j] (Sup. 1878)**

A complaint to set aside fraudulent conveyances must aver that the debtor had no other property subject to execution at the time the fraudulent deeds were made, or must contain some equivalent averment such as an allegation of insolvency, and it is insufficient, where plaintiff's judgments were recovered after the alleged fraudulent deeds were made, to aver that the debtor "is wholly insolvent, now is and has been from the rendition of all of such judgments

and up to this time."—*Harlen v. Watson*, 63 Ind. 143.

In an action to set aside a conveyance as having been made to defraud the grantor's creditors, the complaint should substantially allege that the debtor was insolvent, or had no other property subject to execution at the time the conveyance was made. An allegation that the debtor "is wholly insolvent, now is, and has been from the rendition of said judgment, and up to this time, except the land before mentioned," is insufficient, where the judgment was recovered after the deed had been made.—*Id.*

[k] (Sup. 1879)

An allegation, in a creditor's complaint to set aside his debtor's fraudulent conveyance, that the debtor has no property, "except the above-described real estate, out of which the said judgment obtained by plaintiff against said defendant can be made," will be taken to refer to the time the complaint was filed; and hence, there being no allegation that the debtor had no property at the time of the conveyance, aside from that conveyed, out of which the judgment could be collected, the complaint is bad on demurrer, since, for anything that appears to the contrary, the debtor may have had abundance of property between the date of the conveyance and the filing of the suit out of which plaintiff's claim could have been satisfied.—*Wiley v. Bradley*, 67 Ind. 560.

[l] The complaint is fatally defective, unless it show, not only that the grantor had no other property subject to execution at the time of the conveyance, but also that he had no such property at the commencement of the action.—(Sup. 1880) *Braker v. Kelsey*, 72 Ind. 51; (1888) *Taylor v. Johnson*, 113 Ind. 164, 15 N. E. 238.

[m] (Sup. 1880)

If a suit to set aside an alleged fraudulent conveyance is brought without first prosecuting the debtor to the end of an execution, the complaint should distinctly aver his insolvency and want of property subject to execution at the time of bringing suit; but if execution has been had, and due return of nulla bona thereon has been made, and suit be brought within a reasonable time thereafter, it is a sufficient allegation of insolvency to aver the fact of such judgment and return.—*Braker v. Kelsey*, 72 Ind. 51.

The insolvency of the grantor in a conveyance sought to be set aside as fraudulent is sufficiently averred by an allegation that he had no other property subject to execution sufficient to pay his debts or any portion thereof.—*Id.*

[n] (Sup. 1880)

An allegation that the debtor "owned no property of any consequence" except that alleged to have been fraudulently conveyed is not equivalent to one that he owned no other property subject to execution sufficient for the payment of all his debts.—*Pfeifer v. Snyder*, 72 Ind. 78.

[nn] (Sup. 1880)

In a suit by the grantor's creditors to set aside a conveyance as made without consideration, the complaint must allege that at the time of the conveyance the grantor did not have sufficient other property, subject to execution, to satisfy his liabilities.—*Spaulding v. Blythe*, 73 Ind. 93.

[o] (Sup. 1881)

It is a fatal objection to a complaint to set aside an alleged fraudulent transfer by a decedent of choses in action that it does not allege that at the time of the transfer he had no other property subject to execution sufficient to pay his debts.—*Johnson v. Jones*, 79 Ind. 141.

[oo] (Sup. 1881)

A complaint by creditors to set aside their debtor's conveyance as fraudulent must allege that at the time of making the conveyance the debtor had no other property subject to their claims, and allegations that at such time the debtor was in embarrassed and failing circumstances, or that he afterwards died notoriously insolvent, are not sufficient.—*McCole v. Loehr*, 79 Ind. 430.

[p] (Sup. 1881)

A complaint, in an action to set aside a fraudulent conveyance, is not bad, because it does not show that the alleged fraudulent grantor had no property subject to execution at the time the suit was commenced.—*Jennings v. Howard*, 80 Ind. 214.

[pp] (Sup. 1881)

In an action by a creditor to charge his debtor's wife's land to the extent of improvements made thereon by the debtor in fraud of creditors, the complaint is bad if it fails to aver that the debtor did not have, at the time of making the improvements, ample property to pay his debts subject to be levied on and sold.—*Moore v. Lampton*, 80 Ind. 301.

[q] (Sup. 1882)

In a suit to set aside certain transfers of property as in fraud of creditors, averments that the debtors are each and all of them wholly insolvent, and were so at the time of the several acts complained of, and have no property out of which the plaintiff's debt can be made, "except that which is hereinafter named," coupled with an allegation that the property referred to in the exception was all embraced in the transfers complained of, sufficiently state the debtors' insolvency.—*Nugen v. First Nat. Bank of Cambridge City*, 86 Ind. 311.

[qq] (Sup. 1883)

In an action by a wife against a sheriff and others to quiet her title to certain land, and to enjoin its sale by the sheriff on executions in favor of the other defendants against her husband, a cross bill alleged that the judgment debtor had, previous to the levy on such land, filed a schedule in exemption on execution issued against him, and that he had not as much personal property as is allowed by law to a

debtor as exempt from execution. *Held*, that the cross bill showed that plaintiff's husband remained insolvent up to the commencement of the action and the filing of the cross bill.—*Ream v. Karnes*, 90 Ind. 167.

A cross bill, attacking a debtor's conveyance as fraudulent towards creditors, alleged that the debtor on a certain day conveyed the property, "without leaving any property in his own name to pay defendant's debt or any part of it." *Held*, that the cross bill sufficiently showed the debtor's insolvency, without such land, at the date of the conveyance.—*Id.*

[r] (Sup. 1883)

In an action by a creditor to set aside as fraudulent a conveyance made by his deceased debtor, the complaint need not show that the decedent did not leave other real estate, and that no assets came into the hands of the administrator; but it is sufficient if it shows that the decedent had no other property at the time he made the conveyance, and that there are no "assets" in the hands of the administrator.—*Bottorff v. Covert*, 90 Ind. 508.

[rr] (Sup. 1884)

A complaint to set aside a fraudulent conveyance of a deceased debtor, which does not allege the insolvency of the estate, is bad on demurrer.—*Willis v. Thompson*, 93 Ind. 62.

[s] (Sup. 1884)

A complaint attacking a conveyance as fraudulent averred that at the time of the execution of the deed the grantor had no other property subject to execution out of which his debts could be paid, and that he had not since the execution of the deed acquired any property subject to execution. It also alleged that on the day of the execution of the deed the grantor was indebted to plaintiff in a specified sum, for which indebtedness judgment was subsequently rendered. *Held* to show a continuous indebtedness in favor of plaintiff from the time of the execution of the deed until after the rendition of the judgment, and to show that during this time the grantor was insolvent.—*Hogan v. Robinson*, 94 Ind. 138.

[ss] (Sup. 1884)

A complaint in a suit to set aside an alleged fraudulent conveyance, alleging that the debtor "has not now, nor has he since the note was executed had, any property subject to execution more than the exemption allowed by law," sufficiently alleges the insolvency of the grantor.—*Simpkins v. Smith*, 94 Ind. 470.

[t] A complaint, in an action to set aside a fraudulent conveyance, is bad, unless it shows that the alleged fraudulent grantor had no property subject to execution at the time the suit was commenced.—(Sup. 1891) *Shew v. Hews*, 123 Ind. 474, 26 N. E. 483; (1892) *Line v. State ex rel. Louder*, 131 Ind. 468, 30 N. E. 703.

[tt] (Sup. 1891)

In an action to set aside a conveyance of land as having been made in fraud of the grantor's creditor, an allegation in the complaint that the conveyance left the grantor without any property subject to execution is not sufficient, without further alleging that when the suit was brought the grantor had no property out of which the debt could then be collected.—*Brumbaugh v. Richcreek*, 127 Ind. 240, 26 N. E. 664, 22 Am. St. Rep. 649.

[u] (Sup. 1892)

In an action to set aside a fraudulent conveyance, an allegation that defendant did not have at the time of the conveyance, and has not had since, up to the time of the commencement of the suit, sufficient property subject to execution to pay his debts, is a sufficient allegation of his insolvency during that period.—*York v. Rockwood*, 31 N. E. 1110, 132 Ind. 358.

[uu] (Sup. 1892)

A cross complaint, alleging that a conveyance of the land in question was made to defraud creditors, cannot be sustained when it does not aver that at the time the conveyance was executed the grantor had no other property subject to execution.—*Winstandley v. Stipp*, 32 N. E. 302, 132 Ind. 548.

[v] (Sup. 1893)

An allegation of a complaint in an action to set aside an alleged fraudulent conveyance, that defendant had no property subject to execution at the time such action was commenced, or at the time an execution was issued on a judgment against him, and returned unsatisfied, is not a compliance with the rule of pleading requiring the complaint in such actions to allege that at the time of the conveyance the debtor did not have sufficient property to pay his indebtedness.—*Petree v. Brotherton*, 133 Ind. 692, 32 N. E. 300.

[vv] (Sup. 1895)

An allegation, in a complaint to set aside a conveyance of land for fraud, "that, at the time of said conveyance," defendant "had no other property subject to execution, nor has he had \* \* \* until now, for the payment of said judgment," sufficiently indicates that defendant had not at the time of the conveyance, or at any time since, or at the beginning of the action, sufficient property subject to execution to pay the debt.—*Pierce v. Hower*, 42 N. E. 223, 142 Ind. 626.

[w] (Sup. 1898)

The insolvent condition of the grantor in an alleged fraudulent conveyance is sufficiently set forth in an action by a creditor by allegations that at the time of the transfer, and when suit was brought, the grantor had not property subject to execution sufficient to pay plaintiff's judgment.—*Vansickle v. Shenk*, 50 N. E. 381, 150 Ind. 413.

[ww] (App. 1901)

Where, in an action to reach property transferred by a debtor in fraud of his creditors, the complaint alleges that the debtor was wholly insolvent at the time of the transfer, it is not necessary to also allege that he had no property subject to execution.—Lammert v. Stockings, 61 N. E. 945, 27 Ind. App. 619.

[x] (Sup. 1902)

A complaint to set aside a fraudulent conveyance which only alleged, as to the grantor's financial condition at the time of the filing of the complaint, that he had no property subject to execution "of which these plaintiffs have any knowledge," was insufficient.—Davis v. Chase, 64 N. E. 88, 853, 159 Ind. 242, 95 Am. St. Rep. 294.

[xx] (App. 1902)

Since a constable has no power to levy an execution on real estate, an allegation, in a complaint to set aside an alleged fraudulent conveyance, that an execution had been placed in the hands of the constable, and by him returned nulla bona, was an insufficient allegation of defendant's insolvency.—Stuckwisch v. Holmes, 64 N. E. 894, 29 Ind. App. 512.

[y] (App. 1902)

Where a complaint by a judgment creditor to set aside a fraudulent conveyance alleged that since the date of the judgment, and up to the time of the filing of the complaint, defendant did not own any property, real, personal, or mixed, such averment was a sufficient allegation that defendant had no other property subject to execution than that in controversy.—Jackson v. Saylor, 63 N. E. 881, 30 Ind. App. 72.

[yy] (Sup. 1905)

When a creditor of a grantor attacks a conveyance on the ground of fraud, he must plead and prove that the debtor was insolvent at the time of the conveyance and that he had no property subject to execution when the suit was brought.—Cannon v. Castleman, 164 Ind. 343, 73 N. E. 689.

[z] (App. 1905)

In an action to recover land alleged to have been conveyed in fraud of plaintiff's claim, the insolvency of the debtor is sufficiently alleged by the averment that he at the time of the conveyance "had not, nor has he since, nor has he now, sufficient other property subject to execution to pay his debts, and especially to pay the said amount due this plaintiff."—Borror v. Carrier, 73 N. E. 123, 34 Ind. App. 353.

A complaint to set aside a conveyance as fraudulent is insufficient if it fails to allege that at the time of the conveyance the grantor had not sufficient other property subject to execution to pay his debts.—Id.

[zz] (Sup. 1909)

In an action by a judgment creditor to set aside the debtor's transfers of property as fraudulent, an allegation in the complaint that,

"after the time" of the transfer, the judgment defendant did not have sufficient property to pay his debts, instead of "at the time" of the transfer, was sufficient, as the words "after the time" had relation to and commenced the moment the transfer was made, and in that connection meant "from the time" of the transfer.—Kelley v. Bell, 172 Ind. 590, 88 N. E. 58.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 767, 775.

See, also, 20 Cyc. pp. 731-734.

## § 262. — Description of property.

[a] (Sup. 1898)

The complaint, in a suit to set aside as fraudulent a conveyance of lands, was deficient on demurrer where it described such lands only by the numbers of the sections, townships, and ranges, without any indication of the state or county in which they are located, or reference to any fixed monument from which their location could be inferred.—Sheffer v. Hines, 49 N. E. 348, 149 Ind. 413.

[b] (App. 1904)

In an action of attachment, and to set aside a fraudulent conveyance, an allegation in the complaint that the grantor "was the owner in fee simple of the unincumbered title" was a sufficient allegation of ownership.—Trent v. Edmonds, 70 N. E. 169, 32 Ind. App. 432.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. § 780.

See, also, 20 Cyc. p. 731.

## § 263. — Fraudulent transaction.

[a] In an action by creditors to set aside an instrument as fraudulent as to them, the complaint must expressly charge that it was executed with a fraudulent intent.—(Sup. 1877) Bentley v. Dunkle, 57 Ind. 374; (1895) National State Bank of Terre Haute v. Vigo County Nat. Bank, 141 Ind. 352, 40 N. E. 799, 50 Am. St. Rep. 330.

[b] (Sup. 1877)

The complaint, in an action by a creditor against the heirs of his deceased debtor to set aside an alleged fraudulent conveyance by the debtor, must allege whether such conveyance was joint or several to the defendants.—Allen v. Vestal, 60 Ind. 245.

[c] (Sup. 1878)

In an action to set aside a conveyance of real estate, the complaint alleged that the owner, being indebted to plaintiff and with the intent to defraud him, conveyed the real estate to a third person by a deed in which his wife joined; that afterwards said third person conveyed the same to the wife and infant children of the debtor, both conveyances being alleged to be without consideration; that at the time the debtor did not possess other property sufficient to pay plaintiff's debt, and was insolvent. Held, that a cross complaint filed by another judgment creditor on a mechanic's lien on part

of the land, obtained against the judgment debtor and a contractor, but which did not allege any fraud, was insufficient.—*Spaulding v. Myers*, 64 Ind. 264.

In an action to set aside a conveyance of real estate, the complaint alleged that the owner thereof, being indebted to the plaintiff and with the intent to defraud him, conveyed the said real estate to a third party by a deed in which his wife joined, and that afterwards said third party conveyed the same to the wife and infant children of the debtor, both conveyances being alleged to have been without consideration; that at the time the debtor did not possess other property subject to execution sufficient to pay the plaintiff's debt, and was insolvent at the time this action was brought. The plaintiff also alleged that he afterwards recovered judgment against the debtor on such debt, and that an execution issued thereon was returned by the sheriff nulla bona. *Held*, that the complaint should have alleged that the grantees had notice of the alleged fraud, and was insufficient.—*Id.*

[d] (Sup. 1880)

In a suit by a creditor to set aside his debtor's conveyance as fraudulent, an allegation that at the time the suit was instituted the debtor did not have other property subject to execution is not a substitute for an allegation that years before, and at the time of making the conveyance, the debtor did not have other property sufficient to satisfy plaintiff's claim, which latter allegation is necessary to show plaintiff was injured by the conveyance.—*Noble v. Hines*, 72 Ind. 12.

[e] (Sup. 1880)

In a suit to set aside a conveyance as fraudulent and made without consideration, the complaint need not allege that the grantee had notice of the grantor's fraudulent purpose.—*Spaulding v. Blythe*, 73 Ind. 93.

[f] (Sup. 1881)

A failure to allege the value of real estate, a conveyance of which it is sought to have set aside as fraudulent, does not render the complaint insufficient.—*Sherman v. Hogland*, 73 Ind. 472.

[g] (Sup. 1881)

In an action to set aside an alleged fraudulent mortgage of personalty, the question of fraudulent intent being made one of fact by Rev. St. 1881, § 4924, the complaint must contain charges of actual bad faith and want of integrity.—*Lockwood v. Harding*, 79 Ind. 129.

Fraud in the execution of a mortgage of a stock of goods cannot be inferred from the mere fact alleged in a complaint, that, after the mortgagee became the exclusive owner of the property under the mortgage and freed from the lien thereof, he opened up the store and placed the mortgagor therein.—*Id.*

[h] (Sup. 1884)

A complaint to set aside a fraudulent conveyance of a deceased debtor, which, where

there is a valuable consideration, does not allege a fraudulent intent by the grantee, is bad on demurrer.—*Willis v. Thompson*, 93 Ind. 62.

[i] (Sup. 1884)

A complaint to set aside an alleged fraudulent conveyance, which, instead of alleging that the purchaser participated in the fraud, alleged that he agreed to pay the purchase money to a third person, and was notified of plaintiff's claim and vendor's fraud before he paid, *held* bad, unless also alleging that the third person had not accepted the promise, or that it had been rescinded.—*Seager v. Aughe*, 97 Ind. 285.

[j] (Sup. 1887)

An averment, in a complaint to set aside a conveyance, that it was fraudulently given, with intent to hinder and delay creditors, is not sufficient, in the absence of a statement of any facts tending to show fraud.—*Fisher v. Syfers*, 109 Ind. 514, 10 N. E. 306.

[k] (Sup. 1889)

A complaint drawn upon the theory that plaintiff has a right to set aside a conveyance on the ground that it is fraudulent as against creditors is bad for failing to allege that the conveyance was made to cheat and defraud creditors.—*Hays v. Montgomery*, 20 N. E. 646, 118 Ind. 91.

[l] (Sup. 1892)

Rev. St. 1881, § 4921, provides that "all deeds of gift, \* \* \* made in trust for the use of the person making the same, shall be void as against creditors, existing or subsequent." *Held*, that a complaint by a subsequent judgment creditor to subject land to the payment of the judgment, which showed that defendant furnished his son the money with which to purchase the land, but failed to show that the land was conveyed to the son in trust for defendant, is bad on demurrer. *Bishop v. Redmond*, 83 Ind. 157, distinguished.—*Bright v. Bright*, 132 Ind. 56, 31 N. E. 470.

[m] (Sup. 1894)

A complaint by the administrator of a deceased debtor to set aside the intestate's fraudulent conveyance must allege that it was made without consideration, in the absence of an allegation that the grantee knew of the debtor's intent to defraud creditors.—*Wilson v. Boone*, 136 Ind. 142, 35 N. E. 1096.

A complaint by the administrator of a deceased debtor to set aside the intestate's fraudulent conveyance must allege that the grantee knew of the debtor's intent to defraud creditors, in the absence of an allegation that the conveyance was voluntary.—*Id.*

[n] (Sup. 1894)

A complaint in an action to set aside a conveyance by a debtor through a third person to his wife, which alleges the conveyance to the third person for a colorable consideration of \$8,250, but, in fact, for no consideration whatever, but in pursuance of an agreement between

the parties that the third person should convey the land to the grantor's wife; that, in pursuance of the agreement, the third person conveyed the real estate by warranty deed to the wife without consideration; that the original grantor had not at the time the conveyances were made nor since sufficient other property subject to execution to pay his debts or any part thereof—is sufficient.—*Roberts v. Farmers' & Merchants' Bank of Attica*, 36 N. E. 128, 136 Ind. 154.

[c] (Sup. 1894)

In an action to set aside, as fraudulent, a deed made by a judgment debtor, a complaint which alleges that at the time of the conveyance, and of bringing suit, the debtor had no other property subject to execution, need not also allege that the property conveyed was subject to execution, since, if it were exempt, that is matter of defense.—*Slagle v. Hoover*, 137 Ind. 314, 36 N. E. 1099.

[d] (Sup. 1897)

A complaint to set aside a fraudulent conveyance, alleging that the grantee had notice of the grantor's fraudulent intent, is not demurrable because it shows that a consideration was paid, since the allegation of notice is sufficient to avoid the deed, notwithstanding the consideration.—*State ex rel. Little v. Parsons*, 47 N. E. 17, 147 Ind. 579, 62 Am. St. Rep. 430.

A creditor's complaint to set aside a fraudulent conveyance of land need not allege that the land was not exempt from execution, such exemption being a matter of defense.—Id.

[q] (Sup. 1897)

An allegation that a debtor made a conveyance of all its property for the purpose of defrauding its creditors does not show a fraudulent conveyance.—*Old Nat. Bank of Evansville v. Heckman*, 47 N. E. 953, 148 Ind. 490.

[r] (App. 1901)

In a suit by a creditor to set aside as fraudulent a conveyance made by a father to a daughter in consideration of one dollar and her agreement to support him during his life, for burial at death, etc., the complaint was not demurrable because it failed to allege a fraudulent intent on the part of the grantee.—*Spiers v. Whitesell*, 61 N. E. 28, 27 Ind. App. 204.

[s] (App. 1903)

A complaint alleging that certain defendants claimed to be the owners of all the non-exempt property of the debtor defendant, without alleging any transfer to them, or any description of the property so claimed, except by reference to an exhibit, is insufficient as a charge of a fraudulent conveyance.—*Smith v. Tate*, 66 N. E. 88, 30 Ind. App. 367.

A complaint alleging that plaintiff recovered a judgment against one defendant, and that he then owned a certain lot, which he thereafter caused to be conveyed to another de-

fendant, who claims to own it, but not alleging that such judgment debtor transferred it, states no cause of action.—Id.

[t] (App. 1904)

A contention that a complaint to set aside a fraudulent conveyance from husband to wife is bad, as against the wife, because it does not show that she had any knowledge of the fraudulent intent of her husband, is without merit, where the complaint charges her with knowledge of the facts, and avers that she did not pay any part of the consideration.—*Bass v. Citizens' Trust Co.*, 70 N. E. 400, 32 Ind. App. 583.

Where it is not alleged, in a complaint to set aside a fraudulent conveyance of real estate, that the grantor was a resident householder, a contention that the complaint is bad, because affirmatively showing that the grantor had no property except the \$500 he borrowed from plaintiff's decedent, which was the subject-matter of the litigation (a less amount than allowed as an exemption to a resident householder), and that his investment of it in real estate, which he conveyed to his wife, could not be in fraud of creditors, is without merit.—Id.

[u] (App. 1904)

Where a complaint alleged that a judgment debtor paid to the purchaser at an execution sale of his land the amount of his bid, and took an assignment of the certificate of sale to a third party, who held the title as a volunteer for the benefit of the debtor to prevent a resale of the land in satisfaction of an unpaid balance of the judgment, it was sufficiently alleged that the debtor paid for the certificate with his own money.—*Balch v. Magaw*, 70 N. E. 188, 33 Ind. App. 399.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 771-774, 776-779, 781.

See, also, 20 Cyc. pp. 734-738.

#### § 264. — Want or exhaustion of other remedy.

[a] (Sup. 1909)

*Burns' Ann. St. 1901, § 827* (*Burns' Ann. St. 1908, § 858*), requires execution on a judgment against a resident of the state to be issued to the county where he "resides." *Held*, that an allegation, in a complaint by a judgment creditor to set aside a fraudulent conveyance by the debtor, that execution issued to the sheriff of the county where defendant "resides," was not objectionable for not using the word "resided."—*Kelley v. Bell*, 172 Ind. 590, 88 N. E. 58.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 767, 768.

See, also, 20 Cyc. pp. 726-728.

**§ 265. — Prayer for relief.**

[a] (Sup. 1852).

A court of equity will not render a decree setting aside a conveyance of land made to hinder and delay creditors where the bill does not pray for such a decree.—*Eastman v. Ramsey*, 3 Ind. 419.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 760, 761.

See, also, 20 Cyc. p. 740.

**§ 266. Plea or answer, and subsequent pleadings.**

Partial defense, see PLEADING, § 80.

Pleading conveyance in fraud of creditors as departure in action to reform contract, see PLEADING, § 180.

[a] (Sup. 1876)

To a complaint by a judgment plaintiff to set aside as fraudulent a conveyance of lands made by the judgment defendant in trust for the grantor, after the accrual of the indebtedness and before judgment, and also a conveyance by the trustee to the judgment debtor's wife executed after the judgment was rendered, and to subject such lands to sale, etc., an answer admitting such conveyances, but averring that the first was in trust for the judgment debtor's wife, and averring the payment of a consideration by her by the conveyance of her separate realty, and denying fraud and notice of the husband's indebtedness, is sufficient on demurrer.—*Wynne v. Cornelison*, 52 Ind. 312.

[b] (Sup. 1880)

The answer in a suit to set aside a mortgage given by a debtor to his children pleaded that it was given pursuant to a contract between the debtor and his wife that money which she advanced to him to purchase land should be paid to her children and its payment secured. *Held*, that the fact that the complaint alleged that the mortgage was for \$4,000 did not render the answer insufficient merely because it showed a consideration to the extent of only \$3,000, being the amount advanced.—*Goff v. Rogers*, 71 Ind. 459.

[c] (Sup. 1893)

Where defendant seeks to defeat an action to set aside a conveyance by her as fraudulent, by showing that the property conveyed was exempt, she must show that the right of exemption existed at the time the alleged fraudulent conveyance was made, and an allegation that such right existed at the time the answer was filed is not sufficient.—*Phenix Ins. Co. v. Fielder*, 133 Ind. 557, 33 N. E. 270.

In a suit to set aside conveyances made by defendant, and to subject the lands conveyed to the payment of a judgment, defendant claimed the property conveyed was exempt. *Held*, that a general allegation in her answer

that, at the time of the conveyance, defendant was "a resident householder of the state of Indiana," was not equivalent to an allegation of facts constituting her right to an exemption.—*Id.*

[d] (App. 1905)

One, who is without interest in a suit to set aside a fraudulent conveyance should file a disclaimer in order to protect himself against judgment, and should not appear and answer.—*Tyler v. Davis*, 75 N. E. 3, 37 Ind. App. 537.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 782, 784-788.

See, also, 20 Cyc. pp. 745-747.

**§ 267. Pleading fraud as defense.**

[a] (Super. 1873)

An answer alleging fraud, which does not aver the particular facts amounting to fraud, is insufficient.—*Reid v. Brown*, Wils. 312.

[b] (Sup. 1892)

In an action by a mortgagee to foreclose a mortgage, against the assignee for the benefit of creditors of the mortgagor, an answer, seeking to avoid the mortgage as in fraud of subsequent creditors, must expressly aver that it was executed with intent to defraud them, since Rev. St. 1881, § 4924, provides that the question of fraudulent intent is one of fact.—*Hutchinson v. First Nat. Bank of Michigan City*, 133 Ind. 271, 30 N. E. 952, 36 Am. St. Rep. 537.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. § 783.

**§ 268. Amended and supplemental pleadings.**

Condition of cause and time for amendment, see PLEADING, § 245.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. § 763.

See, also, 20 Cyc. pp. 742, 743.

**§ 269. Issues, proof, and variance.**

Objections to evidence as not within issues, see PLEADING, § 427.

[a] (Sup. 1873)

Certain real estate was purchased of A. and conveyed to B., and by B. and his wife conveyed to C., the father of B.'s wife, and by C. conveyed to the wife of B. In a proceeding to subject said real estate to the payment of a judgment against B. on the ground of fraud, *held* that, under an answer of general denial, evidence was admissible that C. was to pay A. the consideration for the real estate; that the deed was to have been made in the name of B.'s wife; that it was made to her husband with her knowledge and consent; and that she

objected to its being made to her husband as soon as she knew of the fact.—*Summers v. Hoover*, 42 Ind. 153.

[b] (Sup. 1873)

In an action to recover the possession of certain property, plaintiff alleged that he was the owner, and the defendant answered in general denial, and also that as sheriff by virtue of the writ of attachment he seized the property as the property of a third person who he alleged was the owner, and plaintiff replied in general denial and reasserted ownership. *Held* that, after the proof by the plaintiff of his purchase from the third person, evidence in behalf of the defendant that the sale was made by such third person to defraud his creditors, and that plaintiff was aware of such fraudulent purpose, was within the issue, and having been admitted without objection, its admission constituted no cause for new trial on plaintiff's motion.—*Farmer v. Calvert*, 44 Ind. 209.

[c] (Sup. 1888)

A complaint the gravamen of which is a conveyance with intent "to hinder, delay, and defraud creditors," is not supported by evidence of a trust such as is contemplated by Rev. St. § 4921, providing that "all deeds of gift, conveyances," etc., "made in trust for the use of the person making the same, shall be void as against creditors, existing or subsequent of such person."—*Mayer v. Feig*, 114 Ind. 577, 17 N. E. 159.

[d] (Sup. 1894)

Where the complaint alleges that the conveyance was voluntary, and given and accepted with intent to defraud the grantor's creditors, the omission to show want of consideration is not fatal to recovery, since the deed, on the other allegations of the complaint, would be fraudulent, even though there were a valuable consideration.—*Slagle v. Hoover*, 137 Ind. 314, 36 N. E. 1099.

[e] (Sup. 1897)

In an action to set aside a conveyance as fraudulent, evidence that the property was exempt to the grantor is admissible to rebut the charge of fraud, without a special plea setting up the right of exemption.—*Isgrigg v. Pauley*, 47 N. E. 821, 148 Ind. 436.

[f] (Sup. 1907)

In an action to set aside an alleged fraudulent conveyance, evidence to establish that the property transferred was exempt from execution was admissible under a general denial.—*Stark v. Lamb*, 167 Ind. 642, 78 N. E. 668, 79 N. E. 895.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. FRAUD. CONV. §§ 780-795.

See, also, 20 Cyc. pp. 748-750.

(G) EVIDENCE.

Communications between husband and wife, see WITNESSES, § 190.

Competency of witnesses, see WITNESSES, § 83.

Offer of proof, see TRIAL, § 48.

§ 270. Presumptions and burden of proof.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. FRAUD. CONV. §§ 796-821.

See, also, 20 Cyc. pp. 750-763.

§ 271. — In general.

[a] A creditor who assails a conveyance of his debtor for fraud must show it. It cannot be presumed.—(Sup. 1855) *Stewart v. English*, 6 Ind. 176; (1873) *Farmer v. Calvert*, 44 Ind. 209; (1876) *Morgan v. Olvey*, 53 Ind. 6; (1884) *Pennington v. Flock*, 93 Ind. 378.

[b] The presumption of fraud arising from continued possession by the vendor is rebutted by proof of payment of a valuable consideration.—(Sup. 1857) *Blystone v. Burgett*, 10 Ind. 28, 68 Am. Dec. 658; (Sup. 1881) *Rose v. Colter*, 76 Ind. 590.

[c] (Sup. 1875)

Under 1 Gav. & H. St. p. 353, § 21, providing that the question of fraudulent intent shall be deemed a question of fact, and that no conveyance or charge shall be adjudged fraudulent as against creditors or purchasers solely on the ground that it was not founded on a valuable consideration, the burden is on the attacking creditor to show, not only want of consideration, but other facts or circumstances sufficient to make out his case.—*Pence v. Croan*, 51 Ind. 336.

[d] The burden of proving that a conveyance was fraudulent as to creditors rests on the party seeking to set it aside.—(Sup. 1890) *Luce v. Shoff*, 70 Ind. 152; (1881) *McLaughlin v. Ward*, 77 Ind. 383; (1881) *Studabaker v. Langard*, 79 Ind. 320; (1884) *Andrews v. Flanagan*, 94 Ind. 383; (1888) *Heaton v. Shanklin*, 18 N. E. 172, 115 Ind. 595.

[e] (Sup. 1882)

In a suit to set aside a deed as in fraud of creditors, an answer by the grantee alleging that the property was purchased by the grantor with the grantee's money, and that the former took the title in his name without the latter's consent, and that he made the conveyance merely to discharge his trust, states matters provable under the general denial; and the burden of proving the issue of fraud remains upon plaintiff.—*Bishop v. State ex rel. Lord*, 83 Ind. 67.

[f] (Sup. 1895)

A presumption of fraud does not depend on the amount of the debt, extent of the property, or circumstances of the party.—*Gable v. Columbus Cigar Co.*, 38 N. E. 474, 140 Ind. 563.

## [g] (Sup. 1895)

Where, in a suit to set aside a fraudulent conveyance, the complaint alleged that at the beginning of the action complainant's debts were due and unpaid, and there was no answer of payment, the burden was on defendants to prove payment had been made.—*Pierce v. How-er*, 42 N. E. 223, 142 Ind. 626.

## [h] (Sup. 1899)

Fraud is never presumed, but must be proven by clear and satisfactory evidence, and will not be imputed when the facts from which it is supposed to arise are consistent with honest intentions.—*American Varnish Co. v. Reed*, 55 N. E. 224, 154 Ind. 88.

In an action to set aside a transfer of personal property as fraudulent as to creditors, the burden of proof is on plaintiff to show that defendant sold the property with a fraudulent intent, and that the transferee paid no consideration therefor, or, if he paid a valuable consideration therefor, that he purchased with knowledge of the fraudulent intent of defendant.—*Id.*

## [i] (Sup. 1907)

Since the law presumes that a resident householder will avail himself of his right to claim an exemption, where it is made to appear in an action to set aside an alleged fraudulent conveyance that the debtor was a resident householder of the state, and that all the property owned by him at the time of the transfer in question did not exceed \$600 in value, the transfer will not be set aside.—*Stark v. Lamb*, 167 Ind. 642, 78 N. E. 668, 79 N. E. 805.

## FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 796-789, 821.

See, also, 20 Cyc. p. 750; note, 119 Am. St. Rep. 556.

## § 272. — Insolvency.

Presumptions as to continuance of fact, see EVIDENCE, § 67.

## [a] (Sup. 1883)

In an action to set aside an alleged fraudulent conveyance, the burden of proof is on plaintiff to show that the debtor did not retain enough property in his hands to satisfy all his debts.—*Hogan v. Robinson*, 94 Ind. 138.

## [b] (Sup. 1894)

In an action by a judgment creditor to set aside a prior voluntary conveyance by the debtor as in fraud of creditors, the fact that the debtor was insolvent at the time the judgment was rendered carries with it no presumption that the insolvency extended back to the time the conveyance was made; but the burden remains on the creditor to show the debtor's insolvency at the time of the conveyance.—*Nevers v. Hack*, 138 Ind. 260, 37 N. E. 791, 46 Am. St. Rep. 380.

## FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. § 804.

See, also, 20 Cyc. p. 757.

## § 273. — Intent of grantor in general.

## [a] (Sup. 1895)

Rev. St. 1881, § 4924 (Rev. St. 1894, § 6649), providing that the question of fraudulent intent shall be deemed a question of fact, means that fraud cannot be presumed as matter of law, but may be inferred from facts or circumstances proven.—*Personette v. Cronkhite*, 140 Ind. 586, 40 N. E. 59.

In an action to set aside a conveyance of real estate as fraudulent, the grantor must be charged with the probable and necessary consequences of his act, and the result of his fraud must be attributed to him, notwithstanding his claim and statement that he did not intend that the conveyance should operate as a fraud upon his creditors.—*Id.*

## [b] (Sup. 1899)

Under Horner's Rev. St. 1897, § 4924, which provides that, in all actions to set aside transfers of property as being fraudulent as to creditors, the question of fraudulent intent shall be a question of fact for the jury, and that a transfer shall not be adjudged fraudulent merely on the ground that it was not founded on a valuable consideration, in an action to set aside an alleged fraudulent transfer of property fraud cannot be presumed, but must be proven.—*American Varnish Co. v. Reed*, 55 N. E. 224, 154 Ind. 88.

## [c] (Sup. 1907)

In an action to set aside a conveyance as fraudulent, plaintiff must prove facts which either directly or by inference show that such conveyance was made with a fraudulent intent.—*Stark v. Lamb*, 167 Ind. 642, 78 N. E. 668, 79 N. E. 805.

## [d] (App. 1908)

An assignee for the benefit of creditors attacking a mortgage as within Burns' Ann. St. 1901, § 6646, making all conveyances of personalty in trust for the use of the person making the same void as to creditors, has the burden to establish as a fact that the mortgage was a conveyance in trust for mortgagors' use, the presumption being that the mortgage was not fraudulent as to creditors.—*Hamrick v. Hoover*, 41 Ind. App. 411, 84 N. E. 28.

Where there is no finding that a mortgagee held the mortgaged property in trust for the mortgagors' benefit, or that the mortgagors sold any of the property and applied the proceeds to their own use, or of any arrangement or secret agreement between the parties relative to the proceeds of the sale of any of the mortgaged property, or that the assignee for the benefit of creditors was not in possession of all the property originally mortgaged, the presumption of a good faith mortgage, valid as to creditors, is not overcome so as to render the mortgage void within Burns' Ann. St. 1901, § 6646, making all

conveyances of personalty in trust for the use of the person making the same void as against creditors, notwithstanding a finding "that there has never been any arrangement or agreement between the mortgagors and mortgagees whereby the proceeds of sales of the mortgaged property should be applied in payment of the mortgage debt, and that (mortgagee) had no knowledge, nor does he now have, as to how the proceeds were applied," and the conclusion of law of a valid mortgage must be sustained.—Id.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. § 805.

### § 277. — Consideration.

[a] (Sup. 1882)

Mere proof of want of a valuable consideration will not shift the burden of proof from a creditor attacking his debtor's conveyance as fraudulent.—*Bishop v. State ex rel. Lord*, 83 Ind. 67.

[b] (Sup. 1895)

Where a husband conveyed lands to his wife, but it appeared that she held no note or other written contract for the \$1,600 that she claimed the husband owed her, the burden was on her to establish the good faith of the purchase.—*Gable v. Columbus Cigar Company*, 38 N. E. 474, 140 Ind. 563.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 709, 809-814.

See, also, 20 Cyc. p. 758; note, 56 L. R. A. 823.

### § 278. — Relations between parties.

[a] (Sup. 1894)

The burden of proof, upon one attacking a conveyance by an insolvent on the ground that it is fraudulent, is not removed by the fact that the grantee therein was the insolvent's father.—*Rockland Co. v. Summerville*, 139 Ind. 695, 39 N. E. 307.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 801, 802.

See, also, 20 Cyc. pp. 753, 754.

### § 281. — Retention of possession.

Rebuttal of presumptions, see ante, § 271.

[a] (Sup. 1866)

Under the act for the prevention of frauds and perjuries (1 Gav. & H. St. p. 351, § 8), the retention of possession by the vendor of chattels casts on the party who would sustain the sale the burden of rebutting the presumption of fraud.—*Kane v. Drake*, 27 Ind. 29.

[b] (Sup. 1881)

In a contest with creditors who seek to set aside as fraudulent a sale by the debtor, which was not followed by a change of possession, the burden of showing good faith is on the grantee.—*Rose v. Colter*, 76 Ind. 590.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 800, 816.

See, also, 20 Cyc. p. 762.

### § 285. Admissibility.

Admissions as evidence, see EVIDENCE, §§ 207, 215, 230.

Admissions by conspirators as evidence against co-conspirators, see EVIDENCE, § 253.

Admissions by conspirators as evidence against co-conspirators, preliminary proof of conspiracy, see EVIDENCE, § 260.

Evidence of similar facts and transactions, see EVIDENCE, § 135.

Hearsay evidence, see EVIDENCE, § 317.

Relevancy of evidence to show character of grantor, see EVIDENCE, § 106.

Self-serving declarations, see EVIDENCE, § 271.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 822-866.

See, also, 20 Cyc. pp. 764-784; note, 42 Am. Dec. 631.

### § 286. — In general.

[a] (Sup. 1829)

A. obtained judgment on a note against B., and purchased at the sheriff's sale, under the judgment, a tract of land which B., after the date of the note, and before the judgment, had conveyed to C. A. brought an action of ejectment for the land against C., and the question was whether B.'s deed to C. was fraudulent and void as to A. *Held*, that the note on which the judgment was rendered was admissible to show the existence of the debt before the date of the deed.—*Doe ex dem. Helm v. Newland*, 2 Blackf. 233.

[b] (Sup. 1837)

Where property is sold by an absolute bill of sale, but possession thereof remains with the vendor, parol evidence is admissible to explain his possession.—*Foley v. Knight*, 4 Blackf. 420.

[c] (Sup. 1868)

In a suit to set aside a conveyance from husband to wife as fraudulent and void as to creditors, evidence of the indebtedness and insolvency of the husband at the time of the conveyance is admissible.—*Frank v. Kessler*, 30 Ind. 8.

[d] (Sup. 1881)

In a suit to set aside an alleged fraudulent conveyance by a debtor to his wife, the record of a suit against such debtor on a breach of warranty was admissible as tending to show the circumstances of the debtor at the time, though the eviction did not occur until after the date of the fraudulent deed.—*Jennings v. Howard*, 80 Ind. 214.

[e] (Sup. 1887)

In a suit to set aside a fraudulent conveyance, the plaintiff is not confined to one trans-

action between the grantor and grantee, but may prove the general course of business between the grantor and grantee.—*Hunsinger v. Hofer*, 110 Ind. 390, 11 N. E. 463.

The transcript of the judgment recovered against the grantor is properly admitted in evidence, not to bind the grantee, but to establish the creditorship of the plaintiff.—*Id.*

[f] (Sup. 1888)

In a suit to enforce a secret agreement for the return of bank stock assigned and transferred on the books of the bank, creditors of the assignee may properly prove when their claims accrued, and that credit was given deceased on the faith that he owned the stock assigned.—*Hirsch v. Norton*, 115 Ind. 341, 17 N. E. 612.

The declarations of deceased are competent to prove his indebtedness, and to prove that credit was given him on the faith of his ownership of stock assigned to him with a secret trust in favor of the assignor.—*Id.*

[g] (Sup. 1890)

In replevin by a wife against an officer for a horse taken under execution against her husband, in support of the theory of the defense that whatever title she had was through him, and in fraud of his creditors, evidence is relevant that before and at the time of the levy the horse was kept in a stable which the husband controlled as tenant, and that he paid the rent, and took receipts in his own name.—*Laird v. Davidson*, 124 Ind. 412, 25 N. E. 7.

[h] (App. 1894)

A contract tending to show that the vendor was in possession of the premises, under his own lease, at the time of the alleged fraudulent transfer, is admissible, as, in the absence of explanation as to why no change in the lessee was made at that time, it tends to show that there was no change in possession of the goods claimed to have been sold.—*Benjamin v. McElwaine-Richards Co.*, 10 Ind. App. 76, 37 N. E. 362.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. FRAUD. CONV. §§ 822-834, 863-866.

See, also, 20 Cyc. p. 764.

§ 288. — Insolvency.

[a] (Sup. 1876)

Where a conveyance was made to a husband and wife jointly, the question whether such conveyance was for the purpose of defrauding creditors of the husband should be determined by the amount and value of his property at the time of the conveyance; and the fact that, at that time, he had other property, sufficient to pay his debts, is admissible in evidence.—*McConnell v. Martin*, 52 Ind. 434.

[b] (Sup. 1876)

In an action by a judgment creditor to set aside a deed by deceased as fraudulent, on the issue of deceased's insolvency the tax book and

the inventory of deceased's estate are admissible in evidence.—*Cravens v. Duncan*, 53 Ind. 347.

[c] (Sup. 1888)

On an issue as to the insolvency of a debtor, a tax list returned by him to the assessor, under oath, about two months before the commencement of the action, while not competent as original evidence, is admissible against the debtor to show the particular articles of personalty or items of credits claimed by him at the time such list was returned, and also to impeach his testimony.—*Towns v. Smith*, 115 Ind. 480, 16 N. E. 811.

[d] (Sup. 1889)

In an action by a wife against her husband's creditor to quiet her title to land conveyed to her, the consideration having been paid by her, a letter written by the husband to a third person, enumerating certain debts which were not shown to be subsisting claims against him at the time the conveyance in question was made, is not admissible on the issue of his solvency at the date of such conveyance.—*Jones v. Snyder*, 117 Ind. 229, 20 N. E. 140.

FOR CASES FROM OTHER STATES.

SEE 24 CENT. DIG. FRAUD. CONV. §§ 836, 837.

See, also, 20 Cyc. p. 775.

§ 289. — Intent of grantor.

[a] (Sup. 1877)

In an action by a judgment creditor to set aside an alleged fraudulent conveyance by his debtor, evidence that the conveyance was made pending the action in which the judgment was rendered is admissible as tending to prove the fraud.—*Evans v. Hamilton*, 56 Ind. 34.

[b] (Sup. 1883)

Where the issue is as to the intent of a husband in procuring a conveyance to be made to his wife, he may testify that he had no intention of defrauding his creditors.—*Sedgwick v. Tucker*, 90 Ind. 271.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. FRAUD. CONV. §§ 838, 840-848.

§ 290. — Nature and circumstances of transaction.

[a] (Sup. 1871)

On the trial of an action to set aside a fraudulent conveyance, it is proper that the plaintiff should introduce evidence to prove who paid the purchase money, how it was paid, and who were concerned in having the deed made, and to identify the deed with the transaction.—*Rhodes v. Green*, 36 Ind. 7.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. FRAUD. CONV. §§ 826, 839.

See, also, 20 Cyc. p. 772.

**§ 291. — Consideration.**

[a] (Sup. 1891)

An owner of land, worth \$2,500, conveyed it to plaintiff in payment of a debt owing to the latter's brother. A judgment creditor of the brother, claiming that the land had been conveyed to plaintiff in fraud of the brother's creditors, had the land sold in satisfaction of the judgment, and defendant became the purchaser. Plaintiff then brought an action to quiet title, claiming that the conveyance to him had been made in entire good faith, and that, as part of the same transaction, he had agreed to cancel a debt of \$650 which his brother owed him, and that, in addition, he had assumed the payment of other debts of his brother, not including the judgment debt, aggregating a sum equal to the value of the land. The original landowner was examined by deposition, and his testimony substantially supported plaintiff's contention. *Held*, that at the trial it was error to suppress a part of the deposition in which the landowner testified as to the assumption of the brother's debts by plaintiff, as the effect of such suppression was to make it appear that the land, worth \$2,500, had been conveyed to plaintiff in consideration of a debt of \$650 owing to him by his brother.—*McCormick v. Smith*, 127 Ind. 230, 26 N. E. 825.

[b] (Sup. 1894)

To prove consideration, the grantee is not confined to proof of such of his transactions with the grantor as occurred in the presence of the attacking creditors.—*Fleming v. Yost*, 137 Ind. 95, 36 N. E. 705.

Where the consideration is denied, the grantee's entries against the grantor on his books are competent, as *res gestae*, to corroborate the grantee's assertion that the consideration was made up from such charges.—*Id.*

[c] (Sup. 1898)

Evidence of the value of notes given by a grantee to his grantor for property conveyed is not admissible in an action to set aside the conveyance because of the insolvency of the grantor.—*Vansickle v. Shenk*, 50 N. E. 381, 150 Ind. 413.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. FRAUD. CONV. §§ 849–856.

See, also, 20 Cyc. pp. 776–779.

**§ 292. — Knowledge and intent of grantee.**

[a] (Sup. 1887)

In a suit by a person who had recovered judgment in an action for the seduction of his wife, to set aside a conveyance made by the judgment debtor in fraud of the judgment, evidence of a conversation prior to the commencement of the suit between plaintiff and the grantee is admissible to show knowledge on the part of the grantee of the improper intimacy of the grantor with plaintiff's wife, and consequent knowledge of plaintiff's claim against his fu-

ture grantor.—*Hunsinger v. Hofer*, 110 Ind. 300, 11 N. E. 463.

[b] (App. 1891)

Where a conveyance is alleged to be fraudulent towards creditors, the grantee may testify as to his good faith, purpose, and intention.—*Wilson v. Clark*, 1 Ind. App. 182, 27 N. E. 310; *South Bend Iron-Works Co. v. Duddleson*, 27 N. E. 312.

[c] (App. 1891)

Where a person alleged to be a fraudulent vendee claims that he bought the goods to prevent their sale at a sacrifice to the injury of the local market, it is proper to show in disproof of his claim that he advertised the goods for sale at a sacrifice as a bankrupt stock.—*Levi v. Kraminer*, 2 Ind. App. 594, 28 N. E. 1028.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. FRAUD. CONV. §§ 857–861.

See, also, 20 Cyc. pp. 779–782.

**§ 294. Weight and sufficiency.**

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. FRAUD. CONV. §§ 867–908.

See, also, 20 Cyc. pp. 784–801.

**§ 295. — In general.**

[a] (Sup. 1846)

On a bill against a grantor and his infant children to subject land in payment of the claimant's claim, which the grantor had caused to be conveyed to his children in fraud of his creditors, the father confessed the bill. *Held*, that the decree for the complainant on no other evidence than the father's answer was erroneous.—*Shirley v. Shields*, 8 Blackf. 273.

[b] (Sup. 1856)

Where, on a creditor's bill to set aside a conveyance alleged to have been fraudulently made, the testimony of a witness to the fraud in the vendee proved by his own testimony to be implicated as a participant in the fraud, ought to be strongly corroborated to authorize a decree on it against the defendant's answer under oath.—*Kittering v. Parker*, 8 Ind. 44.

Bill by creditors to set aside a conveyance as fraudulent. One witness only testified to fraud in the vendee, and he was implicated, by his own testimony, in the fraud. Bill dismissed.—*Id.*

[c] Fraud may be established as well by circumstantial, as by direct, evidence.—(Sup. 1873) *Farmer v. Calvert*, 44 Ind. 209; (1888) *Heaton v. Shanklin*, 115 Ind. 595, 18 N. E. 172.

[d] (Sup. 1876)

In an action to set aside a conveyance of land by a husband to himself and wife with the right of survivorship, there was evidence that the plaintiff recovered judgment against the husband. Two witnesses testified about a deed, but the parties to the deed were not fully

named. What deed they were testifying about was not mentioned. No description of the property was given, nor whose money paid for it. No deed was introduced in evidence, nor the record of the deed nor their absence accounted for. *Held*, insufficient to sustain a verdict in favor of the plaintiff.—*Wilds v. Bogan*, 55 Ind. 331.

[e] (Sup. 1881)

In a suit to set aside a fraudulent conveyance, a charge that a badge of fraud is a fact calculated to throw suspicion upon a transaction, that its only effect in general is to require proof of the good faith of the parties thereto, that it is not conclusive of fraud, but simply an inference drawn by experience from the customary conduct of men, and that it is open to any reasonable and fair interpretation, is substantially correct.—*Sherman v. Hogland*, 73 Ind. 472.

[f] (Sup. 1883)

In an action to set aside a deed as fraudulent, an instruction that, if the circumstances unexplained clearly indicate that the transaction is fraudulent, they are sufficient, is not error.—*Wright v. Nipple*, 92 Ind. 310.

[g] (Sup. 1890)

In a controversy between a wife and the creditors of the husband, she is bound to establish the facts of which she has the burden of proof by a preponderance of testimony only; and an instruction is properly refused that, to show that he acted as her agent in the purchase of a stock of goods, and in conducting the business, "the evidence must be clear and satisfactory, and sufficiently strong to remove the equivocal character in which she is placed by reason of her relation of wife."—*Laird v. Davidson*, 124 Ind. 412, 25 N. E. 7, distinguishing *Rowell v. Klein* (1873) 44 Ind. 291.

[h] (Sup. 1907)

In a suit to set aside an alleged fraudulent conveyance, a prima facie case is made out by proof that the conveyance was voluntary and without consideration, or that it was made with a fraudulent intent to hinder, delay, cheat, or defraud the creditors of the grantor, and was accepted by the grantee with knowledge of its fraudulent character.—*Stark v. Lamb*, 167 Ind. 642, 78 N. E. 668, 79 N. E. 895.

FOR CASES FROM OTHER STATES.

SEE 24 CENT. DIG. Fraud. Conv. §§ 867-875.

See, also, 20 Cyc. p. 784.

## § 297. — Insolvency.

[a] (Sup. 1888)

The debtor's tax list, returned by him two months before suit commenced, showed no property exempt from execution. He testified that he had a large amount of property in addition to that listed, and failed to show any reason for the discrepancy. *Held*, that a finding that

he was insolvent was warranted.—*Towns v. Smith*, 115 Ind. 480, 16 N. E. 811.

FOR CASES FROM OTHER STATES.

SEE 24 CENT. DIG. Fraud. Conv. § 891.

See, also, 20 Cyc. p. 794.

## § 298. — Intent of grantor.

[a] Evidence of collusion against existing creditors is sufficient evidence of fraud against subsequent creditors.—(Sup. 1859) *Ruffing v. Tilton*, 12 Ind. 259; (1861) *Dart v. Stewart*, 17 Ind. 221.

[b] (App. 1901)

Positive evidence is not necessary to prove an intent to defraud creditors by a conveyance of property, but such intent may be inferred from facts and circumstances proved.—*De Ruiter v. De Ruiter*, 62, N. E. 100, 28 Ind. App. 9, 91 Am. St. Rep. 107.

FOR CASES FROM OTHER STATES.

SEE 24 CENT. DIG. Fraud. Conv. §§ 892-895.

See, also, 20 Cyc. p. 799.

## § 299. — Nature and circumstances of transaction.

[a] Evidence considered, and *held* sufficient to show a conveyance fraudulent as to creditors.—(Sup. 1849) *Basye v. Daniel*, 1 Ind. 378, *Smith*, 252; (1881) *Strong v. Taylor School Tp.*, 79 Ind. 208.

[b] (Sup. 1879)

Evidence considered, and *held* insufficient to show a conveyance fraudulent as to creditors.—*Evans v. Nealis*, 69 Ind. 148.

[c] (Sup. 1885)

On the question of whether a conveyance to a bank was fraudulent as against creditors, *held*, that evidence that large quantities of property, consisting of town lots, a sawmill, and various articles of personalty, were conveyed without inventory, measurement, or count, in payment of a debt claimed to be due to the bank, and that at the time of the conveyance the debtor's wife held in trust for him shares of the bank stock to a large amount, tended to show fraud, and to make it improper to disturb a finding of fraud.—*Fitch v. First Nat. Bank of Rising Sun*, 99 Ind. 443.

[d] (Sup. 1886)

A finding of fraud in a transfer of a stock of goods *held* not to be disturbed where a presumption of fraud was raised by noncompliance with Rev. St. 1881, § 4911, requiring immediate delivery; and, although the validity of the debt for which the goods are transferred was proved, and the fact that the mortgagee contesting the transfer knew of it when he took his mortgage, yet the evidence showed that no inventory of the goods was taken, and no itemized estimate of the value made; that a lump sum was agreed upon, which was about half the real value of the goods; that no credit

was entered by the transferee therefor; and that the bill of sale given was not recorded as it should have been, if intended as a mortgage.—*Seavey v. Walker*, 108 Ind. 78, 9 N. E. 347.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 876-890.

See, also, 20 Cyc. pp. 788-792.

### § 300. — Consideration.

[a] (Sup. 1883)

That lands conveyed to a wife were paid for with her husband's money, so as to render the conveyance fraudulent as against his creditors, is not sufficiently established by her mere testimony that she never inherited or received any property by gift or bequest, aside from her father's estate, which was wholly inadequate to pay the consideration.—*Talkington v. Parish*, 89 Ind. 202.

[b] (Sup. 1891)

In an action by a creditor to set aside a deed from the debtor to his son on the ground that it was without consideration, and rendered the debtor insolvent, the only testimony as to consideration was that of the debtor, his wife, and son, who all testified that the deed was given for a valuable consideration. *Held*, that the fact that there were inconsistencies and discrepancies in their evidence was not sufficient to justify a judgment for the plaintiff, since the burden was on him to show that the deed was without consideration.—*McConnell v. Citizens' State Bank of Petersburg*, 130 Ind. 127, 27 N. E. 616.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 896-903.

See, also, 20 Cyc. p. 790.

### (II) DISCOVERY, INJUNCTION, AND RECEIVER.

#### § 304. Injunction.

Injunction by general creditors to restrain contemplated fraudulent conveyance by debtor, see INJUNCTION, § 44.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 910-916.

See, also, 20 Cyc. pp. 828-831.

#### § 305. Appointment of receiver.

Condition of cause as affecting appointment of receiver, see RECEIVERS, § 5.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 917-919.

See, also, 20 Cyc. pp. 831-833.

### (I) TRIAL.

Dismissal of part of cause of action, see DISMISSAL AND NONSUIT, § 3.

Grounds for objection to dismissal of action, see DISMISSAL AND NONSUIT, § 19.

Right to trial by jury, see JURY, §§ 13, 14, 18.

Statutory new trial, see NEW TRIAL, § 178.

Submission of issue to jury, see EQUITY, § 378.

#### § 308. Questions for jury.

Instructions invading province of jury, see TRIAL, § 194.

[a] (Sup. 1853)

Whether a deed made upon a valuable consideration is fraudulent or not is, under Rev. St. 1843, a question of fact, and not of law.—*Hubbs v. Bancroft*, 4 Ind. 388.

[b] Where the fraudulent intent in making a transfer of a debtor's property is to be determined by evidence collateral to the writing, such question is determinable alone by the jury.—(Sup. 1855) *Stewart v. English*, 6 Ind. 176; (1855) *Church v. Drummond*, 7 Ind. 17; (1872) *Parton v. Yates*, 41 Ind. 456; (1875) *Pence v. Croan*, 51 Ind. 336; (1879) *Hardy v. Mitchell*, 67 Ind. 485; (1880) *Goff v. Rogers*, 71 Ind. 459; (1882) *Bishop v. State ex rel. Lord*, 83 Ind. 67; (1882) *Jarvis v. Banta*, 83 Ind. 528; (1889) *Citizens' Bank v. Bolen*, 121 Ind. 301, 23 N. E. 146.

[c] (Sup. 1859)

The question of intent in the case of an alleged fraudulent conveyance of property by a husband to a wife is one of fact for the jury.—*Holman v. Martin*, 12 Ind. 553.

[d] (Sup. 1864)

The question of intent to defraud creditors, based on the grantor's retention of property, where there is any evidence of good faith or consideration to repel the presumption of fraud, is one of fact for the jury.—*Maple v. Burnside*, 22 Ind. 139.

Whether a mortgage is given with a fraudulent intent is under the statute (1 Gav. & H. Rev. St. p. 353, § 21) a question of fact for the jury to determine.—*Id.*

[e] (Super. 1874)

Whether a mortgage is given with a fraudulent intent is a question of fact, to be determined by the court or jury trying the cause.—*O'Brien v. O'Brien*, Wils. 558.

[f] (Sup. 1875)

Under 1 Gav. & H. Rev. St. p. 353, § 21, providing that the question of fraudulent intent shall be deemed a question of fact, the question of fraudulent intent in making conveyance is not one of legal inference or presumption, but is one of fact, to be found from the facts and circumstances in the case.—*Pence v. Croan*, 51 Ind. 336.

[g] (Sup. 1877)

For a person to buy a title bond from another, knowing the latter is indebted by judg-

ment to a third person, is not necessarily fraudulent as towards the creditor. The question of fraudulent intent in fact is for the jury.—*Leasure v. Coburn*, 57 Ind. 274.

[h] (Sup. 1880)

A mortgage is not necessarily fraudulent because executed for a larger sum than is actually due from the mortgagor to the mortgagee. If the amount is materially larger than that due, this is merely a badge of fraud, and the question of fraud is one of fact for the jury.—*Goff v. Rogers*, 71 Ind. 459.

[i] (Sup. 1881)

Under 1 Rev. St. 1876, p. 506, § 21, providing that whether or not a conveyance of property shall be deemed fraudulent shall be a question of fact, and that no conveyance or charge shall be adjudged fraudulent as against creditors or purchasers solely on the ground that it was not founded on a valuable consideration, an instruction that "if defendant executed the conveyance alleged to be fraudulent, without any valuable or good consideration, and that, after the conveyance thereof, he did not have a sufficient amount of property unincumbered, subject to execution, to pay all his debts, and that he was indebted at the time and is indebted to the plaintiff, as alleged in the complaint, then you should find for the plaintiff," was erroneous, as invading the province of the jury.—*Wooters v. Osborn*, 77 Ind. 513.

[j] (Sup. 1881)

In view of 1 Rev. St. 1876, p. 506 (Rev. St. 1881, § 4924), declaring that the question of fraudulent intent shall be a question of fact, it was held that the cases would be rare in which it can be correctly stated that a chattel mortgage, without regard to extrinsic facts, is void on its face.—*Lockwood v. Harding*, 79 Ind. 129.

[k] (Sup. 1882)

A recorded mortgage on its face cannot be declared fraudulent and void as against creditors, but the fraud is a question for the jury under 1 Rev. St. 1876, providing that the question of fraudulent intent is a question of fact.—*McFadden v. Hopkins*, 81 Ind. 459.

[l] (Sup. 1884)

On a finding that a husband was indebted to his wife, that he had a conveyance made to her, that she never afterwards claimed the debt, and that he had sufficient property to pay all his debts, the court could say, as a matter of law, that the conveyance was not fraudulent.—*Secor v. Souder*, 95 Ind. 95.

[m] (Sup. 1891)

Where an insolvent debtor, on the day before making an assignment for benefit of creditors, gives mortgages to one or more of his creditors, the question of the bona fides of the mortgages is one of fact under Rev. St. 1881, § 4924, providing that "the question of fraudulent intent in all cases arising under the provisions of this act [one relating to fraudulent con-

veyances, etc.] shall be deemed a question of fact."—*Carnahan v. Schwab*, 127 Ind. 507, 26 N. E. 67.

[n] (App. 1891)

Where a debtor conveyed the personal property used in his business to one of his creditors in payment of his debt, and the creditor left the debtor in possession under an agreement to conduct the business for their joint benefit, the question whether the transfer was fraudulent is one of fact.—*South Branch Lumber Co. v. Stearns*, 2 Ind. App. 7, 28 N. E. 117.

FOR CASES FROM OTHER STATES.

SEE 24 CENT. DIG. Fraud. Conv. §§ 923-940.

See, also, 20 Cyc. pp. 803-808.

### § 309. Instructions.

Construction and effect of charge as a whole, see TRIAL, § 295.

Instructions invading province of jury, see TRIAL, § 194.

Requests for instructions, see TRIAL, § 255.

[a] (Sup. 1864)

A justice's judgment directed that a certain sum should be collected without appraisal. At the suggestion of the constable, who held the execution issued on the judgment, the debtor indorsed on it his consent that the constable should sell the property levied on without appraisal, which was done, and the execution creditor became the purchaser. Held, that an instruction that, before the jury could find that the judgment, execution, and sale thereon were fraudulent so as to confer no title on the purchaser at the sale, they must be satisfied that the purchaser confederated with the debtor to defraud other creditors of the debtor, was not erroneous.—*Stockwell v. Byrne*, 22 Ind. 6.

[b] (Sup. 1881)

In a suit to set aside a fraudulent conveyance, a charge that a conveyance is not to be deemed fraudulent solely upon the ground that it was made without consideration, while correct as an abstract proposition, was properly refused where it was not relevant to the case made by the evidence.—*Sherman v. Hogland*, 73 Ind. 472.

While the fact that actions are pending against a vendor is not of itself sufficient to overthrow a conveyance by him, yet such fact is proper for the consideration of the jury in determining the question of fraud, and their attention may be directed to it accordingly by an instruction.—Id.

[c] (Sup. 1883)

In an action by a husband and wife to enjoin the sale of land on an execution against the husband, it appeared that the husband inherited the land from his father, and that on partition the deed was made to the plaintiffs jointly. Held, that the court properly charged that the controlling question was whether such deed was or was not fraudulent as to the hus-

band's creditors, where such question was the only really debatable one.—*Sedgwick v. Tucker*, 90 Ind. 271.

In an action involving the question as to whether or not a certain deed was fraudulent as to creditors, it is not error to charge in effect that in such case fraud can never be presumed as an existing fact, in the absence of any evidence on the subject to which the charge of fraud has reference.—*Id.*

[d] (Sup. 1884)

Where, in an action to set aside a conveyance as fraudulent against a creditor, it was admitted that the debtor at the time the conveyance was made did not have any property subject to execution, an instruction that if the debtor conveyed the property for the purpose of defrauding his creditors, and the grantee accepted it for such purpose, the conveyance was void as against creditors, was not erroneous for failing to modify it by adding that the debtor must have had no other property subject to execution.—*Simpkins v. Smith*, 94 Ind. 470.

In a suit to set aside a conveyance by a debtor to his wife as fraudulent as against creditors, the wife claimed that her father gave her land, but conveyed it to her husband, who sold it and purchased land from a third person, taking the deed thereto in his own name, and sold that land and obtained the premises which he conveyed to her. *Held*, that an instruction that if the wife and husband agreed that the land claimed to have been given her by her father should be sold and the proceeds invested in land belonging to the third person for her, and if, in pursuance of the agreement, she joined in the conveyance of such land, and the proceeds were invested in lands belonging to the third person, and the title thereto was taken in the name of her husband without her consent, he held the lands in trust for her, was properly refused because it was immaterial how the land purchased from the third person was held, unless such holding was connected with the land in controversy.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 941-958.

See, also, 20 Cyc. pp. 809-813.

#### § 310. Verdict and findings.

[a] (Sup. 1878)

Where, in an action by an execution purchaser to recover possession of lands fraudulently conveyed by the judgment debtor, the jury renders a special verdict, in which it fails to find that at the time of the conveyance the debtor had no other property subject to execution, such purchaser is not entitled to a judgment on the verdict, since a special verdict must find all the facts necessary to support a judgment.—*Holman v. Elliott*, 65 Ind. 78.

[b] (Sup. 1881)

Where there is no request for a special verdict and the jury "find for the plaintiffs,"

and in addition thereto find the amount due each, and that the debtor's conveyances were fraudulent and void as against them and ought to be set aside, such verdict can only be regarded as a general finding in plaintiff's favor, and there is no ambiguity, uncertainty, or repugnancy which will prevent the rendition of a proper judgment thereon, or render it necessary to grant a venire de novo.—*Strong v. Taylor School Tp.*, 79 Ind. 208.

[c] (Sup. 1882)

Where the fact is found to be that the debtor's intention in making a conveyance was to insure the payment of as much of his indebtedness as possible, there is no fraud; and a conclusion of law that such a conveyance was fraudulent is a non sequitur.—*Jarvis v. Banta*, 83 Ind. 528.

[d] (Sup. 1884)

A special finding of facts where a fraudulent transfer is alleged need not find an intent to defraud, that being a conclusion of law from the facts found.—*Corbin v. Goddard*, 94 Ind. 419.

[e] (Sup. 1885)

Answers to interrogatories are inconsistent with a general verdict for plaintiff, in a suit to set aside conveyances as fraudulent, where they show that such fraud was not proved, as a general verdict implies that the fraud alleged was proved.—*Jewett v. Meech*, 101 Ind. 289.

[f] Where, in an action to set aside a conveyance as fraudulent, there is a special finding of fact, the fraudulent intent must be found, or the conveyance will not be set aside.—(Sup. 1889) *Citizens' Bank v. Bolen*, 121 Ind. 301, 23 N. E. 146; (1892) *Sickman v. Wilhelm*, 130 Ind. 480, 29 N. E. 908.

[g] (Sup. 1890)

In a suit to set aside a chattel mortgage as fraudulent, a special finding by the court which states some of the badges of fraud, but does not state as an ultimate fact that there was fraud, will not sustain a judgment for plaintiff.—*Fletcher v. Martin*, 126 Ind. 55, 25 N. E. 886.

[h] (Sup. 1891)

In an action to set aside a conveyance alleged to have been made in fraud of the grantor's creditors, where the court made special findings of facts, and stated conclusions of law thereon, a failure to find that the grantor had no property other than that alleged to have been fraudulently conveyed, out of which the creditors' claim might have been made at the time of the conveyance or of the trial, is fatal to a judgment in the creditors' favor.—*Hartlepp v. Whiteley*, 129 Ind. 576, 131 Ind. 543, 28 N. E. 535, 31 N. E. 203.

[i] (Sup. 1892)

In an action to set aside a fraudulent conveyance, a special verdict, which does not find

that the alleged fraudulent grantor had no property subject to execution at the time of the conveyance, is defective, and does not cure the complaint in which such an allegation is also wanting.—*Line v. State ex rel. Louder*, 131 Ind. 468, 30 N. E. 703.

[j] (Sup. 1892)

Where the court finds that a conveyance, at the time it was made, and at the time of the trial, operated to defraud the creditors of the grantor, this finding will be construed to mean that the grantor was insolvent from the date of the conveyance to the date of the trial.—*Crow v. Carver*, 133 Ind. 260, 32 N. E. 569.

[k] (Sup. 1892)

Where, in an action to set aside a conveyance as fraudulent, the trial court makes a special finding which does not state fraud as an ultimate fact, the action must fail.—*Morgan v. Worden*, 145 Ind. 600, 32 N. E. 783.

[l] In a suit to set aside a conveyance as fraudulent, there must be an express finding of fraud, and a finding of ultimate facts from which fraud may be inferred is not sufficient.—(Sup. 1894) *Phillips v. Kennedy*, 38 N. E. 410, 39 N. E. 147, 139 Ind. 419; (App. 1895) *Levi v. Bray*, 39 N. E. 754, 12 Ind. App. 9; (1895) *Holmes v. Henderson*, 40 N. E. 151, 12 Ind. App. 698; (1903) *State Bank v. Backus*, 67 N. E. 512, 160 Ind. 682.

[m] (App. 1895)

In an action to recover property from the purchaser of an alleged fraudulent vendee, plaintiffs alleged that the original vendee was insolvent at the time of the purchase; that he concealed his insolvency, intending not to pay for the property, and that defendant had knowledge of such fraudulent intent. The latter claimed to be a bona fide purchaser, and the jury found that the original purchaser was insolvent when he purchased, and that defendant was a bona fide purchaser, but disagreed as to the fraudulent intent of the first vendee. *Held* that, though the verdict was defective in not finding on the latter issue, the finding for defendant on his affirmative defense entitled him to a judgment.—*Waterbury v. Miller*, 41 N. E. 383, 13 Ind. App. 197.

[n] (Sup. 1876)

In a suit to set aside a conveyance of lands executed by the plaintiff to the defendant one paragraph asked such relief on the ground of fraud, specifically alleging the facts constituting such fraud, and the other on the ground that such conveyance should be treated as a mortgage to secure the payment of a debt due from the former to the latter. To this complaint the defendant answered the general denial and two special pleas; and on these special answers issue was formed by a reply of denial and a special plea. And the jury trying such cause found specifically the facts alleged in the first paragraph of the complaint and as to a portion of the allegations of the

special answers, but did not find as to the other allegations of the pleadings. *Held*, that such verdict was properly set aside, and a venire de novo granted, on motion therefor.—*Housworth v. Bloomhuff*, 54 Ind. 487.

[o] (Sup. 1891)

Where, in an action to set aside conveyances for fraud, the findings are silent on the subject of fraud, it will be presumed that none exists, and that none was proven.—*Parke County Coal Co. v. Terre Haute Paper Co.*, 26 N. E. 884, 129 Ind. 73.

[p] (Sup. 1893)

In an action by creditors to set aside a conveyance as fraudulent, where the pleadings put the grantor's indebtedness to them in issue, it is error for the court, on trial without a jury, to omit a finding of such indebtedness, though it is proved by uncontradicted evidence, since the burden of proof in such case is on plaintiffs, and failure to find on the question is equivalent to a finding against them.—*Elliott v. Pontius*, 35 N. E. 562, 36 N. E. 421, 136 Ind. 641.

[q] (Sup. 1896)

Where several creditors brought suit against several defendants to set aside alleged fraudulent conveyances, and the relief prayed for in the complaint was not that the lands of one of the alleged fraudulent grantors be subjected to the payment of a judgment or judgments against the other, a conclusion of law that the lands found to be fraudulently conveyed be subjected to the payment of the judgments mentioned in the complaint in the order of their priority was not invalid as subjecting the land of other defendants to the payment of the debts of one of them.—*Armstrong v. Dunn*, 41 N. E. 540, 143 Ind. 433.

[r] (Sup. 1897)

In an action to set aside conveyances by a decedent as fraudulent, and certain mortgage liens as without consideration, a finding that the deeds were invalid and the mortgagee had no interest is insufficient, without some finding concerning the invalidity of the lien.—*Galtine v. Brubaker*, 46 N. E. 903, 147 Ind. 458.

[s] (Sup. 1898)

A failure to find whether a mortgage was made with fraudulent intent, in an action to set aside such mortgage, does not make the findings defective, so as to require a venire de novo.—*Selz Schwab & Co. v. Mayer*, 51 N. E. 485, 151 Ind. 422.

As the burden of proving that a mortgage given to secure creditors is fraudulent is on the party attacking it, a failure to find a fraudulent intent is equivalent to a finding that there was none.—*Id.*

[t] (Sup. 1900)

Where fraud in a conveyance is essential to a recovery, it must be found as a fact, and a finding that property sold by an insolvent to

his surety on a note was sold for \$200 less than its value is not equivalent to a finding that such sale was fraudulent in fact.—*Owens v. Gascho*, 56 N. E. 224, 154 Ind. 225.

[u] (App. 1900)

In an action to set aside a conveyance of a debtor's property, as made with intent to defraud creditors, the jury must find as a fact the intent to defraud, and not simply facts and circumstances from which such intent might be inferred.—*Stout v. Price*, 24 Ind. App. 360, 55 N. E. 904, 56 N. E. 857.

[v] (App. 1904)

Where, in an action to set aside a deed to a daughter as fraudulent, the daughter answered by general denial, and by a separate paragraph alleged that the deed was executed to secure a debt owing to her by her father, and for no other purpose, as against complainants, it was not outside the issues for the court to find that the conveyance was executed to secure a valid debt, and was a prior lien, though such answer contained no prayer for the foreclosure of such lien.—*Clow v. Brown*, 72 N. E. 534, 37 Ind. App. 172.

[w] (App. 1905)

In an action to declare void a conveyance of real property and to subject it to a vendor's lien, failure of a special finding to show the value of the property is not prejudicial to defendant.—*Borror v. Carrier*, 34 Ind. App. 353, 73 N. E. 123.

[x] (App. 1905)

In a suit to set aside a mortgage as fraudulent, a finding that the mortgagor has been insolvent ever since the commencement of the action does not raise the presumption that his insolvency existed prior to that time and at the time of the execution of the mortgage, which was more than 17 months before the institution of suit.—*Dinius v. Lahr*, 74 N. E. 1033, 36 Ind. App. 425.

In a suit to set aside a mortgage as fraudulent, a finding that the mortgagee took the mortgage with full knowledge of the claims of creditors and of the fact that the same would render the mortgagor insolvent is not a finding that the execution of the mortgage, on the date thereof, left the mortgagor insolvent, and without property sufficient to pay plaintiff's judgment.—*Id.*

FOR CASES FROM OTHER STATES.

SEE 24 CENT. DIG. Fraud. Conv. §§ 959-961.

See, also, 20 Cyc. p. 814.

#### (J) JUDGMENT OR DECREE AND EXECUTION.

##### § 311. Judgment or decree.

Collateral attack, see JUDGMENT, § 522.

Conclusiveness, see JUDGMENT, §§ 634-749.

Conformity to prayer for relief, see JUDGMENT, § 252.

Merger and bar of causes and action and defenses, see JUDGMENT, §§ 540-633.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 963-975.

See, also, 20 Cyc. pp. 816-822.

##### § 312. — In general.

[a] (Sup. 1894)

In an action by creditors to set aside a fraudulent conveyance, and asking judgment for the amount of plaintiff's claims against the grantor, the court may enter a finding against defendants at one term of court, and assess damages and render the proper decree at a subsequent term.—*Doherty v. Holliday*, 137 Ind. 282, 32 N. E. 315, 36 N. E. 907.

[b] (Sup. 1899)

In an action to set aside, as fraudulent, a conveyance by husband to wife, it was not error to deny the latter's motion for judgment, where part of the property conveyed was subject to plaintiff's debt.—*Nelson v. Cottingham*, 52 N. E. 702, 152 Ind. 135.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 963-965, 967.

See, also, 20 Cyc. p. 816.

##### § 313. — As to property transferred.

[a] (Sup. 1884)

On complaint to set aside a deed as fraudulent, defendant answered that he took the deed in satisfaction of a bona fide mortgage, and plaintiff replied by general denial and allegation that the mortgage was in fraud of creditors; and both these and the issues on the complaint were found for plaintiff. *Held*, that a decree setting aside the deed and ordering a sale free from any claim of the grantee was proper.—*Hadley v. Hood*, 94 Ind. 119.

[b] (Sup. 1899)

Where defendant had fraudulently conveyed his property, it is not error for a court of equity, in which the conveyance is assailed by his creditors, to direct that the property be sold upon an order of sale instead of execution.—*McNally v. White*, 54 N. E. 794, 56 N. E. 214, 154 Ind. 163.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 963-970.

##### § 314. — Personal judgment.

[a] (Sup. 1889)

In an action by judgment creditors to set aside a mortgage as fraudulent and subject the mortgagor's property to plaintiffs' judgment, a personal judgment cannot be rendered against the mortgagee; nor can the property conveyed be ordered to be sold without relief from valuation or appraisement law, under Rev. St.

1881, § 743, where there is no finding of fraud.—*Levy v. Chittenden*, 120 Ind. 37, 22 N. E. 92.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. § 972.

See, also, 20 Cyc. p. 821.

**§ 315. — Construction and operation.**

[a] (Sup. 1830)

Where the purchaser of real estate at sheriff's sale obtains a decree setting aside a deed which had been made to defraud the judgment creditor, such decree does not vest the absolute title in the complainant.—*Frakes v. Brown*, 2 Blackf. 295.

[b] (Sup. 1833)

Decedent, owning lands lying partly in the counties of S. and O., conveyed the same to his sons in fraud of plaintiffs, his creditors, who subsequently obtained judgments in the county of S., and, after decedent's death, transcripts of the judgments were filed in the county of O. Subsequently, by a judgment in the county of S., said judgments were revived, and the deed made by deceased to his sons was set aside as fraudulent, and the land was decreed subject to and ordered to be sold for the payment of said judgments. *Held*, that whether the filing of the transcripts created a lien upon the lands in the county of O. was immaterial, for the reason that the decree setting aside the deed and reviving the judgments created a specific lien and incumbrance on the land in both counties.—*Dunning v. Seward*, 90 Ind. 63.

[c] (Sup. 1897)

In a suit to set aside for fraud a married woman's deed, in which her husband joined, the latter's want of good faith is immaterial; and hence the action of the court in striking out his answer for failure to submit to examination before trial, and in adjudging the complaint confessed as to him, does not affect the validity of the deed as between the wife and her grantee.—*Working v. Garn*, 47 N. E. 951, 143 Ind. 546.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Fraud. Conv. §§ 973-975.

See, also, 20 Cyc. p. 821.

**§ 316. Execution and enforcement of judgment or decree in general.**

[a] (Sup. 1843)

A purchaser of land at a sheriff's sale, under a judgment against a person who had conveyed the land to defraud his creditors, stands in the place of a creditor of the fraudulent grantor, and has the same rights.—*Scott v. Purcell*, 7 Blackf. 66, 39 Am. Dec. 453.

[b] (Sup. 1850)

A verdict that an attachment defendant, at the time the writ issued, had conveyed his property with intent to defraud his creditors, will not authorize a sale without appraisement, unless an order of the court to that effect be made.—*Shirk v. Wilson*, 13 Ind. 129.

[c] (Sup. 1871)

2 Gav. & H. St. p. 244, § 456, provides that property conveyed by a debtor with intent to hinder or delay creditors shall be sold without appraisement; and 2 Gav. & H. St. p. 650, § 15, provides that, upon any instrument of writing containing a promise to pay money without relief from valuation laws, judgment shall be rendered and execution had accordingly. Judgment was rendered against the maker of promissory notes, in which appraisement was waived; and the judgment creditors brought suit to reach the proceeds of property conveyed by the judgment debtor in fraud of his creditors, and disposed of by the fraudulent grantee. In this latter proceeding, personal judgment was rendered against the grantee for the value of the goods. *Held*, that a sale under execution on this latter judgment, without appraisement, was erroneous; the grantee not being a party to the original judgments against the debtor, and the statute (2 Gav. & H. St. p. 244, § 456) applying only to cases in which the specific property conveyed by the debtor was seized on execution.—*Whitehall v. Crawford*, 37 Ind. 147.

[d] (Sup. 1875)

A judgment was rendered in the court of common pleas, and afterwards the circuit court, at the suit of the administrator of the estate of the judgment-plaintiff, set aside as fraudulent and void certain conveyances of real estate of the judgment-defendant, adjudged that the title to said real estate was in said judgment-defendant, and that said real estate was subject to the payment of said judgment of the common pleas, and ordered that it be sold to pay said judgment. *Held* that, to render valid the sale of said real estate by the sheriff, it was not necessary that such sale should be made on an execution issued upon the judgment of the court of common pleas, but it was proper for said sale to be made on an order therefor issued upon said judgment of the circuit court.—*Vandever v. Hardy*, 51 Ind. 490.

[e] (Sup. 1881)

By the express provision of Code 1852, § 456, property conveyed by a debtor with intent to hinder, delay, or defraud his creditors is to be sold without appraisement.—*Sherman v. Hogland*, 73 Ind. 472; *Mugge v. Helgemeier*, 81 Ind. 120.

[f] (Sup. 1881)

Code 1852, § 456, providing that property conveyed by a debtor with intent to hinder, delay, or defraud his creditors shall be sold on execution without appraisements, applies to property to be conveyed to another and which ought to have been conveyed to himself.—*Mugge v. Helgemeier*, 81 Ind. 120.

When a judgment is rendered upon a contract waiving appraisement, or where on account of the nature of the cause of action an appraisement is not allowed, it must be so ex-

pressed in order that the execution may so issue.—Id.

Code 1852, § 456, provides that property conveyed by a debtor with intent to hinder, delay, or defraud creditors shall be sold without appraisement, and section 381 provides that, when a judgment is to be executed without relief from appraisement, it shall be so stated in the judgment. *Held* that, where the judgment whereby a fraudulent conveyance was set aside and the property declared subject to execution was not the judgment by virtue of which a sale was made, it was not necessary that the judgment merely finding a fraudulent conveyance should have ordered a sale without appraisement in order to authorize the same.—Id.

[g] (Sup. 1893)

Where a judgment is obtained in an action for breach of warranty, and execution issues thereon, and land conveyed by the judgment debtor is sold before an order has been made decreeing such transfer to be fraudulent and void, failure to appraise the rents and profits before the sale on execution is not cured by Rev. St. 1881, § 743, providing that property conveyed by a debtor with intent to delay or defraud his creditors may be sold without appraisal.—*Milburn v. Phillips*, 136 Ind. 680, 34 N. E. 983, 36 N. E. 360.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 976-978.

See, also, 20 Cyc. p. 822.

### § 317. Sales and conveyances under order of court.

Provisions in judgment, see ante, § 313.

[a] (Sup. 1888)

Under Rev. St. § 2508, providing that where the inchoate interest of a married woman is not directed by the judgment to be sold, as well as the interest of her husband, her interest shall become absolute, and vest as on death of her husband, when a deed of husband and wife has been set aside as in fraud of creditors, and a sale of the husband's interest in the property ordered, in a proceeding to which the wife was not a party, she is entitled to recover her third interest in the property of the husband so sold, in a suit against the purchasers, and the purchasers are not entitled to set up that her interest is held by the grantee in the fraudulent deed, who is not a party to the action.—*Rupe v. Hadley*, 113 Ind. 416, 16 N. E. 391.

It is no defense to an action by a wife to recover her interest from the purchasers of real estate judicially sold as her husband's property, after a deed to the property by the husband and wife to a third person had been set aside and declared in fraud of rights of the husband's creditors, that the deed which was set aside was executed for value to one who sold to an innocent purchaser for value, and that the last

purchaser was not a party to the suit to set aside said deed.—Id.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 979, 980.

See, also, 20 Cyc. p. 823.

### (K) DISPOSITION OF PROPERTY OR PROCEEDS.

Right of debtor to claim portion of proceeds as exempt, see ante, § 51.

Right of debtor to exemptions as to property fraudulently conveyed after conveyance has been set aside, see EXEMPTIONS, § 59.

### § 318. Subjection to claims of creditors in general.

[a] (Sup. 1835)

Where a conveyance of real estate executed by an intestate in his lifetime to defraud his creditors is set aside after his death and the land sold to pay the debts, neither the administrator of the estate nor the probate court has any control over the proceeds of the sale, but the creditor whose bill is first filed to set aside the fraudulent conveyance, executed before any judgment against the intestate, is entitled to priority of payment over the other creditors.—*Bank of United States v. Burke*, 4 Blackf. 141.

[b] (Sup. 1851)

Where a decree is rendered in equity, setting aside a deceased's debtor's conveyance for fraud against creditors and ordering a sale of the land, the entire proceeds of the sale should be ordered to be brought into court to be distributed among creditors, should there be such in the course of administration; and hence a decree directing the sheriff to bring into court only so much of the proceeds as would satisfy the claims of complainants, and to pay the surplus to the debtor's heirs, is erroneous.—*McNaughtin v. Lamb*, 2 Ind. 642.

[c] (Sup. 1883)

When, upon the complaint of one or more creditors of an estate, fraudulent conveyances made by the deceased are set aside, the creditors should all share therein.—*Bottorff v. Covert*, 90 Ind. 508.

[d] (Sup. 1884)

After a fraudulent grantee had mortgaged the land to a bona fide mortgagee, a judgment creditor obtained a decree setting aside the grantee's deed, from which decree an appeal was taken. After the decree, but prior to the appeal, the grantee was adjudged bankrupt and the land was sold, and thereafter the mortgage was foreclosed and bid in by the mortgagee; the purchaser at the bankrupt sale redeeming and taking a conveyance by the bankrupt and his grantor. *Held*, in a suit by the purchaser to quiet title against the judgment creditor, that after the satisfaction of the mortgage de-

defendant's judgment must be satisfied before plaintiff was entitled to any further decree.—*Hines v. Dresher*, 93 Ind. 551.

[e] (*Sup.* 1894)

Creditors should all be permitted to participate, upon due application, in the proceeds of property fraudulently conveyed.—*Doherty v. Holliday*, 32 N. E. 315, 36 N. E. 907, 137 Ind. 282.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. § 981.

See, also, 20 Cyc. p. 824.

§ 321. Priorities of creditors.

[a] (*Sup.* 1836)

Where a conveyance of real estate executed by an intestate in his lifetime to defraud his creditors is set aside after his death and the land sold to pay the debts, neither the administrator of the estate nor the probate court has any control over the proceeds of the sale, but the creditor whose bill is first filed to set aside the fraudulent conveyance, executed before any judgment against the intestate, is entitled to priority of payment over the other creditors.—*Bank of United States v. Burke*, 4 Blackf. 141.

[b] (*Sup.* 1833)

The proceeds of property a transfer of which has been declared void as to creditors are distributable among all the creditors of the grantor according to their legal priorities, without preference to the party first moving to set aside the transfer.—*Bottorff v. Covert*, 90 Ind. 508.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 985–988.

(L) REVIEW.

Appellate jurisdiction as dependent on amount or value in controversy, see COURTS, § 220 (14).

Decisions reviewable, see APPEAL AND ERROR, § 80.

§ 325. Presentation and reservation in lower court of grounds of review.

[a] (*Sup.* 1838)

Failure of a complaint to set aside a fraudulent conveyance to allege that the debtor had no other property subject to execution at the time the action was commenced may be raised for the first time in the supreme court.—*Taylor v. Johnson*, 113 Ind. 164, 15 N. E. 238.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 903, 904.

See, also, 20 Cyc. p. 833.

§ 327. Scope and extent of review.

[a] (*Sup.* 1836)

Under Rev. St. 1881, § 4911, a sale without delivery is presumed to be fraudulent as to

creditors; but, where there is evidence tending to support a finding of the jury to the contrary, the case will not be reversed merely because there is also contradictory evidence.—*Seavey v. Walker*, 108 Ind. 78, 9 N. E. 347.

[b] (*Sup.* 1839)

Since, by statute (Rev. St. 1881, § 4924), the question of fraud is a question of fact, a decision of the bona fides of the transaction must be upheld.—*Purple v. Farrington*, 21 N. E. 543, 119 Ind. 164, 4 L. R. A. 535.

[c] (*App.* 1892)

Since, by statute, fraud is made a question of fact for the court or jury trying the cause, the appellate court will not weigh the evidence and determine the preponderance on appeal in an action involving the question whether a sale was made with intent to defraud creditors.—*Eaken v. Thompson*, 4 Ind. App. 393, 30 N. E. 1114.

[d] (*Sup.* 1893)

Where several creditors have joined in a suit to set aside a mortgage of their debtor, and award his assignee possession of the mortgaged property, the court's failure to find the validity of plaintiffs' claims on the undisputed evidence is harmless, where the mortgage is upheld, since, under the rule that causes of action joined must affect all the parties, (*Burns' Rev. St.* §§ 279, 281,) no several judgments could be rendered for plaintiffs on their claims, the basis of the joinder being eliminated.—*Elliott v. Pontius*, 136 Ind. 641, 35 N. E. 562, 36 N. E. 421.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 990–1002.

See, also, 20 Cyc. p. 833.

IV. CRIMINAL RESPONSIBILITY.

§ 331. Criminal prosecutions.

Following language of statute in indictment or information, see INDICTMENT AND INFORMATION, § 110.

[a] (*Sup.* 1834)

An indictment under Rev. St. 1881, § 2156, punishing one who is a party to a conveyance in fraud of creditors, which states that the accused was a party to the conveyance to defraud, and that such conveyance was corruptly executed for such purpose, sufficiently describes the offense, and it is not necessary to show that the conveyance was actually fraudulent.—*State v. Miller*, 98 Ind. 70.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Fraud. Conv. §§ 1019–1024.

See, also, 20 Cyc. pp. 837–840.

FRAUDULENT MARRIAGE.

To escape prosecution for bastardy or seduction, penalty for abandonment of wife by husband, see HUSBAND AND WIFE, § 305½.

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**FRAUDULENT REPRESENTATIONS.***See—*

Affecting right to specific performance. SPECIFIC PERFORMANCE, § 53.

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**COLLEGES AND UNIVERSITIES**, § 6.Corporation, rights and liabilities of officers and agents. **CORPORATIONS**, § 312.Rights and liabilities of stockholders. **CORPORATIONS**, § 182.Special fund of insurance companies. **INSURANCE**, § 58.**RELIGIOUS SOCIETIES**, §§ 15-25.**Public funds.**

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Accounting for by county officers. **COUNTIES**, § 94.By municipal officers. **MUNICIPAL CORPORATIONS**, § 172.By town officers. **TOWNS**, § 32.Appropriation for bridges. **BRIDGES**, § 11.**COUNTIES**, §§ 149-196.Custody and care of by officers. **OFFICERS**, § 111.Deposits of. **DEPOSITARIES**, §§ 5, 6.

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Element of damages for death caused by wrongful act. **DEATH**, § 84.Indigent soldiers, sailors, or marines. **ARMY AND NAVY**, § 53.

Liability for funeral expenses of paupers.

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Of estate of decedent. EXECUTORS AND ADMINISTRATORS, § 214.

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Assignability. ASSIGNMENTS, §§ 6-8.

Restrictions against perpetuities. PERPETUITIES, § 4.

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Sales for future delivery, see GAMING, § 12.

## FUTURE SUPPORT.

Consideration for conveyance or other transfer, sufficiency as to creditors and subsequent purchasers, see FRAUDULENT CONVEYANCES, § 80.

## GAMBLING.

See GAMING.

# GAME.

### Scope-Note.

[INCLUDES wild animals pursued for sport or profit; regulations for their preservation; and nature and incidents of rights of taking game.

[EXCLUDES regulations relating to animals in general, and the offense of cruelty to animals (see *Animals*); and hunting on Sunday (see *Sunday*). For complete list of matters excluded, see cross-references, post.]

### Analysis.

- § 4. Constitutional and statutory provisions.
- § 7. Offenses.

### Cross-References.

See—

FISH.

Hunting on Sunday. SUNDAY, § 29.

Regulations constituting exercise of power of eminent domain. EMINENT DOMAIN, § 2.

### § 4. Constitutional and statutory provisions.

Deprivation of property without due process of law, see CONSTITUTIONAL LAW, § 278.

Subjects and titles of acts, see STATUTES, § 107.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Game. § 3.

See, also, 19 Cyc. p. 1010; note, 3 L. R. A. (N. S.) 163; note, 42 Am. St. Rep. 138.

### § 7. Offenses.

[a] (Sup. 1900)

Where defendant came into possession of a quail on the 30th day of December, and re-

tained it in his possession until February 5th, he is liable to punishment therefor under Burns' Rev. St. 1894, § 2209 (Horner's Rev. St. § 2107), providing that whoever has in his possession any quails from the 1st of January of any year to November 10th of the same year shall be fined, etc.—Smith v. State, 58 N. E. 1044, 155 Ind. 611, 51 L. R. A. 404.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Game, §§ 6, 7.

See, also, 19 Cyc. pp. 1008-1016.

## GAMES.

On Sunday, see SUNDAY, § 6.

# GAMING.

## *Scope-Note.*

[INCLUDES wagers and other agreements to risk money or other property on the result of a contest or the happening of any uncertain event; nature, requisites, validity, incidents, construction, operation, and effect of such agreements in general; rights, liabilities, and remedies of the parties; and unlawfully betting, playing games, keeping or frequenting houses or other places for gaming, as public offenses, and liability therefor, civil and criminal.

[EXCLUDES wager policies of insurance (see *Insurance*); lotteries (see *Lotteries*); and gambling on Sunday (see *Sunday*). For complete list of matters excluded, see cross-references, post.]

## *Analysis.*

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- § 1. Wagers in general.
- § 2. What law governs.
- § 3. Constitutional and statutory provisions.
- § 5. Subject-matter and interest of parties therein in general.
- § 6. Games, sports, and contests.
- § 7. Prizes or premiums.
- § 8. Subscriptions or entrance fees.
- § 9. Disposition of money or property by chance.
- § 10. Speculative transactions and dealings.
- § 11. — In general.
- § 12. — Sales for future delivery.
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#### (B) RIGHTS AND REMEDIES OF PARTIES.

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- § 36. — Rights and liabilities in general.
- § 40. Actions.
- § 42. — Grounds of action.
- § 45. — Time to sue, and limitations.
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- § 48. — Pleading.
- § 50. — Trial, judgment, and review.

### II. Penalties and Forfeitures.

- § 52. Constitutional and statutory provisions.
- § 56. Persons liable for penalties.
- § 58. Property subject to forfeiture.

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**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

## II. Penalties and Forfeitures—Continued.

- § 60. Searches and seizures.
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## III. Criminal Responsibility.

### (A) OFFENSES.

- § 62. Nature of offense of gaming.
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- § 64. Elements of criminal gaming.
- § 65. — Intent.
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- § 92. — Ownership and use of house or place.
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### Cross-References.

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Violation of gaming laws as ground for dissolution of corporation. CORPORATIONS, § 597.

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**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

## I. GAMBLING CONTRACTS AND TRANSACTIONS.

### (A) NATURE AND VALIDITY.

#### § 1. Wagers in general.

[a] (Sup. 1851)

By Rev. St. 1843, p. 593, all wagering contracts are declared void.—*Parsons v. State*, 2 Ind. 499.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, § 1.

See, also, 20 Cyc. pp. 921, 933, 934; note, 18 L. R. A. 859; note, 37 Am. St. Rep. 697.

#### § 2. What law governs.

[a] (Sup. 1839)

Rev. St. 1831, § 4950, which makes void all notes, bills, etc., the whole or any part of the consideration of which is for money or other valuable thing won by wager, or money lent at the time of such wager for the purpose of being wagered, does not apply to notes executed and payable in New York in pursuance of a transaction engaged in and consummated there, but such notes are governed by the laws of New York.—*Sondheim v. Gilbert*, 117 Ind. 71, 18 N. E. 687, 10 Am. St. Rep. 23, 5 L. R. A. 432.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, § 2.

See, also, 20 Cyc. p. 923; note, 64 L. R. A. 160.

#### § 3. Constitutional and statutory provisions.

Criminal responsibility, see post, § 63.

Subjects and titles of acts, see STATUTES, § 118.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, § 3.

See, also, 20 Cyc. p. 922.

#### § 5. Subject-matter and interest of parties therein in general.

[a] A wager or bet made between parties on the result of an election is void.—(Sup. 1858) *Frybarger v. Simpson*, 11 Ind. 59; (1859) *Hizer v. State*, 12 Ind. 330; (1859) *Worthington v. Black*, 13 Ind. 344.

[b] (Sup. 1859)

Defendant bought a hat on an agreement that he should pay for it when B. (who was at that time candidate for governor) should be defeated. *Held*, that the contract was a wager, and had reference to the election at which B. was running for governor.—*Hizer v. State*, 12 Ind. 330.

[c] (Sup. 1860)

A note, payable if "James Buchanan is the next president," is illegal.—*Nudd v. Burnett*, 14 Ind. 25.

[d] (Sup. 1879)

A transaction by which plaintiff delivered to defendant a wagon valued at \$120, for which defendant agreed to pay plaintiff \$5 and the further sum of \$235 in the event of Tilden's election, was a wagering contract, and therefore void under 2 Rev. St. 1876, p. 468, § 28.—*Davis v. Leonard*, 69 Ind. 213.

[e] (Sup. 1833)

A contract to pay a sum of money on condition that the payee do not marry within two years, and, if he do, then to pay a certain sum per day during the time he shall remain single, is a wager on the probability of marriage, and is void.—*Chalfant v. Payton*, 91 Ind. 202, 46 Am. Rep. 586.

[f] (Sup. 1833)

An agreement to pay a certain sum of money to the payee by a certain time on his marriage to a certain lady between certain dates, provided he gave the promisors "the exclusive right to carry marriage benefit insurance on him" and the lady, is void as a wagering contract.—*James v. Jellison*, 94 Ind. 292, 48 Am. Rep. 151.

[g] (Sup. 1890)

A transaction whereby 10 bushels of oats, of the actual value of 30 or 40 cents a bushel, are delivered by one party to the other, upon an agreement that the party receiving the oats should execute his note for \$100, the party furnishing the oats agreeing in turn to sell 20 bushels of oats to be delivered by the maker of the note at the price of \$10 per bushel, both parties having full knowledge of the actual value of the oats, is a wagering contract, and void as between the parties.—*Schmueckle v. Waters*, 125 Ind. 265, 25 N. E. 231.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, §§ 5-15.

#### § 6. Games, sports, and contests.

[a] (Sup. 1903)

A wrestling match is a game within the meaning of Burns' Rev. St. 1901, § 6076, providing that a person may, within six months, recover money or other valuable things paid on a bet on a game, and therefore money lost and paid by virtue of a bet on a wrestling match can be recovered.—*Desgain v. Wessner*, 67 N. E. 991, 161 Ind. 205.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, §§ 12-14.

#### § 7. Prizes or premiums.

[a] (Sup. 1878)

To offer to pay a premium to the owner of the horse that shall "make the quickest time" is not against public policy as a wager or bet, and such owner may maintain an action to recover such premium.—*Alvord v. Smith*, 63 Ind. 58.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, § 16.

See, also, 20 Cyc. p. 924.

**§ 8. Subscriptions or entrance fees.**

[a] (Sup. 1878)

In an action by a driving park association to recover on subscriptions given for the purpose of assisting in the payment of premiums offered for certain horse races which were to take place in the park, an answer alleging that plaintiff was organized for an unlawful purpose, viz. the purchase of ground for horse racing "and other purposes," or to enable plaintiff to sell pools on horse races, and that the party who had obtained the subscription had misrepresented the contents of the subscription paper and the extent of the liability to be incurred by signing the same, was insufficient.—Mullen v. Beech Grove Driving Park, 64 Ind. 202.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, § 17.

See, also, 20 Cyc. p. 924.

**§ 9. Disposition of money or property by chance.**

[a] (Sup. 1858)

Schemes for the distribution of property to be determined by chance are unlawful.—Swain v. Russell, 10 Ind. 438.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. § 18.

**§ 10. Speculative transactions and dealings.**

Rights and liabilities of brokers, see post, §§ 35, 36.

Rights and remedies of parties, see post, §§ 31-34.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, §§ 19-27.

See, also, 20 Cyc. pp. 926-931.

**§ 11. — In general.**

[a] (Sup. 1865)

The mere fact that a person may not have in his possession, and has not attempted to acquire possession of, a particular commodity which he undertakes to sell, deliverable at a future time, will not render illegal a contract made by him to sell and deliver the article. He is bound by his contract, and must deliver the property or be subject to the consequence of a nondelivery.—Shipp v. Bowen, 25 Ind. 44.

[b] (Sup. 1881)

Where the defense to a note is that it was given to plaintiff, a broker, to purchase wheat, in pursuance of a scheme or combination between defendant and others to corner the market, but it does not appear that plaintiff was a party to the combination, the plaintiff is entitled to recover.—Wright v. Crabbs, 78 Ind. 487.

[c] (App. 1894)

Where there is evidence that defendant proposed to his cousin that they should buy some wheat; that they bought, through reputa-

ble members of the Chicago Board of Trade, a certain quantity, which was delivered to them in the shape of warehouse receipts; that actual delivery on demand was intended by all parties; that they could have got the wheat on demand; that they carried it awhile on margin with said dealers; that wheat depreciated, and they closed out at a loss, which was all paid by said cousin, defendant giving him the note in suit in settlement of his share,—a finding that the note was not founded on a gambling consideration will not be reversed.—Fisher v. Fisher, 8 Ind. App. 665, 36 N. E. 206.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, §§ 19-21, 23, 26.

**§ 12. — Sales for future delivery.**

[a] (Sup. 1888)

Where any commodity is bought for future delivery, without regard to the form of the contract, if the parties mutually understand and intend that the purchaser shall pay for, and the seller shall deliver, the commodity sold at the maturity of the contract, the transaction is legal and valid; and the fact that the purchaser is required to deposit a margin, and to increase the same at any time the market may require it, to secure the payment of the purchase price at maturity, or that the seller shall deposit a margin, and increase the same like the purchaser, to secure the delivery of the commodity sold at maturity, does not vitiate such contract.—Fisher v. Fisher, 15 N. E. 832, 113 Ind. 474.

[b] (Sup. 1889)

A contract for the sale and future delivery of a commodity of a designated kind, which the seller does not own and which has at the time no actual existence, but which may be supplied by purchase in the market at the proper time, is a valid contract, provided it is the intention of the parties or one of them, when the contract was made, that the commodity shall actually be procured by the seller and supplied to the purchaser at or before the maturity of the agreement.—Sondheim v. Gilbert, 18 N. E. 687, 117 Ind. 71, 5 L. R. A. 432, 10 Am. St. Rep. 23.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, § 22.

See, also, 20 Cyc. p. 926; note, 1 Am. St. Rep. 752.

**§ 13. — Options.**

[a] (Sup. 1889)

It is a good defense to a note, sued on by the payee, that it was given to reimburse plaintiff for defendant's share of margins advanced by plaintiff upon an option contract in grain, entered into by plaintiff and defendant jointly, without any intention of paying for the grain or having it delivered.—Davis v. Davis, 119 Ind. 511, 21 N. E. 1112.

## [b] (Sup. 1897)

Option deals, where it is mutually understood and intended by both buyer and seller that the grain purported to be purchased shall not be delivered, where in fact the seller has no grain to deliver, and where settlements at the time fixed for delivery are to be made upon the market value of such cereals at that time, being understood by the parties to be a speculation wholly on chances, are against public policy, and therefore illegal.—*Pearce v. Dill*, 48 N. E. 788, 149 Ind. 136.

## [c] (Sup. 1904)

A manufacturer in September, 1898, contracted with brokers that the latter should take orders for hardware at specified prices on commission to be paid by the manufacturer; the hardware to be shipped direct to the buyer. In April, 1899, the brokers took an order from plaintiff for a bill of goods at the prices fixed in the contract between the manufacturer and broker, which order was accepted by the manufacturer. *Held*, that the contract of sale thus made through the broker did not violate a statute prohibiting contracts for options to sell or buy commodities at a future time, etc.—*Tuthill Spring Co. v. Holliday*, 72 N. E. 872, 164 Ind. 13.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, § 24.

See, also, 20 Cyc. p. 931.

#### § 14. — Agreements for payment of differences.

## [a] (Sup. 1884)

Contracts of sale that do not contemplate the actual bona fide delivery of the property by the seller, nor the payment by the buyer, but are intended to be settled by paying the difference in price at some future time, are gambling contracts.—*Whitesides v. Hunt*, 97 Ind. 191, 49 Am. Rep. 441.

## [b] (Sup. 1889)

A contract for the sale of a commodity for future delivery is valid if the parties intend a future delivery; but invalid if none is contemplated, but only a payment of the difference between the contract and the market price.—*Sondheim v. Gilbert*, 18 N. E. 687, 117 Ind. 71, 5 L. R. A. 432, 10 Am. St. Rep. 23.

## [c] (Sup. 1889)

Where a commodity is bought for future delivery, no matter what the contract is, the law regards the substance, and not the shadow, and, if the parties mutually understood and intended that the purchaser should pay for, and the seller should deliver, the commodity at the maturity of the contract, it is a legal and valid transaction, and the fact that the purchaser is required to deposit a margin, and increase the same at any time the market requires it, in order to secure the payment at maturity, or that the seller shall deposit a margin, and increase the same like the purchaser, in order to secure the delivery at maturity,

does not vitiate the contract. But if, at the time of the contract, it is mutually understood and intended by all the parties, whether expressed or not, that the commodity said to be sold was not to be paid for, nor to be delivered, but the contract was to be settled and adjusted by the payment of difference in price, if the price should decline, the purchaser paying the difference. If it should rise, the seller paying the advance, the contract price being the basis upon which to calculate a difference. In such case it would be a gambling contract, and void.—*Davis v. Davis*, 21 N. E. 1112, 119 Ind. 511.

## [d] (App. 1895)

It is a good defense to a note that it was given for the profits arising out of the purchase and sale of grain by the maker as plaintiff's broker, it being understood between them that none of the wheat should be delivered, but that the profits or losses should be determined by the fluctuating market prices, and that the maker should be at liberty, without consulting the payee, to deal with such persons as he might see fit.—*Nave v. Wilson*, 12 Ind. App. 38, 38 N. E. 876.

## [e] (Sup. 1905)

Contracts for the purchase and sale of commodities not to be delivered, but only to be performed, by advancing and paying differences are void at common law.—*Western Union Tel. Co. v. State ex rel. Hammond Elevator Co.*, 76 N. E. 100, 165 Ind. 492, 3 L. R. A. (N. S.) 153.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, §§ 25, 26.

See, also, 20 Cyc. p. 929; note, 98 C. C. A. 368.

#### § 17. Contracts in furtherance of gaming in general.

Constitutionality of law as to sufficiency of evidence that building was rented for gaming, see CRIMINAL LAW, § 732.

## [a] (Sup. 1842)

Two persons made a bet of goods of the value of \$100 on the result of a presidential election, and each executed his promissory note to a merchant for that sum; the payee, with notice of the facts, agreeing to furnish the goods to the winner. The loser was to pay his note, and the winner's was to be void. After the election, a suit on the note given by the loser was brought by an assignee. *Held* that, though the goods had been delivered to the winner by the payee of the note, the suit could not be sustained; the consideration of the note being illegal.—*Duncan v. Cox*, 6 Blackf. 270.

## [b] (Sup. 1858)

The sale of a race horse, racing being illegal, is a good consideration for a note for the price, although the payee knows the maker buys the horse to run him for a wager in a race.—*Cummings v. Henry*, 10 Ind. 109.

[c] (Sup. 1860)

A. and B. owed C. for goods sold to both, for which he held their notes. Without C.'s knowledge, they bet on an election as to who should pay the debt. *Held*, that C.'s right of action was not thereby affected.—*Maulsby v. Wolf*, 14 Ind. 457.

[d] (Sup. 1865)

A contract for the sale of a billiard table is not so illegal as to deprive the seller of his right to recover the purchase price, though the buyer informed him that he was buying it for the purpose of setting it up in his saloon for his customers to play on for the liquor.—*Bickel v. Sheets*, 24 Ind. 1.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming. §§ 29-35.

See, also, 20 Cyc. pp. 934, 935.

### § 18. Loans for gambling purposes.

[a] (Sup. 1890)

Mere knowledge, on the part of a person loaning money, that the borrower intends to use it by engaging in the purchase of options on grains in the market of another state, or investing it in wagering or gambling contracts, will not defeat a recovery.—*Jackson v. City Nat. Bank of Goshen*, 125 Ind. 347, 25 N. E. 430, 9 L. R. A. 657.

[b] (Sup. 1891)

It is a good defense on a note that the note sued on was given for money borrowed to be used by the parties jointly in gambling contracts, and in paying losses sustained on account of such contracts.—*Plank v. Jackson*, 128 Ind. 424, 26 N. E. 568, 27 N. E. 1117.

Rev. St. 1881, § 4950, which makes void notes given "for repaying money lent at the time of such wager for the purpose of being wagered," does not apply to a note given for money borrowed and used for the purpose of future gambling in wheat, where the lender had no interest in the gambling transactions, though he knew that the borrower intended to engage in them.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming. §§ 36-38.

See, also, 20 Cyc. pp. 939, 940; note, 1 Am. St. Rep. 302.

### § 19. Obligations and securities for gambling considerations.

Estoppel to deny validity of note, see ESTOPPEL, § 86.

[a] (Sup. 1889)

The statutes of New York do not render void merchantable notes executed in consideration of money which was to be used in gambling speculations on the stock market, and the statutes of Indiana indicate such a coincidence in the policy of both states as that the courts will not hesitate to enforce the liability of a maker of a note, executed in order to obtain

money with which to purchase options and in the hands of an innocent holder.—*Sondheim v. Gilbert*, 18 N. E. 687, 117 Ind. 71, 5 L. R. A. 432, 10 Am. St. Rep. 23.

[b] (App. 1901)

Under Burns' Rev. St. 1894, § 2181, prohibiting the keeping of any gambling apparatus for the purpose of gaming, the answer in a suit on notes, setting up that the consideration therefor was a slot machine, which could be used for no other purpose but gambling, was not demurrable.—*Barnhart v. Goldstein*, 59 N. E. 1067, 27 Ind. App. 101.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming. §§ 39-44.

See, also, 20 Cyc. pp. 935-937.

### § 21. Loans to pay losses.

[a] (Sup. 1891)

Mere knowledge on the part of a lender that the borrower intends to use the money to pay a debt which the borrower is under no legal obligation to pay by reason of its growing out of a gambling or unlawful contract does not render a note given for such money so loaned void.—*Plank v. Jackson*, 26 N. E. 568, 27 N. E. 1117, 128 Ind. 424.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming. §§ 47, 48.

See, also, 20 Cyc. p. 940.

### (B) RIGHTS AND REMEDIES OF PARTIES.

Right of parties winning money to claim benefit of exemption laws, see EXEMPTIONS, § 62.

### § 22. Parties to bet or game.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming. §§ 49-61.

See, also, 20 Cyc. pp. 941-951.

### § 23. — In general.

[a] (Sup. 1859)

The contingency of a bet based on the result of an election is determined when the popular vote is cast, though perfect evidence of the result, as shown by the official count, cannot be had until later.—*Hizer v. State*, 12 Ind. 330.

[b] (App. 1895)

Where the judges in charge of the races at a county fair, acting in good faith, postpone a horse race until the next day, and the riders, under the belief that the starting signal was given, or in obedience to the clamor of the bystanders, run the race, the winner, if at the time aware of the postponement, cannot recover the premium.—*Malke v. Daviess County A. M. M. & I. Ass'n*, 12 Ind. App. 542, 40 N. E. 927.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming. § 49.

### § 25. — Enforcement of contract.

[a] (Sup. 1835)

Where goods wagered respecting the result of a presidential election are not delivered to the winner, he is without remedy.—*McHatton v. Bates*, 4 Blackf. 63.

[b] (Sup. 1858)

Courts will not aid the winner of a wager to recover the thing won.—*Frybarger v. Simpson*, 11 Ind. 59.

[c] (Sup. 1859)

An election wager being illegal, the winner cannot maintain an action for it against the stakeholder.—*Worthington v. Black*, 13 Ind. 344.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, §§ 51-56.

### § 26. — Recovery of payments.

Right of wife of loser to attack conveyance by winner, see FRAUDULENT CONVEYANCES, § 213.

[a] (Sup. 1835)

If goods be won on a wager respecting the result of a presidential election, and be delivered to the winner, the loser cannot, either at common law or under the statute, sustain an action against the winner for the price of the goods.—*McHatton v. Bates*, 4 Blackf. 63.

[b] (Sup. 1852)

Under Rev. St. 1843, c. 34, an action of debt lies to recover money lost by betting on a horse race.—*Little v. Brannenburgh*, 4 Ind. 85.

[c] A gubernatorial election is not a "game," within 1 Rev. St. p. 305, § 2, allowing a loser, who has paid, to recover back.—(Sup. 1858) *Woodcock v. McQueen*, 11 Ind. 14; (1859) *Same v. Palmer*, 12 Ind. 482.

Where a bet or wager is laid and lost on the result of an election or on any other act, event, or fact, except a game, it cannot be recovered under 1 Rev. St. p. 305, § 2, allowing a loser who has paid to recover back the money paid.—*Id.*

[d] (Sup. 1858)

Courts will not entertain an action by the loser of a wager which he voluntarily paid to compel repayment.—*Frybarger v. Simpson*, 11 Ind. 59.

[e] (Sup. 1859)

If the loser of a wager gives notice to the stakeholder not to pay over the money, but does not, before the payment of such money by the stakeholder to the winner of such money, give notice to the winner, the loser cannot recover from the winner.—*Morris v. Philpot*, 11 Ind. 447.

[f] (Sup. 1867)

One who has lost money on a bet may recover it from the other party to the bet, to

whom it has been paid over, notwithstanding a third person was interested with the winner in the bet. The liability is perfected by receiving the money won on the bet.—*Wilson v. Gardner*, 28 Ind. 188.

[g] (Sup. 1879)

Plaintiff agreed to sell to defendant a wagon valued at \$120 for \$5, and the further sum of \$235 in the event of Tilden's election. The wagon was delivered to defendant, and, with the acquiescence of plaintiff, defendant entered into an arrangement with a third person to loan defendant \$240 in case he should need it, \$5 of which was to be paid to plaintiff in any event and \$235 in the event of Tilden's election. Held that, though the transaction was a wagering contract, it became an executed one on the delivery of the wagon and the making of the arrangement for the payment of the money, and plaintiff was not entitled to recover the wagon or its value on the happening of the event favorably to defendant.—*Davis v. Leonard*, 69 Ind. 213.

[h] (Sup. 1883)

Money paid on a contract by which a benefit association agrees to pay a certain sum to the beneficiary, in case he do not marry for two years, cannot be recovered back, the contract being void as a wager on the probability of marriage.—*Chalfant v. Payton*, 91 Ind. 202, 46 Am. Rep. 586.

[i] (Sup. 1884)

At common law money lost by betting could not be recovered, but might be stopped in the hands of the stakeholder.—*Schlosser v. Smith*, 93 Ind. 83.

Money lost on an election bet cannot be recovered at common law, nor under Rev. St. 1881, § 4951, authorizing a recovery in case of betting "on any game."—*Id.*

[j] (App. 1891)

In an action to recover money lost at gambling, the fact that a part of the building in which the gambling occurred was occupied as a saloon by defendant, that he sometimes personally received the "take out,"—a certain percentage of the money put up in gambling,—and that such "take out" was sometimes placed with other moneys in the saloon, was sufficient to sustain a verdict against him.—*Thomas v. Griffin*, 1 Ind. App. 457, 27 N. E. 754.

[k] (App. 1895)

If A. and B. enter into a wagering contract, and B. pays the wager to C., who was not connected with the original illegal transaction to deliver to A., he can recover the money in an action against C., or where in an honest effort to comply with the law, there has been an unintentional omission which renders the transaction illegal, and there is no moral turpitude, as the result of which money belonging to the principal comes into the hands of the agent, the principal can recover it, because to require the agent to account for the

money would not sanction the original illegal transaction, but where A. authorizes and directs C. to enter into wagering contracts for his benefit, with authority to collect and account to him for the winnings, and C. enters into such wagering contract in his own name with B. and the wager is paid by B. to C., A. cannot recover the money in an action against C., because all the parties are in *pari delicto* throughout the entire illegal transaction from its inception to its conclusion, and to hold that A. could recover would encourage vicious and demoralizing practices.—*Nave v. Wilson*, 38 N. E. 876, 12 Ind. App. 38.

[1] (Sup. 1897)

Title to money lost at gaming never vests in the winner, though the loser fails to seek its recovery; so that Rev. St. 1894, § 6678, authorizing recovery thereof in the name of the state for the benefit of the loser's wife or minor children in case he does not sue therefor within the time allowed him by section 6676, does not violate Const. art. 1, § 21, providing that "no man's property shall be taken without just compensation."—*Ervin v. State ex rel. Walley*, 48 N. E. 249, 150 Ind. 332.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, §§ 13, 28, 57-61.

See, also, 20 Cyc. pp. 942-947.

§ 27. Stakeholders.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, §§ 62-68.

See, also, 20 Cyc. pp. 947-950.

§ 28. — Rights and liabilities in general.

[a] If a stakeholder fairly pays over the money before being notified not to pay it, the loser has no remedy against him.—(Sup. 1858) *Frybarger v. Simpson*, 11 Ind. 59; (1859) *Morris v. Philpot*, Id. 447.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, §§ 62-67.

See, also, 20 Cyc. p. 947.

§ 29. — Effect of withdrawal or repudiation of bet.

[a] (Sup. 1858)

A party to a bet can recover his stake from a stakeholder, if he give notice in season not to pay over to the winner.—*Alexander v. Mount*, 10 Ind. 161.

[b] (Sup. 1858)

The loser may recover from the stakeholder the amount he has deposited, whether the wager has been decided or not, provided he demand the return of the stake before it has been actually paid over, after the event, to the winner.—*Frybarger v. Simpson*, 11 Ind. 59.

[c] (Sup. 1859)

Where the pleadings show that money passed into the hands of the defendant as stake-

holder in a wager on the result of an election, an action for the money may be maintained against him by the party who disaffirms the illegal contract, and notifies him thereof before the money is paid to the other contracting party.—*Burroughs v. Hunt*, 13 Ind. 178.

[d] (App. 1898)

A person can recover his money or property staked on a wager while still in the hands of the stakeholder, and before the determination of the event on which the wager is laid, provided he has notified the stakeholder and demanded its return.—*Taylor v. Moore*, 50 N. E. 770, 20 Ind. App. 654.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, § 68.

§ 31. Parties to speculative transactions.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, §§ 70-72.

See, also, 20 Cyc. pp. 951, 952.

§ 34. — Recovery of payments.

[a] (Sup. 1891)

When a person loans money, and as a part of the arrangement it is to be used in speculative contracts, and he is interested in the contracts or assists in bringing the parties together, and aids in consummating the contracts by conspiring with and urging and aiding the person to whom he loans the money to make such investments and loans him the money to be so invested, he becomes particeps criminis, and the law will not aid him to collect the money which he parted with under such circumstances.—*Plank v. Jackson*, 26 N. E. 568, 27 N. E. 1117, 128 Ind. 424.

[b] (App. 1903)

*Burns' Rev. St. 1894*, § 6676, providing for a recovery, by action, of money or property lost by betting on any game, or by betting on the hands or sides of such as play at any game, does not authorize a recovery of money lost in bucket-shop transactions.—*Lancaster v. McKinley*, 67 N. E. 947, 33 Ind. App. 448.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, § 72.

See, also, 20 Cyc. p. 952.

§ 35. Brokers in speculative transactions.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, §§ 73-75.

See, also, 20 Cyc. p. 952.

§ 36. — Rights and liabilities in general.

[a] (Sup. 1884)

Where the plaintiffs, as commission merchants, made a contract with defendant for the purchase of certain grain, which was not to be delivered, and advanced certain amounts on his account, if the transaction was legal, they would have a right to recover back the money

which they paid for defendant, but, if the transaction was a gambling contract and illegal, they were not entitled to recover, for in such case they were in *pari delicto*, and will not be aided by the courts in profiting by their own wrong.—*Whitesides v. Hunt*, 97 Ind. 191, 49 Am. Rep. 441.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Gaming, § 73.

See, also, 20 Cyc. p. 952.

**§ 40. Actions.**

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Gaming, §§ 77-107.

See, also, 20 Cyc. pp. 954-966; notes, 30

L. R. A. 240, 48 L. R. A. 844; note, 12

Am. Dec. 239.

**§ 42. — Grounds of action.**

[a] (Sup. 1853)

Where a party to a bet has notified the stakeholder not to pay over to the winner the amount deposited in his hands, he need not make a demand before suing the stakeholder, where the latter, notwithstanding the notice, paid over the money before the suit.—*Alexander v. Mount*, 10 Ind. 161.

[b] (Sup. 1858)

Where a wager was made upon the result of an election, a request by the loser to the stakeholder to delay the payment of the money to the winner until the loser could see the winner to arrange a particular mode of payment is not such notice not to pay over the money as will entitle the loser to recover the sum paid from the stakeholder.—*Frybarger v. Simpson*, 11 Ind. 59.

[c] (Sup. 1890)

A bond given by the party furnishing certain oats to secure his part of the agreement, which stipulated that it was mutually understood that the transaction was not based upon the real value of the grain, and showed upon its face that the transaction was of a wagering character, although it formed the chief consideration for a note, was of no value as a contract, and the payees were not bound to return it as a condition precedent to their right to defend against the note.—*Schmueckle v. Waters*, 125 Ind. 265, 25 N. E. 281.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Gaming, §§ 85-87.

**§ 45. — Time to sue and limitations.**

[a] (Sup. 1859)

1 Rev. St. p. 305, § 2, has reference to the rights and remedies of parties to certain illegal contracts as between themselves, and not to the right of action, nor the time within which it must be brought, against a stakeholder.—*Burroughs v. Hunt*, 13 Ind. 178.

[b] (Sup. 1897)

Rev. St. 1894, § 6676, providing that a person losing money at gaming, and paying it,

may within six months thereafter recover it by action; and section 6678 providing that, if the loser shall not within such time sue and with effect prosecute for the money, it shall be the duty of the prosecuting attorney, on information filed, "by such action as aforesaid," to sue for the same in the name of the state,—do not permit the action by the state within the six months allowed the loser for suit.—*Ervin v. State ex rel. Walley*, 48 N. E. 249, 150 Ind. 332.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Gaming, §§ 91, 92.

See, also, 20 Cyc. p. 958.

**§ 46. — Parties.**

[a] (Sup. 1897)

Action by the state for the benefit of the wife whose money is lost at gaming by her husband, holding it in trust for her, is not authorized by Rev. St. 1894, § 6678, providing for action by the state for the benefit of the wife of one who loses money at gaming, and does not sue to recover it, as authorized by section 6676; as, if the money was lost without her knowledge, she would have a common-law right of action against the winner as a trustee *de son tort*, and if it was lost with her knowledge and consent, the action would be in her own name, under section 6676.—*Ervin v. State ex rel. Walley*, 48 N. E. 249, 150 Ind. 332.

Action for the benefit of the wife of the loser at gaming is prosecuted in the name of the state as sole plaintiff, as required by Rev. St. 1894, § 6678, though the wife is named as relator.—*Id.*

Rev. St. 1894, § 6678, authorizing recovery in the name of the state of money lost at gaming, is not inconsistent with sections 251, 252, requiring every action to be prosecuted in the name of the real party in interest, except that a person expressly authorized by statute may sue without joining the person for whose benefit the action is prosecuted; the state being a person, under section 1309, declaring that "the word 'person' extends to bodies politic and corporate."—*Id.*

[b] (App. 1905)

Burns' Ann. St. 1894, § 6678, makes the state the proper party to sue for money lost at gambling after the loser thereof has failed for six months to sue therefor, and provides that, if the loser of money sued for by the state has a wife, she is the sole beneficiary of a judgment for such money. Sections 251, 252, require every action to be prosecuted in the name of the real party in interest, except that executors, trustees of an express trust, or parties expressly authorized by statute may sue without joining the party for whose benefit the action was prosecuted. Section 273 authorizes the court to bring in additional parties when a complete determination of the controversy cannot be had without their presence, and further provides for the addition of parties by

amendment on their application. *Held*, that where the state, as sole plaintiff, recovered money lost in gambling, it was not error for the court to substitute the wife of the loser as plaintiff over defendant's objection, and without the consent of the official representative of the state, in order to permit her to enforce the judgment by setting aside a fraudulent conveyance made by the winner in order to defeat such judgment.—*Tyler v. Davis*, 75 N. E. 3, 37 Ind. App. 557.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, §§ 93, 94.

See, also, 20 Cyc. pp. 958, 959.

§ 48. — Pleading.

[a] (Sup. 1862)

Where, in a suit on a note for money loaned to be wagered, the maker relies on the illegality of the consideration, he must aver in his answer that the money was "lent at the time of such wager."—*Ensley v. Patterson*, 19 Ind. 95.

[b] (Sup. 1888)

Where the maker of a note pleads an illegal consideration in bar, he must state fully all the facts rendering it illegal; and a plea that the only consideration was "the payment of margins on wheat that had never been delivered to defendant by plaintiff, or by any one for him," is insufficient.—*Fisher v. Fisher*, 113 Ind. 474, 15 N. E. 832.

[c] (Sup. 1889)

Where the answer in a suit upon a note sets up that the note was given for money due on a gambling transaction in options, that in such transaction there is a balance from plaintiff to defendant greater than the amount of such note, that the note was given without consideration, and that it has been paid, a reply which alleges that the note was given for money lent, separate and apart from any other transaction, and that defendant's share of the profit arising from the option transaction had been fully paid to him, leaving said note unpaid, is good.—*Davis v. Davis*, 119 Ind. 511, 21 N. E. 1112.

Where such a defense is pleaded, a reply alleging the settlement of all matters of business between the parties except the note in suit is insufficient.—*Id.*

[d] (App. 1892)

In an action on a note, the answer alleged that the consideration of the original note, of which the one in suit was a renewal, was oats estimated by the payee at \$10 per bushel, but as known by him only worth 20 cents per bushel, and the payee's further agreement to buy at \$10 per bushel oats raised from those sold defendant. *Held*, that the fact that the oats were admitted to be of some value did not render the allegations of the answer any the less a complete defense on the ground of the transaction being a

gaming contract.—*Kain v. Bare*, 4 Ind. App. 440, 31 N. E. 205.

[e] (App. 1892)

An answer, in an action on a note for \$200, alleging that the only consideration for the note was the delivery of 20 bushels of Bohemian oats, of the value of \$5, and a bond providing that the party furnishing the oats would sell for the other, at a future time specified, 40 bushels, at \$10 per bushel, and providing also that the contract was not based upon the value of the oats, but was purely speculative, sufficiently shows the illegality of the consideration.—*Glass v. Murphy*, 4 Ind. App. 530, 30 N. E. 1097, 31 N. E. 545.

[f] (Sup. 1897)

Complaint by the state to recover, for the loser's wife, money lost at gaming, sufficiently states that the money was paid defendants, by alleging that defendants are indebted to plaintiff for the use and benefit of N. in the sum of \$6,000 lost by W. to defendants at gaming, and had and received by defendants for the use and benefit of W., the husband of N.; it being provided by Rev. St. 1894, § 6677, that "in such action it shall be sufficient for the plaintiff to allege that defendant has received, for the plaintiff's use, the money so lost and paid."—*Ervin v. State ex rel. Walley*, 48 N. E. 249, 150 Ind. 332.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, §§ 96-99.

See, also, 20 Cyc. pp. 959-961.

§ 50. — Trial, judgment, and review.

[a] (App. 1905)

Since under Burns' Ann. St. 1894, § 6678, making the state a proper party to sue for money lost at gambling, and providing that the wife of the loser is the beneficiary of any judgment recovered, the wife is not a proper party to the suit, the judgment in such suit should not state that the recovery is for the use and benefit of the wife.—*Tyler v. Davis*, 75 N. E. 3, 37 Ind. App. 557.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, §§ 103-107.

See, also, 20 Cyc. pp. 965, 966.

II. PENALTIES AND FORFEITURES.

§ 52. Constitutional and statutory provisions.

Local and special laws relating to horse racing, see STATUTES, § 85.

[a] (Sup. 1878)

Neither 2 Rev. St. 1876, p. 442, § 38, making the keeping of any gaming apparatus, and professional gambling, felonies punishable by fine and disfranchisement; nor Id. p. 469, § 29, making the keeping of a gaming house a misdemeanor punishable by fine; nor Id. p. 480, § 74, prescribing a punishment for the keeping of any gaming apparatus,—authorizes the

seizure, detention, or destruction of gaming instruments.—*Ridgeway v. West*, 60 Ind. 371.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, § 109.

### § 56. Persons liable for penalties.

[a] (Sup. 1887)

Under Rev. St. 1881, providing that money lost by betting on a game can be recovered by the loser by suit brought within six months, and section 4953, that, if the loser fail to sue, the prosecuting attorney shall do so on information, for the benefit of the wife or minor children, a gambling-house keeper is liable in a suit for the benefit of a wife, though the game in which the loss occurred was dealt by his servant in his absence.—*Condon v. State*, 113 Ind. 73, 14 N. E. 705.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, § 113.

### § 58. Property subject to forfeiture.

[a] (Sup. 1908)

Public Offense Laws (Acts 1905, p. 718, c. 169) § 565, punishing whoever keeps or exhibits for gain, or to win money, any gambling device, condemns the use of the devices as a means of accomplishing unlawful acts, and not the devices themselves, and such devices may be owned and enjoyed as property within the limitations imposed by the statute.—*State v. Derry*, 171 Ind. 18, 85 N. E. 765, 131 Am. St. Rep. 237.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, § 115.

### § 60. Searches and seizures.

[a] (Sup. 1878)

An ordinance authorizing the arrest, etc., of a person keeping a gaming house, does not, without a specific provision therefor, authorize the seizure and destruction of gaming implements.—*Ridgeway v. West*, 60 Ind. 371.

The act defining felonies (2 Rev. St. 1876, p. 442, § 38) makes the keeping of any gaming apparatus and professional gambling a felony punishable by fine and disfranchisement. Section 29 (page 469) declares the keeping of a gaming house to be a misdemeanor punishable by fine of not less than \$5 and not more than \$500. Section 74 (page 480) declares the keeper or exhibitor of any gaming table or other gaming apparatus guilty of misdemeanor punishable by fine, to which imprisonment may be added. Each section is silent as to the seizure or destruction of the property so kept or exhibited for the purpose of gaming. The act for the incorporation of cities (1 Rev. St. 1876, p. 288, § 53, cl. 9) provides that the common council shall have power to enforce ordinances to suppress gaming and gaming houses, and to prohibit and destroy instruments and devices. *Held* that, in the absence of a city ordinance authorizing the seizure and detention of the property, the statute did not authorize either

the seizure or detention of gambling property by police officers of the city, and the owner was entitled to replevin the same in the hands of the officers who had possession thereof.—*Id.*

[b] (Sup. 1890)

Unless articles seized are of such a character that the law will not recognize them as property, entitled as such to protection under any circumstances, they cannot be summarily destroyed without affording the owner an opportunity to be heard on the subject of their unlawful use, and to show whether the articles are intrinsically useful or valuable for any other purpose than gambling, or whether their only recognized value and customary use is as implements for gaming.—*State v. Robbins*, 24 N. E. 978, 124 Ind. 308, 8 L. R. A. 438.

[c] (Sup. 1908)

A search warrant being unavailable to individuals in civil proceedings, or for the maintenance of a private right, but only in aid of public prosecutions, a statute authorizing the issuance of search warrants is sustainable under the federal Constitution, forbidding unreasonable search and seizure, only as a necessary means in the suppression of crime and the detection and punishment of criminals, and must be cautiously framed and strictly construed.—*State v. Derry*, 171 Ind. 18, 85 N. E. 765, 131 Am. St. Rep. 237.

Under Public Offense Law (Acts 1905, p. 596, c. 169) §§ 56, 57, authorizing the issuance of search warrants to search for devices "kept for the purpose of unlawful gaming," and declaring that no warrant shall be issued without an affidavit describing the house and the things to be searched for, etc., gaming devices can be seized legally under a search warrant only on the ground that the same were kept for unlawful gaming; and before a justice has authority to issue a search warrant he must be not only informed that the articles were kept for unlawful gaming, but advised under oath of the nature of the offense that had been committed by their use.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, § 117.

See, also, 20 Cyc. pp. 919, 920.

### § 61. Enforcement and effect of forfeitures.

Denial of due process of law, see CONSTITUTIONAL LAW, § 278.

[a] (Sup. 1890)

Where a sheriff, at the time of arresting a defendant for unlawfully keeping and exhibiting gaming implements, seizes the implements, they become subject to the order of the court trying the defendant, though not seized by virtue of a search warrant.—*State v. Robbins*, 124 Ind. 308, 24 N. E. 978, 8 L. R. A. 438.

Rev. St. 1881, § 1623, provides that gaming implements seized shall be held subject to the order of the court, and on conviction of the

owner shall be destroyed, or returned to the owner on the order of the court. *Held* that, after the court has pronounced final judgment against the defendant, it loses further jurisdiction over the implements seized. Any order regarding them must be made at or before the judgment.—*Id.*

[b] (Sup. 1908)

Under Acts 1907, p. 661, c. 290, amendatory of Public Offense Law (Acts 1905, p. 597, c. 169) § 60, directing the sheriff, receiving gambling devices seized under a search warrant, to destroy the same on order by the court, and providing that such order shall be made only after 10 days' notice to the person in whose possession they were found and an opportunity to him for a hearing, and that, where the property shall be delivered by the justice to the sheriff, the justice shall, without waiting for the trial of accused on the charge of keeping a gambling place, order the sheriff to destroy the property, a proceeding in the nature of a libel against the property seized may be maintained by the state, and the legal status of the articles finally determined, separate from the prosecution of accused for keeping the articles for unlawful gaming.—*State v. Derry*, 171 Ind. 18, 85 N. E. 765, 131 Am. St. Rep. 237.

In a proceeding under Acts 1907, p. 661, c. 290, amendatory of Public Offense Law (Acts 1905, p. 597, c. 169) § 60, to determine the legal status of gambling devices seized under a search warrant, the court must decide whether the articles seized were kept for illegal purposes, and on finding in the affirmative it must order the same destroyed, and otherwise must order their restoration.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, § 118.

### III. CRIMINAL RESPONSIBILITY.

#### (A) OFFENSES.

Betting on election as violation of election laws, see ELECTIONS, § 315.

#### § 62. Nature of offense of gaming.

[a] (Sup. 1856)

Under 2 Rev. St. § 28, providing that any one who shall, by betting at or upon any game, either lose or win any article of value, shall be fined, it is sufficient that a game was played and defendant has won something of value, since it is not the purpose of the law to punish only that form of betting in which there is a gain or loss between the parties, such as would excite a spirit of cupidity.—*Mount v. State*, 7 Ind. 654.

[b] (Sup. 1876)

Since the repeal of the act of 1852 (2 Rev. St. 1876, p. 442, § 38) by the act of March 15, 1875 (2 Rev. St. 1876, p. 480), amending section 74 of the act of 1852, the keeping of a gaming apparatus, commonly called a "trick

knife," for the purpose of wagering, winning, and gaining money and articles of value thereon, is a misdemeanor, and not a felony.—*Hayes v. State*, 55 Ind. 99.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, § 119.

See, also, 20 Cyc. pp. 877, 878; note, 33 Am. Dec. 134.

#### § 63. Constitutional and statutory provisions.

[a] (Sup. 1875)

2 Gav. & H. Rev. St. p. 450, § 38, relating to felonies so far as the keeping of a gaming apparatus called a "wheel of fortune" is concerned, was not repealed by 2 Gav. & H. Rev. St. § 74, relating to misdemeanors.—*State v. Thomas*, 50 Ind. 202.

[b] (Sup. 1876)

Section 38 of the act of 1852, defining felonies (2 Rev. St. 1876, p. 442), so far as it relates to the keeping of gaming apparatus, is repealed by implication by the act of March 15, 1875 (2 Rev. St. 1876, p. 480), amending the seventy-fourth section of the act of 1852, defining misdemeanors.—*Hayes v. State*, 55 Ind. 99.

[c] (Sup. 1890)

Rev. St. 1881, § 1815, declaring that it shall be sufficient evidence that any building or other place was rented for the purpose of gambling if the gaming was actually carried on, and the owner or lessor knew, or had good reason to believe, that the lessee suffered gaming therein, and took no sufficient means to prevent or restrain the same, is not void as being within the rule that statutes which undertake to make proof of certain facts absolute or conclusive of guilt are unconstitutional, but is valid under the rule that statutes which merely declare presumptions affecting the burden of proof are constitutional.—*Voght v. State*, 24 N. E. 680, 124 Ind. 358.

[d] (App. 1897)

Burns' Rev. St. 1894, § 2179 (Horner's Rev. St. 1897, § 2084), provides that "any person who shall keep any room or building, \* \* \* or occupy any place or public or private grounds anywhere within the state with apparatus, books or other devices for the purpose of recording or registering bets or wagers or of selling pools; and any person who shall record or register bets or wagers or sell pools upon the result of any trial or contest of skill, speed, or power of endurance of man or beast" shall be deemed guilty of a misdemeanor, etc. *Held*, that section describes two distinct offenses, and the word "and" therein, after the word "pools," where the latter first occurs, may be read "or."—*Douglass v. State*, 48 N. E. 9, 18 Ind. App. 289.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, § 120.

See, also, 20 Cyc. p. 879.

**§ 64. Elements of criminal gaming.**

FOR CASES FROM OTHER STATES.

SEE 24 CENT. DIG. Gaming, §§ 124-139.

See, also, 20 Cyc. pp. 880-890.

**§ 65. — Intent.**

Allegations in indictment, see post, § 86.

Weight and sufficiency of evidence, see post, § 98.

[a] (Sup. 1819)

A conviction on an indictment for keeping a gaming house is not sustained by proof that gaming was carried on by third persons on the premises of the defendant without his knowledge.—*Padgett v. State*, 69 Ind. 46.

[b] (App. 1891)

On a prosecution under Rev. St. 1881, § 2079, for keeping a gaming house and for renting a house to be used for gaming, an instruction that the jury should convict if they find that defendant "did unlawfully keep the room mentioned in said information for gaming, or rent said room to others to be used and occupied for gaming," is correct, and the court need not charge that defendant should have "knowingly" permitted the building to be used for gaming.—*Fisher v. State*, 2 Ind. App. 365, 28 N. E. 565.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, § 124.

**§ 66. — Game, event, or hazard.**

[a] (Sup. 1857)

Horse racing is a game, and betting on such is within the meaning of 1 Rev. St. p. 305, § 2.—*Wade v. Deming*, 9 Ind. 35.

[b] (Sup. 1859)

An election bet is within 2 Rev. St. p. 435, § 28, providing that every person who shall, by playing or betting at or upon any game or wager, either lose or win any article of value, shall be fined not exceeding \$50.—*Hizer v. State*, 12 Ind. 330.

[c] (Sup. 1862)

An information, charging that the defendant did "unlawfully lose the sum of five dollars by then and there unlawfully betting with one S. C., upon an affidavit made by P. N. against J. C., for an assault and battery with intent to kill, contrary to the statute" (Acts 1857, p. 97), etc., fails to charge a crime, and is bad, since the statute makes unlawful only bets on games, on elections, and on other bets.—*Smoot v. State*, 18 Ind. 18.

[d] Betting on the result of an election is gaming.—(Sup. 1877) *Frazer v. State*, 58 Ind. 8; overruling *State v. Henderson* (1874) 47 Ind. 127.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, §§ 125-134.

See, also, 20 Cyc. pp. 880-886.

**§ 67. — Bet or stake.**

Description in indictment, see post, § 88.

Weight and sufficiency of evidence, see post, § 98.

[a] (Sup. 1856)

2 Rev. St. p. 435, § 28, provides that "every person who shall, by playing or betting at or upon any game or wager whatever, either lose or win any article of value, shall be fined," etc. *Held*, that where defendant and a companion hired the use of a tenpin alley, and played a game of tenpins, and by previous agreement the one failing to knock the largest number of pins paid the keeper of the alley, the liability of the other being his share of the hire of the alley, there was an article of value lost and won within the statute.—*Mount v. State*, 7 Ind. 654.

[b] (Sup. 1878)

1 Rev. St. 1876, p. 267, § 53, specifications 9, 14, authorizing cities incorporated under the act to suppress gaming and gaming houses, use the words in the sense in which they are employed in the Criminal Code of the state, as meaning a game on the result of which something of value is staked and must be lost and won; and hence an ordinance of a city incorporated under such act, prohibiting the owner or attendant of a place where intoxicating liquor is sold from allowing a minor "to participate in any game of any kind whatever" in such a place, must be construed, under section 53, as referring to "any game" on the result of which a wager depends.—*Williams v. City of Warsaw*, 60 Ind. 457.

[c] (Sup. 1881)

Suffering gaming for the hire of the table is indictable under 2 Rev. St. 1876, p. 469, § 29.—*Hamilton v. State*, 75 Ind. 586.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, §§ 135-139.

See, also, 20 Cyc. pp. 887-890.

**§ 68. Games, sports, and devices prohibited.**

Description in indictment, see post, § 87.

[a] (Sup. 1847)

A horse race is a game.—*Cheesum v. State*, 8 Blackf. 332, 44 Am. Dec. 771.

[b] (Sup. 1895)

Under Act March 5, 1895, § 2, the holding in the same place of a race meeting, whether by the same or different persons or corporations, oftener than twice in any period of 60 days, is prohibited, and a period of 30 days must elapse between any two of such meetings.—*State ex rel. Duensing v. Roby*, 142 Ind. 168, 41 N. E. 145, 33 L. R. A. 213, 51 Am. St. Rep. 174; *Roby v. State ex rel. Matthews*, 142 Ind. 700, 42 N. E. 350.

[c] (Sup. 1896)

After Act March 5, 1895, to forbid a race meeting for a longer period than 15 days at one

time, and less than 30 days subsequent to the last race meeting at the same place, regardless of the person, company, or association holding either of such meetings, two other race tracks were constructed near one already equipped, one being separated by a highway only, and the other being less than a half mile distant. Evidence showed that horse racing was profitable only where horses could be kept together for a long period, and that the arrangement between the proprietors of the three tracks was that R. should open and run for 15 days, then F. for the next 15 days, and S. for the next 15 days, thus leaving a period of 30 days since R. closed, and that one track only should be open during any given 15 days; that the same judges acted at all the tracks, the same horses were entered, and the meeting was simply transferred from one track to another at the end of each period of 15 days; and that the horses remained located in the various barns in which they were quartered without regard to the particular track on which they might be racing. *Held*, that there was but one and the same "race meeting," within the statute.—*State ex rel. Matthews v. Forsythe*, 147 Ind. 466, 44 N. E. 593, 33 L. R. A. 221.

[4] (App. 1906)

Dice constitute a gambling device, within Burns' Ann. St. 1901, § 2181, providing punishment for keeping or exhibiting for gain "any gambling apparatus, device, table or machine of any kind or description under any denomination or name whatever."—*White v. State*, 76 N. E. 534, 37 Ind. App. 95.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, §§ 140-162, 164, 165.

See, also, 20 Cyc. pp. 881-886; note, 121 Am. St. Rep. 693.

§ 70. **Playing or betting.**

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, §§ 166-186.

See, also, 20 Cyc. pp. 890-892.

§ 71. — **In general.**

Indictment, see post, § 85.

Weight and sufficiency of evidence, see post, § 98.

[a] (Sup. 1851)

A. sold a horse to B. for \$65, payable when General Taylor should be elected president of the United States, which sum B. subsequently paid. The horse was worth \$50. *Held*, that the transaction was a wager.—*Parsons v. State*, 2 Ind. 499.

[b] (Sup. 1878)

Under 2 Rev. St. 1876, p. 468, § 28, providing a fine against any person who shall win or lose any article of value by betting on election, a conviction cannot be had for losing an article of value where defendant bought a ring at its alleged value, to be paid for only in the

event of the election of a certain candidate, which event happened.—*Wagner v. State*, 63 Ind. 250.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, §§ 166, 167.

See, also, 20 Cyc. p. 890.

§ 74. **Keeping or exhibiting gaming table, device, or implements.**

Allegations in indictment, see post, § 90.

Weight and sufficiency of evidence, see post, § 98.

[a] (Sup. 1841)

Under Rev. St. 1838, p. 218, prohibiting the keeping of a billiard table for the purpose of winning or gaining money, the keeper of a billiard table, though he did not play on it himself for money, or suffer others to do so, yet if, for a stipulated compensation per game, he allows other people to use it, he is liable to an indictment.—*Blanton v. State*, 5 Blackf. 560.

[b] (Sup. 1860)

As the keeping of a billiard table for the purpose of wagering any article of value thereon is specially prohibited by section 74 of the act defining misdemeanors, it must be *held* that such tables are not within section 38 of the Crimes Act, denouncing the keeping of gaming tables generally.—*State v. Hope*, 15 Ind. 474.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, §§ 190-198.

§ 76. **Owning or letting or permitting use of house or place for gaming.**

Admissibility of evidence, see post, § 97.

Allegations in indictment, see post, § 92.

Burden of proof, see post, § 96.

Instructions, see post, § 102.

Leasing grounds of agricultural society for gaming purposes, see AGRICULTURE, § 2.

Weight and sufficiency of evidence, see post, § 98.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, §§ 202, 203.

See, also, 20 Cyc. p. 894.

§ 77. **Frequenting or visiting gaming houses or places for betting or gaming.**

Allegations in indictment, see post, § 93.

Burden of proof, see post, § 96.

Verdict, see post, § 103.

Weight and sufficiency of evidence, see post, § 98.

[a] (Sup. 1837)

Evidence of a single, or even an occasional, visit to a gambling house, is not sufficient to sustain a conviction, under section 2085, Rev. St. 1881, for the crime thereby defined of "frequenting" a gambling house, but something akin to a habit must be shown.—*Green v. State*, 109 Ind. 175, 9 N. E. 781.

[b] (App. 1900)

Under Burns' Rev. St. 1894, § 2089 (Horner's Rev. St. 1897, § 2002), which provides that "whoever, being a male person, \* \* \* frequents or visits a gambling house or houses, \* \* \* shall be fined," etc., a single visit is sufficient to constitute an offense.—*Roberts v. State*, 58 N. E. 203, 25 Ind. App. 368.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, § 204.

See, also, 20 Cyc. p. 895.

### § 78. Common gamblers.

[a] (Sup. 1878)

Under a statute which provided that "any person who, for the purpose of gaming with cards or otherwise, travels about from place to place, or shall frequent any place where gambling is permitted, shall be deemed a professional gambler," a prosecution was instituted against A.; the affidavit on which the same was based stating that, on a certain day, etc., the said A. "did then and there unlawfully frequent, for the purpose of gaming with cards, a certain place in said county, where gambling was then permitted, to wit, a certain room then and there occupied by B.," etc. *Held*, that the affidavit was sufficient, and that it was not necessary to aver or prove that A. actually engaged in gaming.—*Howard v. State*, 64 Ind. 516.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, § 205.

See, also, 20 Cyc. p. 895.

### § 79. Persons liable.

[a] (Sup. 1847)

An indictment for gaming may be sustained against the person who made the bet, though another person furnished the money.—*Iseley v. State*, 8 Blackf. 403.

[b] (Sup. 1881)

Under 2 Rev. St. 1876, p. 480, § 74, making it an offense for a person to keep a "gaming apparatus for the purpose of wagering," the proprietor must himself wager in order to be guilty of the offense.—*Sumner v. State*, 74 Ind. 52.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, §§ 206-217.

See, also, 20 Cyc. pp. 896-898; note, 41 L. R. A. 659.

### § 80. Distinct offenses in one act.

[a] (Sup. 1848)

It is an offense to permit one's horse to be run in a horse race, and a separate offense to act as a rider in a race.—*State v. Ness*, 1 Ind. 64.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, § 122.

### § 81. Continuing or separate offenses.

[a] (Sup. 1860)

A continuous keeping of a gaming house for many months, even, is but one criminal act, and the subject of but one indictment. The act cannot be divided into several successive offenses.—*State v. Lindley*, 14 Ind. 430.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, § 123.

### (B) PROSECUTION AND PUNISHMENT.

Former jeopardy, see CRIMINAL LAW, §§ 169, 198.

### § 82. Jurisdiction.

Jurisdiction as affected by extent of penalty, see CRIMINAL LAW, § 94.

[a] (Sup. 1829)

The winning of any sum of money, however small, at a game with cards, is an indictable offense, of which the circuit court has exclusive jurisdiction.—*State v. Albertson*, 2 Blackf. 251.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, § 218.

See, also, 20 Cyc. p. 898.

### § 84. Indictment or information.

Allegations as to provisos and exceptions, see INDICTMENT AND INFORMATION, § 111.

Allegations as to time of offense, see INDICTMENT AND INFORMATION, § 87.

Following language of statute in indictment or information, see INDICTMENT AND INFORMATION, § 110.

Variance between indictment or information and preliminary affidavit, see INDICTMENT AND INFORMATION, § 122.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, §§ 220-284.

See, also, 20 Cyc. pp. 898-912.

### § 85. — Requisites and sufficiency in general.

Issues, proof and variance, see post, § 94.

[a] (Sup. 1839)

An indictment for gaming need not state the name of the person with whom the bet was made, his name being alleged to be unknown.—*State v. Maxwell*, 5 Blackf. 230.

[b] (Sup. 1840)

An indictment for gaming must state the name of the person with whom the defendant played, or allege his name to be unknown.—*Butler v. State*, 5 Blackf. 280.

[c] (Sup. 1840)

An indictment for unlawfully winning of several persons (naming them) and others a certain quantity of beef, etc., is bad for not

naming all the persons with whom the bet was made, or stating that the names not given were unknown.—*State v. Irvin*, 5 Blackf. 343.

[d] (Sup. 1842)

An indictment alleging that defendant did unlawfully win of, and take from, one N. G. two notes, etc., by betting on the result of an election, shows sufficiently that the bet was made with N. G.—*State v. Little*, 6 Blackf. 267.

An indictment for winning, etc., by betting on the result of an election, is not objectionable because it alleges the making of the bet on a day subsequent to the day of the election.—*Id.*

[e] (Sup. 1844)

An indictment against a person for suffering gaming in his grocery should give the names of the persons who played, or state their names to be unknown.—*Ball v. State*, 7 Blackf. 242.

[f] (Sup. 1848)

An indictment founded on Rev. St. c. 53, § 103, and charging that defendant acted as "rider in a certain horse race which was then and there run along a public highway, in said county, between animals of the horse kind in a trial of speed," is not sufficiently certain and definite as to the sex of the horse; the statute reading "horse, mare, or gelding."—*Myers v. State*, 1 Ind. 251.

[g] (Sup. 1850)

An indictment for keeping a gaming house need not state the names of the persons who played in the house.—*Dormer v. State*, 2 Ind. 308.

[h] (Sup. 1852)

An indictment for gaming presented two counts,—the first for money won, and the second for money lost, on a bet made at a game of cards played by the defendant and others; but it did not show whether the bet was made with the persons played with, or with some third person. *Held*, that the indictment was bad for uncertainty.—*State v. Stallings*, 3 Ind. 531.

[i] (Sup. 1860)

An information for keeping a gaming house need not allege the name of the gambler.—*Carpenter v. State*, 14 Ind. 109.

[j] (Sup. 1874)

An indictment under Act March 8, 1873, § 1 (Acts 1873, p. 30), which does not allege that a game was played, and state the name of the person with whom the minor played the game, or allege that such name is unknown, is bad.—*Alexander v. State*, 48 Ind. 394.

[k] (Sup. 1878)

Under Acts 1877 (Sp. Sess. p. 80) § 3, declaring any person who frequents any place where gambling is permitted a professional gambler and punishable as such, an affidavit charging defendant with being a common gambler need not allege the kind of gambling which was permitted, or that defendant frequented the room for the purpose of gaming with cards,

or what kind of game was permitted therein.—*Howard v. State*, 64 Ind. 516.

[l] (Sup. 1885)

An indictment under the statute charging that defendant, on a certain date, "did then and there unlawfully play for money, to wit, the sum of ten cents, at and upon a certain game of pool played by him with J. and H. upon a billiard and pool table, and did then and there, and thereby, unlawfully win of and from said H. the sum of ten cents," etc., is sufficient.—*Middaugh v. State*, 103 Ind. 78, 2 N. E. 292.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, §§ 220-223, 228, 261, 266.

See, also, 20 Cyc. pp. 898-902.

§ 86. — Intent.

[a] (Sup. 1883)

An indictment for gaming, charging that defendant kept a roulette wheel "for the purpose of wagering, winning and gaining thereon money," etc., sufficiently showed that the wheel was kept and exhibited to win money.—*Keith v. State*, 90 Ind. 89.

[b] (App. 1895)

Rev. St. 1894, § 2173 (Rev. St. 1881, § 2079), prescribes the same penalty against one who keeps a building to be used or occupied for gaming, or "knowingly" permits the same to be used or occupied for gaming, or, being the owner, rents it for such purpose, the word "knowingly" being inserted in the revision of 1881. *Held*, that an indictment which failed to allege that defendant "knowingly" permitted a house to be used for gaming was insufficient.—*Emperly v. State*, 13 Ind. App. 393, 41 N. E. 840.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, § 225.

See, also, 20 Cyc. p. 900.

§ 87. — Description of game, device, or implements.

Issues, proof and variance, see post, § 94.

[a] An indictment for gaming need not state the name of the game played; but there should be in it some description of the game, as that it was with cards, dice, etc.—(Sup. 1833) *State v. Dole*, 3 Blackf. 294; (1833) *Same v. Bougher*, Id. 307; (1839) *Same v. Maxwell*, 5 Blackf. 230; (1844) *Same v. Ross*, 7 Blackf. 322; (1847) *Webster v. State*, 8 Blackf. 400.

[b] (Sup. 1882)

An indictment charging defendants with having unlawfully exhibited to persons named "for gain and to win money a certain gambling device," the name of which was to the grand jurors unknown, sufficiently states an excuse for not giving in the indictment the name of the device.—*Pemberton v. State*, 85 Ind. 507.

[c] (App. 1904)

Under Burns' Ann. St. 1901, § 2180, defining a common gambler as one who, "for the

purpose of gaming with cards or otherwise," does certain acts, an indictment for being a common gambler should charge the kind of gaming indulged in.—*Bickel v. State*, 70 N. E. 548, 32 Ind. App. 656.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, §§ 235-240.

See, also, 20 Cyc. pp. 903, 904.

### § 88. — Description of bet or stake.

Issues, proof and variance, see post, § 94.

#### [a] (Sup. 1859)

In an information for gaming, the amount lost or won should be set forth with certainty in order that the amount of the fine may be determined in accordance with the statute; this fact determining the question of jurisdiction.—*Long v. State*, 13 Ind. 566.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, §§ 241-243.

See, also, 20 Cyc. p. 904.

### § 89. — Description of place or house.

[a] An indictment, founded on Rev. St. 1843, p. 982, § 103, for permitting a horse to be run in a horse race on a public highway, need not state the termini of the highway.—(Sup. 1849) *State v. Burgett*, 1 Ind. 479, Smith, 340; (1849) *Same v. Brown*, 1 Ind. 532; (1851) *Same v. Armstrong*, 3 Ind. 139.

#### [b] (Sup. 1908)

An affidavit for visiting a gambling house, in violation of Public Offense Statute 1905 (Laws 1905, p. 693, c. 169) § 470, being Burns' Ann. St. 1908, § 2371, is sufficient, where charging the offense in the language of the statute, and need not particularly designate the gambling house visited.—*State v. Bridgewater*, 171 Ind. 1, 85 N. E. 715; *Same v. Henson*, 171 Ind. 725, 85 N. E. 718; *Same v. Larter*, 171 Ind. 725, 85 N. E. 719; *Same v. Brooks*, 171 Ind. 725, 85 N. E. 975; *Same v. Charles*, Id.; *Same v. Ritter*, Id.; *Same v. Turner*, 171 Ind. 725, 85 N. E. 1027; *Same v. Ballard*, Id.; *Same v. Romaine*, 171 Ind. 725, 86 N. E. 73.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, §§ 244-248.

See, also, 20 Cyc. p. 905.

### § 90. — Keeping or exhibiting table, device, or implements.

#### [a] (Sup. 1875)

An indictment does not charge the offense of being the keeper of a billiard table, within the meaning of the statute (2 Gav. & II. St. p. 477, § 74), which does not allege that the table was kept for the purpose of wagering any article of value thereon.—*Carr v. State*, 50 Ind. 178.

#### [b] (Sup. 1875)

In an indictment under 2 Gav. & II. St. p. 450, § 38, for being the keeper of a gaming apparatus, it is not necessary to allege that any

game was played with or on the apparatus, nor that any names should be stated as the names of persons who played.—*State v. Thomas*, 50 Ind. 292; *Same v. Beedles*, Id. 294.

#### [c] (Sup. 1882)

An indictment for exhibiting a certain gambling device is sufficiently explicit.—*Pemberton v. State*, 85 Ind. 507.

#### [d] (Sup. 1883)

An indictment under Rev. St. 1881, § 2086, for keeping a device for gaming, is sufficient if it merely alleges the device to have been kept in the "county and state aforesaid," without further description of the place where kept.—*App v. State*, 90 Ind. 73; *Keith v. Same*, Id. 89.

#### [e] (Sup. 1883)

An indictment for gaming, charging that defendant did, at the county and state aforesaid, unlawfully keep and exhibit certain gaming tables, and there unlawfully kept the same for the purpose of wagering, winning, and making money, or articles of value, was sufficient.—*App v. State*, 90 Ind. 73.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, §§ 249-255.

See, also, 20 Cyc. p. 906.

### § 91. — Keeping house or place.

Issues, proof and variance, see post, § 94.

Names of gamblers, see ante, § 85.

#### [a] (Sup. 1841)

An indictment under the statute of 1838, charging that the defendant kept a room "to be used and occupied for gambling," is sufficient, without alleging that gambling has actually taken place in the room.—*State v. Miller*, 5 Blackf. 502.

#### [b] (Sup. 1852)

An indictment for keeping a gaming house was held not to be bad for charging that the defendant kept "a" house, instead of "his" house, to be used for gaming; the latter term being employed by the statute defining the offense.—*State v. Hubbard*, 3 Ind. 530.

#### [c] (Sup. 1877)

An indictment for keeping a gaming house is sufficient, where it avers that defendant unlawfully kept a certain house, building, and room to be used for gaming, and unlawfully rented it to a person named, and suffered him "and divers other persons, to the grand jurors unknown," to play a certain game called "faro," for money and other articles of value.—*Enwright v. State*, 58 Ind. 567.

#### [d] (Sup. 1879)

An indictment charging that the defendant did on a certain day, "and on divers other days between said day and the day of making this presentment, \* \* \* unlawfully keep a certain building, arbor, booth, shed, and tenement to be used for gaming," and unlawfully allowed

certain persons named, "and divers other persons to the grand jurors unknown, to play at a certain game of cards called 'poker,' for money and other articles of value," was sufficient.—*Padgett v. State*, 68 Ind. 46.

[e] (Sup. 1881)

An indictment averring that defendant did "keep his said room and tenement to be used for gaming" held sufficient, under 2 Rev. St. 1876, p. 469, § 29, as a charge of keeping a house for gambling. Averments of the kind of games played, and of the names of the persons playing, do not render the indictment bad.—*State v. Pancake*, 74 Ind. 15.

[f] (App. 1903)

Burns' Rev. St. 1901, § 2173, provides that "whoever keeps a building or room \* \* \* to be used or occupied for gaming, or knowingly permits the same to be used or occupied for gaming, or whoever, being the owner of any building or room, \* \* \* rents the same to be used or occupied for gaming, shall be fined," etc. Held, that an indictment charging that defendant, being then and there the keeper of a building and room within the county and state, did then and there permit said building and room to be used and occupied for gaming by certain persons, and did permit them to play faro and other games of chance therein for money, sufficiently stated an offense described by the first clause of such section.—*Christ v. State*, 69 N. E. 269, 33 Ind. App. 488.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, §§ 256-262.  
See, also, 20 Cyc. p. 907.

§ 92. — Ownership and use of house or place.

Issues, proof and variance, see post, § 94.

[a] (Sup. 1853)

An indictment against D. S., containing two counts under the gaming act, alleged that the said D. S., on, etc., at and in the county aforesaid, did then and there knowingly keep and suffer his house, in which he kept his grocery, to be used and occupied for the purpose of gaming, at and with cards, for money and other valuable articles, contrary, etc. Held, that the indictment was sufficient.—*State v. Staker*, 3 Ind. 570.

[b] (Sup. 1859)

2 Rev. St. p. 436, § 29, provides that, if any person shall keep or suffer his building, etc., to be used for gambling, or if any person, being the owner of any building, etc., shall rent the same to be used for gaming, he shall be fined, etc. Held that, under the first part of said statute, one keeping a building for gaming may be fined, though gaming be not averred to have taken place. Under the latter part of the same section (for suffering a building to be used), suffering gaming therein must be averred, and the names of those gaming, or a valid

reason for their omission, must be set out.—*Sowle v. State*, 11 Ind. 492.

[c] (Sup. 1867)

Under 2 Gav. & H. St. § 55, providing that "the indictment must be direct and certain as it regards the party and the offense charged," an indictment against a person for allowing his building to be used for gaming is bad on motion in arrest, unless it states the names of the persons suffered to game therein, or shows cause for not doing so, and that the offense was committed within the statute of limitations.—*State v. Noland*, 29 Ind. 212.

[d] (Sup. 1878)

Under Acts 1877 (Sp. Sess. p. 80), § 3, declaring any person who frequents any place where gambling is permitted a professional gambler and punishable as such, an affidavit charging one with being a professional gambler, and stating that the place where the gambling was permitted was occupied by a certain person, sufficiently alleges by implication that such person permitted gambling at the place mentioned.—*Howard v. State*, 64 Ind. 516.

[e] (Sup. 1879)

An indictment under Acts 1877, Sp. Sess. p. 81, § 3, for being a professional gambler, is defective, if it only alleges that defendant "did unlawfully frequent a house where gambling is permitted," etc., and does not charge the purpose of defendant in frequenting such house.—*State v. Allen*, 69 Ind. 124.

[f] (Sup. 1886)

In an indictment for permitting and renting a house to be used for gaming purposes, it is sufficient to charge that the building is in the county and the property of the defendants, without any particular description.—*Kleespies v. State*, 106 Ind. 383, 7 N. E. 186.

[g] In an information charging defendant with renting a house to be used and occupied for gaming, it is not necessary to allege the name of the person to whom the room was rented.—(Sup. 1886) *Kleespies v. State*, 106 Ind. 383, 7 N. E. 186; (1891) *Fisher v. Same*, 2 Ind. App. 365, 28 N. E. 565.

[h] (App. 1895)

Under Rev. St. 1894, § 2173, making it an offense for one to "knowingly" keep a building to be used or occupied for gaming, knowledge must be charged in the indictment.—*Emperly v. State*, 41 N. E. 840, 13 Ind. App. 393.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, §§ 263-272.  
See, also, 20 Cyc. pp. 907-909.

§ 93. — Frequenting or visiting house or place.

Issues, proof and variance, see post, § 94.

[a] (Sup. 1878)

Under Acts 1877 (Sp. Sess. p. 80), § 3, declaring any person who frequents any place

where gambling is permitted a professional gambler and punishable as such, an affidavit charging one with frequenting a place "where gambling was then permitted" sufficiently avers facts, and not mere conclusions or inferences.—Howard v. State, 64 Ind. 516.

[b] (Sup. 1908)

An affidavit charging that accused visited a gambling house in a certain county in violation of Public Offense Statute 1905 (Laws 1905, p. 693, c. 169), § 470 (Burns' Ann. St. 1908, § 2371), etc., is sufficient.—State v. Derry, 171 Ind. 725, 86 N. E. 482.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, § 273.

§ 94. — Issues, proof, and variance.

[a] (Sup. 1839)

An indictment charging the defendant with winning the sum of \$5 by a wager, etc., is not sustained by proof that he won the promissory note for \$5 of the person with whom he bet.—Tate v. State, 5 Blackf. 174.

[b] (Sup. 1843)

An indictment charging that the defendant suffered his mare to be run in a certain race is not supported by evidence that the animal run was a horse.—Thrasher v. State, 6 Blackf. 460.

[c] (Sup. 1845)

An indictment for gaming alleged that the defendant, by playing at cards, etc., had won from A., B., and C. a certain article, etc. The evidence was that the winning was by the defendant and another as partners from A. and C. as partners. *Held*, that the variance was fatal.—Wilcox v. State, 7 Blackf. 456.

[d] (Sup. 1847)

Where an indictment for gaming charges the defendant with winning or losing with several persons, etc., proof that the winning or losing was with a part of those persons is not sufficient.—Iseley v. State, 8 Blackf. 403.

[e] (Sup. 1850)

Where the indictment for keeping a gambling house states the names of the persons who played therein, it is not necessary to prove every name alleged.—Dormer v. State, 2 Ind. 308.

[f] (Sup. 1851)

In an indictment for winning a certain sum of money, the prosecution may prove the winning of a smaller sum.—Parsons v. State, 2 Ind. 490.

[g] (Sup. 1851)

To sustain an indictment founded on Rev. St. c. 53, § 103, it is not necessary to prove that a bet or wager was made, or a distance to be run agreed upon, or that judges were appointed to decide the race.—Watson v. State, 3 Ind. 123.

Upon an indictment, under the statute, for horse racing, evidence that the race was run

along a road leading from one turn to another in the county was *held* sufficient, prima facie, to sustain the averment in the indictment that the road in question was a public highway.—Id.

[h] (Sup. 1853)

An indictment under the gaming act was as follows: The grand jurors impaneled, etc., upon their oath, present that S. M. on, etc., at the county, etc., aforesaid, and continuously from that day until the day of the finding of this bill of indictment, had and possessed a house, a room, a shed, and a tenement situate in said county, and that the said M. there, during all the time aforesaid, did keep and suffer his said house, room, shed, and tenement to be used and occupied for gaming, contrary, etc. *Held*, that the indictment was good; and, also, to sustain the indictment, it was sufficient to prove that he kept either of the places set forth, for any length of time, for such a purpose.—McAlpin v. State, 3 Ind. 567.

[i] (Sup. 1853)

A charge, in an information, that A. alone lost upon a game of cards, etc., is not supported by proof that A., with another, jointly lost, etc.—Jackson v. State, 4 Ind. 560.

[j] (Sup. 1856)

An information under 2 Rev. St. p. 435, § 28, charged that A. kept a tenpin alley for hire, and that defendant and a companion hired the alley to play a game of tenpins, for which they agreed to pay A. ten cents, and then played the game, by which defendant won of his companion five cents, the half of the hire of the alley, by unlawfully wagering with him the said five cents on the result of the game. *Held*, that there was no variance raised by evidence that defendant won the value of five cents, the same being his liability to A., instead of winning five cents, the half hire of the alley.—Mount v. State, 7 Ind. 654.

[k] (Sup. 1865)

An indictment for professional gambling was in two counts. The first charged that the defendant, at Marion county, etc., was engaged in the habit and practice of gaming, and did then and there get his livelihood thereby. The second count charged that the defendant, at, etc., was wandering about from place to place, in the habit and practice of gaming. The evidence showed that the accused had been for two months traveling about and gaming for a livelihood, but that he had come into the county where he was indicted on lawful business, and had not gamed therein. *Held*, that the evidence did not sustain the indictment.—Bowe v. State, 25 Ind. 415; Bruce v. Same, Id. 424; Hamilton v. Same, Id. 426.

[l] (Sup. 1875)

On the trial of an indictment charging the defendant with keeping his house to be used for gaming, the only evidence as to wagering was that persons played upon a billiard table, and the loser paid for the use of the table 20

or 25 cents; and the only charge in the indictment which this evidence sustained was the charge that persons were permitted to play, etc., and bet and wager upon the result of the games "the hire of said billiard table." *Held*, that the evidence was insufficient, as it sustained only a part of the charge which was not well made.—*Carr v. State*, 50 Ind. 178.

[m] (Sup. 1875)

On the trial of indictment under Act March 8, 1873 (Acts 1873 [Reg. Sess.] p. 30), charging the defendant with having the care and management of a pigeon-hole table, and suffering and allowing a person named, under the age of 21, to play a game of pigeon hole thereon with another person named, such table not being kept or used in a private family, it was proved that the table on which the game in question was played was not a pigeon-hole table, but a Jenny-Lind table, and the two kinds of tables and the games played thereon were shown to be substantially different. *Held*, that there was a fatal variance.—*Bartender v. State*, 51 Ind. 73, 76.

[n] (Sup. 1875)

Where an indictment charges defendant with suffering his horse to be run in a horse race, and the proof is that defendant rode a horse not his own in the race, the variance is fatal.—*Robb v. State*, 52 Ind. 216.

[o] (Sup. 1881)

On indictment under 2 Rev. St. 1876, § 74, for keeping a gaming table "for the purpose of wagering therein," *held*, that this clause must be construed, "for the purpose of wagering [himself] therein," and that a conviction would not be warranted unless the evidence showed that defendant had wagered on such table himself, though he had permitted others to do so.—*Sumner v. State*, 74 Ind. 52.

[p] (Sup. 1885)

It is not necessary to prove that defendant won the whole sum charged in an indictment for gambling with, and winning money from, another person.—*Alexander v. State*, 99 Ind. 450.

A charge of playing pool and winning money is sustained by proof that the question of which player should pay for the game was alone at stake.—*Id.*

[q] (Sup. 1890)

Under Rev. St. 1881, § 2079, which provides that the owner of any building or room who rents the same to be used for gaming shall be fined, and section 1815, which provides that "it shall be sufficient evidence that any building or other place was rented for the purpose of gaming, if such gaming was actually carried on, and the owner or lessor thereof knew, or had good reason to believe, that the lessee suffered any gaming therein, and such owner or lessor took no sufficient means to prevent or restrain the same," though the indictment charges that defendant rented a room to be used for

gaming, evidence that gaming was carried on in the room, and that defendant knew or had good reason to believe, after the renting, that his lessee suffered gaming in the room, is admissible.—*Voght v. State*, 124 Ind. 358, 24 N. E. 680.

[r] (App. 1892)

Rev. St. 1881, § 1738, provides that the precise time of the commission of an offense need not be stated in the information if it is shown to have been within the statute of limitations, except when the time is an indispensable ingredient in the offense. *Held* that, on a charge of frequenting a place where gambling was permitted, it was proper to not confine the evidence to visits stated in the indictment, but to admit evidence of any such visits within two years prior to the indictment.—*Courtney v. State*, 5 Ind. App. 356, 32 N. E. 335.

[s] (App. 1896)

Where an indictment charged that defendant, being the keeper of a certain building, did permit persons, to the grand jurors unknown, to be and remain playing therein, etc., and on the trial a witness testified that he was before the grand jury, and that he knew at that time the persons engaged in gambling in the building, and could have given their names upon inquiry, there was no variance, as the offense charged was not shown to be a specific, but a continuing, one.—*Jessup v. State*, 14 Ind. App. 230, 42 N. E. 948.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, §§ 274-283.

See, also, 20 Cyc. pp. 910-912.

#### § 95. Evidence.

Effect of statutory protection of witness from use of evidence against himself, see WITNESSES, § 304.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, §§ 285-298.

See, also, 20 Cyc. pp. 912-915.

#### § 96. — Presumptions and burden of proof.

[a] (Sup. 1853)

To sustain an indictment for keeping a gaming house, it is not necessary that the fact of gambling having taken place in the house should be shown, but it may be inferred from other circumstances.—*McAlpin v. State*, 3 Ind. 567.

[b] (Sup. 1881)

To sustain an indictment for renting a building to be used for gaming, under 2 Rev. St. 1876, p. 469, § 29, the state must show by sufficient evidence, either direct or circumstantial, that the accused so rented the property.—*Rodifer v. State*, 74 Ind. 21.

[c] (Sup. 1908)

An affidavit for visiting a gambling house, in violation of Public Offense Statute 1905

(Laws 1905, p. 693, c. 169) § 470, being Burns' Ann. St. 1908, § 2371, need not allege that defendant went there to gamble; but, if defendant has any legitimate excuse for his visit, the burden is on him to show it.—*State v. Bridgewater*, 171 Ind. 1, 85 N. E. 715; *Same v. Henson*, 171 Ind. 725, 85 N. E. 718; *Same v. Larter*, 171 Ind. 725, 85 N. E. 719; *Same v. Brooks*, 171 Ind. 725, 85 N. E. 975; *Same v. Charles*, Id.; *Same v. Ritter*, Id.; *Same v. Turner*, 171 Ind. 725, 85 N. E. 1027; *Same v. Ballard*, Id.; *Same v. Romaine*, 171 Ind. 725, 86 N. E. 73.

#### FOR CASES FROM OTHER STATES.

SEE 24 CENT. DIG. Gaming, § 285.

See, also, 20 Cyc. p. 912.

### § 97. — Admissibility.

Declarations by accused, see CRIMINAL LAW, § 413.

Hearsay, see CRIMINAL LAW, § 421.

#### [a] (Sup. 1890)

On a prosecution under Rev. St. 1881, § 2079, providing that whoever being the owner of any building or room rents the same to be used or occupied for gaming shall be fined, etc., evidence tending to prove that gambling was actually carried on in the room, and that the defendant knew or had good reason to believe that it was being carried on and suffered by his lessee, was competent as tending to prove or raise a presumption that the room was rented for the purpose of gaming.—*Voght v. State*, 24 N. E. 680, 124 Ind. 358.

On a prosecution under Rev. St. 1881, § 2079, providing that whoever being the owner of any building or room rents the same to be used or occupied for gaming shall be fined, etc., evidence that it was generally reputed that the room was kept as a gambling room; that the occupant was a gambler; that he had been indicted on and pleaded guilty to the charge of keeping a room in which gambling was permitted while occupying defendant's room—was competent as tending to raise an inference that defendant, an active man looking after his own business, and residing only two squares and a half away from the community in which the occupant's acts and business were the subject of comment, knew of the facts.—Id.

#### [b] (App. 1895)

Under Rev. St. 1804, § 2173, making it an offense for one to "knowingly" keep a building to be used or occupied for gaming, knowledge was provable like any other fact by either direct or circumstantial evidence.—*Emperly v. State*, 41 N. E. 840, 13 Ind. App. 393.

#### FOR CASES FROM OTHER STATES.

SEE 24 CENT. DIG. Gaming, §§ 286-290.

See, also, 20 Cyc. p. 913.

### § 98. — Weight and sufficiency.

#### [a] (Sup. 1856)

On the trial of an information against A. for money won of B. at a game of cards, B.

testified that, on or about the day stated in the information, he played cards with A., who won from him two five-dollar gold pieces, etc. *Held*, that the testimony obviously meant that the money was paid over to A.—*Branscum v. State*, 7 Ind. 593.

#### [b] (Sup. 1859)

2 Rev. St. p. 436, § 29, provides that if any person shall keep or suffer his building, etc., to be used for gambling, or if any person, being owner of any building, etc., shall rent the same to be used for gaming, he shall be fined, etc. *Held*, that under the first part of said section, upon proof that there has been gambling on the premises, it is still a question whether the premises were kept by defendant for that purpose.—*Winemiller v. State*, 11 Ind. 516.

#### [c] (Sup. 1870)

Where there is testimony showing that it was customary in defendant's billiard room for the loser to pay the hire of the table, defendant's knowledge sufficiently appears.—*Crawford v. State*, 33 Ind. 304.

#### [d] (Sup. 1879)

Evidence in a prosecution for keeping a gaming house reviewed, and *held* insufficient to show that defendant had knowledge of the gaming.—*Padgett v. State*, 68 Ind. 46.

#### [e] (Sup. 1881)

A finding that one indicted for keeping a gaming house knowingly suffered the house to be used for gaming purposes is sustained by evidence that, although his clerk or bartender had charge of the saloon, bar, and tables, defendant himself was often present and apparently inattentive to what was going on, and that the tables had been used for gaming for two years.—*Hamilton v. State*, 75 Ind. 586.

#### [f] (Sup. 1885)

Under Rev. St. § 2081, making it an offense to lose or win by playing or betting at any game or wager, evidence that a game of pool was played by defendant with A. and B. at the time and place charged; that the amount played for was 10 cents; and that A. lost the game and paid for it,—is not sufficient to justify a conviction, it not appearing that defendant won the 10 cents, or any sum.—*Middaugh v. State*, 103 Ind. 78, 2 N. E. 292.

#### [g] (Sup. 1886)

On the trial of an indictment for gaming, the only evidence to connect the accused with the offense was to the effect that the gambling was done in a room above his saloon. *Held*, that there was no evidence to support a conviction.—*Barnaby v. State*, 106 Ind. 539, 7 N. E. 231.

#### [h] (Sup. 1889)

Under Rev. St. 1881, § 2079, making it penal to rent premises for gaming, evidence that defendants, who were hotel keepers, rented a room in their hotel, ostensibly for a stor-

age and sleeping room; that soon after they were notified that gambling was carried on in the room; that for two months a faro bank was kept there, and the room regularly used for gambling, and that it had that reputation; that many people visited it; and that a man usually stood at the door who admitted only such persons as were thought desirable,—will support a verdict of guilty.—*Morgan v. State*, 117 Ind. 569, 19 N. E. 154.

[l] (Sup. 1890)

The evidence is sufficient to support a verdict of guilty when it shows that the general reputation was that the room was used for gambling; that during his occupancy the lessee had pleaded guilty to two indictments for keeping a room for gambling; and that defendant lived within two and one-half squares of the room, and collected his own rents.—*Voght v. State*, 124 Ind. 358, 24 N. E. 680.

On an indictment for renting a room to be used for gambling, the evidence is sufficient to support a verdict of guilty when it tends to show that defendant knew, or had good reason to believe, after the renting of the room, that it was used for gaming, and took no means to prevent it, and there is no rebutting evidence on his part.—*Id.*

[j] (App. 1900)

That a room is used for gambling so as to constitute a "gambling house," within the meaning of the statute, may be shown by circumstantial evidence in a prosecution for visiting a gambling house.—*Roberts v. State*, 58 N. E. 203, 25 Ind. App. 366.

[k] (App. 1900)

Evidence that the room occupied by defendant was over a saloon, and was furnished with a table, five or six chairs, a lounge, and a drawing board, and when visited, between 1 and 2 o'clock on Sunday morning, was occupied by five or six men, who were seated around the table, playing cards, and in front of them were piles of poker chips and money, and that some of the chips were piled in the middle of the table, was sufficient to support a conviction for keeping a gambling room, notwithstanding defendant's testimony that the room was occupied as an architect's office.—*Neeld v. State*, 58 N. E. 734, 25 Ind. App. 603.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, §§ 291-298.  
See, also, 20 Cyc. pp. 914, 915.

§ 99. Trial.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, §§ 299-302.  
See, also, 20 Cyc. pp. 915, 916.

§ 101. — Questions for jury.

[a] Whether the fact that the defendant permitted a roulette to be gambled upon once in his house is sufficient evidence to support an

indictment for keeping a gaming house is a question for the jury.—(Sup. 1836) *Armstrong v. State*, 4 Blackf. 247; (1860) *Gaylor v. McHenry*, 15 Ind. 383.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, § 300.  
See, also, 20 Cyc. p. 915.

§ 102. — Instructions.

[a] (Sup. 1881)

On a prosecution for keeping a gaming house, a charge which correctly declares to be gaming a wager of the money rent of a table is not rendered erroneous by the further statement that playing for a wager of checks, chips, or other things of value is gambling. Such statement does not withdraw the question of value from the jury, and is not a judicial declaration that checks and chips are things of value.—*Hamilton v. State*, 75 Ind. 586.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, § 301.  
See, also, 20 Cyc. p. 916.

§ 103. — Verdict.

[a] (Sup. 1819)

In an indictment under St. Dec. 30, 1816, § 4, charging the defendant in the same count with playing cards in a tavern and betting, the jury found him guilty of the playing, but not guilty of the betting. *Held*, that the verdict was sufficient.—*Durham v. State*, 1 Blackf. 33.

[b] (App. 1900)

Where a defendant was charged in the information with visiting a gambling house, under a statute making it an offense to "frequent or visit" a gambling house, and the evidence showed but a single visit, a finding that he was "guilty of frequenting a gambling house, as charged," must be construed in connection with the information, and is sufficient to support a judgment for the offense charged.—*Roberts v. State*, 58 N. E. 203, 25 Ind. App. 366.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, § 302.

§ 104. New trial.

Newly discovered evidence as ground for new trial, see CRIMINAL LAW, § 943.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, § 303.

§ 105. Appeal and error.

Appealability of judgment, see CRIMINAL LAW, § 1023.

Conclusiveness on appeal of a finding that a room is a gambling house, see CRIMINAL LAW, § 1159.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, § 304.  
See, also, 20 Cyc. p. 916.

**§ 106. Sentence and punishment.**

Denial of due process of law, see CONSTITUTIONAL LAW, § 278.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gaming, § 305.

See, also, 20 Cyc. p. 917.

**GARBAGE.**

See—

Nuisance, liability of city. MUNICIPAL CORPORATIONS, § 736.

Removal and disposition, municipal regulations. MUNICIPAL CORPORATIONS, § 607.

## GARNISHMENT.

### *Scope-Note.*

[INCLUDES subjection of property of defendants in civil actions, in possession of third persons, or of debts owing to such defendants, to payment of judgments recovered against them therein, by process of garnishment, trustee process, factorizing, etc.; nature and scope of the remedy in general; in what cases and to and against whom it is allowed, who may be charged as garnishees, trustees, factors, etc., and what property or credits may be reached: grounds of garnishment and jurisdiction over and proceedings to obtain garnishments; issuance, requisites, and validity of writs or summonses or notices of garnishment, trustee process, etc., and amendment thereof; service of writs, summonses, etc., and return thereof, and lien acquired by garnishment; quashing, vacating, or setting aside writs, etc., and dissolution thereof or discharge therefrom on giving security; claims of third persons to subject-matter of garnishment, interventions, and trials of such claims; liabilities of garnishees, trustees, etc.; proceedings to determine such liabilities, judgment therein, and enforcement of judgments; application of proceeds; liabilities on and enforcement of securities given to obtain, dissolve, discharge, etc., garnishments; and liabilities of persons other than officers for wrongful procuring, issuance, service, etc., of garnishments.]

[EXCLUDES attachment of property in general (see *Attachment*); proceedings against third persons supplementary to execution (see *Execution*); garnishments in proceedings before justices of the peace (see *Justices of the Peace*); exemptions from garnishment and protection of rights of exemption (see *Exemptions*); judgment and execution after garnishment (see *Judgment; Execution*); review of decisions in garnishment proceedings (see *Appeal and Error*); garnishment of property conveyed in fraud of creditors (see *Fraudulent Conveyances*); effect on garnishments of proceedings under insolvent acts (see *Insolvency*) or bankrupt acts (see *Bankruptcy*); and duties and liabilities of officers in respect of issuance, service, etc., of writs, summonses, etc., in garnishment proceedings (see *Clerks of Courts; Sheriffs and Constables*; and titles of other specific officers). For complete list of matters excluded, see cross-references, post.]

### *Analysis.*

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- § 4. — Nature of cause of action in general.
- § 10. Grounds of garnishment.

#### II. Persons and Property Subject to Garnishment.

- § 13. Existence of right of action by defendant against garnishee.
- § 16. Corporations in general.
- § 27. Corporate stock.
- § 29. Property pledged.
- § 34. Interests under insurance policies.
- § 35. Interests of heirs or distributees.
- § 36. Interests of devisees or legatees.
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- § 41. Demands not matured.
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**II. Persons and Property Subject to Garnishment—Continued.**

- § 48. Ownership or possession of property or rights.
- § 55. — Property in course of transportation by carrier.
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- § 90. Writ or summons of garnishment.
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**V. Lien of Garnishment and Liability of Garnishee.**

- § 109. Transfers of property or rights pending garnishment.
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- § 117. Prosecution of principal action.
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- § 166. Trial of issues between plaintiff and garnishee.
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**VI. Proceedings to Support or Enforce—Continued.**

§ 187. — Opening and vacating.

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**VII. Quashing, Vacating, Dissolution, or Abandonment.**

§ 193. Grounds for quashing, vacating, or dissolving.

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**VIII. Claims by Third Persons.**

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**IX. Operation and Effect of Garnishment, Judgment, or Payment.**

§ 229. Effect of garnishment as between defendant and garnishee.

§ 230. — In general.

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§ 232. Effect of garnishment as between garnishee and third persons.

§ 234. Effect of judgment against garnishee and payment or other satisfaction thereof.

§ 235. — In general.

§ 236. — Judgment on default or admission.

§ 237. — Foreign judgment.

**X. Liabilities on Bonds or Undertakings.**

[No paragraphs or references in this Digest. But see 24 Cent. Dig. Garn. §§ 455-469.]

**XI. Wrongful Garnishment.**

[No paragraphs or references in this Digest. But see 24 Cent. Dig. Garn. §§ 470-475.]

*Cross-References.**See—*Assignment of claim for loss under insurance policy affecting liability to garnishment. **INSURANCE**, § 594.**ATTACHMENT.****Banks**, procedure. **BANKS AND BANKING**, § 224.**County**, procedure. **COUNTIES**, § 221.**Decisions reviewable**. **APPEAL AND ERROR**, § 71.**Right of garnishee to review**. **APPEAL AND ERROR**, § 150.**Enforcement of claims against railroads**. **RAILROADS**, § 177.**Estoppel to deny validity of proceedings**. **ESTOPPEL**, § 70.**EXECUTION.****EXEMPTIONS.****LIS PENDENS**, § 8.**Mandamus to control acts of court or judge in reference to**. **MANDAMUS**, § 36.**Procedure in justices' courts**. **JUSTICES OF THE PEACE**, § 87.**Property fraudulently transferred by debtor**. **FRAUDULENT CONVEYANCES**, § 229.**Repeal of statute as affecting pending actions**. **STATUTES**, § 276.**Stockholder**. **CORPORATIONS**, § 253.**Supersedeas or stay, effect on jurisdiction of lower court**. **APPEAL AND ERROR**, § 487.**I. NATURE AND GROUNDS.****§ 3. Actions in which garnishment is authorized.****FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. §§ 3, 5.

See, also, 20 Cyc. pp. 979, 980.

**§ 4. — Nature of cause of action in general.**

[a] (Sup. 1882)

A writ of garnishment may issue in a suit to foreclose a mortgage where a personal

judgment may be rendered.—*Martin v. Holland*, 87 Ind. 105.**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. § 3.

See, also, 20 Cyc. p. 979.

**§ 10. Grounds of garnishment.**Garnishment of particular property fraudulently transferred by debtor, see **FRAUDULENT CONVEYANCES**, § 229.**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. §§ 15-17.

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

## II. PERSONS AND PROPERTY SUBJECT TO GARNISHMENT.

Laws exempting wages as class legislation, see CONSTITUTIONAL LAW, § 208.  
Statutory exemptions, see EXEMPTIONS.

### § 13. Existence of right of action by defendant against garnishee.

[a] (Sup. 1857)

Testator devised lands to his son, subject to the maintenance of his mother. The son allowed the mother to sell the land, joining her in a deed to the purchaser, and directing that the notes for the purchase money be made payable to her. *Held*, that the purchaser could not be held as a garnishee in respect to the purchase money in an attachment suit against the son.—*Hunt v. Coon*, 9 Ind. 537.

[b] (Sup. 1889)

One who has been paid in advance for services which he has agreed to render is not subject to garnishment therefor at the suit of his employer's creditors.—*Boyd v. Brown*, 120 Ind. 393, 22 N. E. 249.

[c] (App. 1892)

In a garnishment proceeding, where it appeared that some months before the action was begun the principal defendant transferred to the garnishee certain notes, receiving part payment, and also left other notes with the garnishee for collection, but that before the commencement of the action the garnishee had paid the balance due on the notes so transferred, and had collected and paid over the money on the notes left with him for collection, and there is no evidence of fraud or bad faith, the jury were properly charged to find for the garnishee.—*Wiles v. Lee*, 4 Ind. App. 579, 31 N. E. 474.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Garn. §§ 21-24.

See, also, 20 Cyc. pp. 983-986.

### § 16. Corporations in general.

Procedure in garnishment of banks, see BANKS AND BANKING, § 224.

• FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Garn. §§ 29, 30; 12 CENT. DIG. Corp. § 2630.

See, also, notes, 28 L. R. A. 600, 36 L. R. A. 561.

### § 27. Corporate stock.

[a] (App. 1893)

The stock of a nonresident in a foreign corporation held in trust in this state cannot be garnished in an action in this state.—*Smith v. Downey*, 8 Ind. App. 179, 34 N. E. 823, 35 N. E. 568, 52 Am. St. Rep. 467.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Garn. §§ 45, 46.

See, also, 20 Cyc. p. 990.

### § 29. Property pledged.

[a] (Sup. 1840)

The payee of a note delivered it to his replevin bail to indemnify the latter. In a writ of attachment afterwards issued against the payee, the maker was summoned as garnishee, and the bail subsequently sold the note without giving notice to the payee to redeem it. *Held*, that the maker was chargeable, not to the payee for the use of the purchaser from the bail, but to plaintiff in attachment.—*Evans v. Darlington*, 5 Blackf. 320.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Garn. §§ 47, 50, 74, 98, 100.

See, also, 20 Cyc. p. 991.

### § 34. Interests under insurance policies.

Effect of assignment by insured, see INSURANCE, § 594.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Garn. §§ 59, 60.

See, also, 20 Cyc. pp. 996, 997.

### § 35. Interests of heirs or distributees.

[a] (Sup. 1856)

The distributive share of an heir in his father's estate, while the amount thereof is unascertained, is liable in the hands of the executor to the process of garnishment.—*Stratton v. Ham*, 8 Ind. 84, 65 Am. Dec. 754.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Garn. §§ 61, 62.

See, also, 20 Cyc. p. 998.

### § 36. Interests of devisees or legatees.

[a] (Sup. 1884)

An executor can be held as garnishee in foreign attachment for a legacy payable to the debtor.—*Simonds v. Harris*, 92 Ind. 505.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Garn. §§ 63-65.

See, also, 20 Cyc. p. 990.

### § 38. Instruments and securities for payment of money and liabilities thereon in general.

[a] (Sup. 1859)

A person indebted by a note not negotiable, or not assignable by the law merchant, may be made liable as a garnishee, after the note has become due and before it is assigned, but not, as a general rule, before it becomes due, nor after he has had notice of its assignment, if he rely upon such notice in his answer.—*Junction R. Co. v. Cleneay*, 13 Ind. 161.

The maker of a note or bond negotiable by the law merchant cannot be subjected to judgment as garnishee without proof by the plaintiff that the negotiable paper actually remains at the time of the trial in the hands of the debtor, against whom the attachment issued as his

property, or in the hands of a fraudulent assignee.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. §§ 73-77.

See, also, 20 Cyc. pp. 1003-1005; note, 55 Am. Dec. 68.

**§ 41. Demands not matured.**

[a] (Sup. 1858)

One owing money to defendant debitum in presenti, solvendum in futuro, as on a note not due, may be summoned in as trustee under 2 Rev. St. p. 153, §§ 522-524.—Pursell v. Pappenheimer, 11 Ind. 327.

[b] (Sup. 1859)

A person indebted by a note not negotiable may be subjected to judgment as garnishee before the note is due, where all the parties are residents of the state, and are before the court, so that the maker may be protected from a second liability, though he cannot be compelled to pay until the note falls due.—Junction R. Co. v. Cleneay, 13 Ind. 161.

[c] (Sup. 1874)

A party indebted to an attachment defendant by a note not negotiable may be garnished, although his note may not be due, and judgment may be rendered against him in favor of the attaching creditor.—King v. Vance, 46 Ind. 246.

A judgment cannot be taken against a garnishee indebted by negotiable paper, unless it be shown that the note is past maturity and in the hands of the payee or not in the hands of a bona fide holder.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. §§ 78-81.

See, also, 20 Cyc. pp. 1005-1007; note, 85 C. C. A. 373.

**§ 44. Judgments.**

[a] (Sup. 1843)

A debt evidenced by judgment or decree may be reached by garnishment.—Halbert v. Stinson, 6 Blackf. 398.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. § 90.

See, also, 20 Cyc. p. 1009.

**§ 48. Ownership or possession of property or rights.**

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. §§ 91-112; 6 CENT. DIG. Banks, §§ 310, 311.

See, also, 20 Cyc. pp. 1010-1022; note, 23 L. R. A. 33.

**§ 55. — Property in course of transportation by carrier.**

[a] (App. 1906)

Burns' Ann. St. 1901, § 943, authorizes the making of any person a garnishee defendant when such person "has property of the defend-

ant of any description in his possession," etc. By section 951, a garnishee shall not be compelled in any case to pay or perform any contract in any other manner or at any other time than he would be bound to do for the defendant. Held, that where shippers consigned goods to themselves, acting under assumed names, the carrier, who had no knowledge save that derived from the shipment, was not liable as a garnishee to the shippers' creditors under a writ served during the transit.—Pittsburgh, C. & St. L. R. Co. v. Cox, 73 N. E. 120, 36 Ind. App. 291, 114 Am. St. Rep. 377.

[b] (App. 1906)

Burns' Ann. St. 1901, § 951, providing that a garnishee shall not be compelled to pay or perform a contract in any other manner or at any other time than he would be bound to do for defendant, when construed in connection with section 944, providing that a garnishee, from the day of the summons, shall be accountable to the plaintiff for property of the defendant in his hands, and section 952, relieving the garnishee from liability on payment to the sheriff or into court of the money owing by him, does not prevent a valid garnishment of goods in the possession of a carrier consigned to a point outside the state.—Malott v. Johnson, 77 N. E. 866, 37 Ind. App. 678.

A railroad corporation receiving goods from a connecting carrier for shipment is subject to garnishee process.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. § 108.

See, also, 20 Cyc. p. 1021; note, 50 Am. St. Rep. 465.

**§ 57. Property in custody of the law.**

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. §§ 113-116, 119.

See, also, 20 Cyc. pp. 1022-1028.

**§ 59. — Deposits and funds in court.**

[a] (Sup. 1853)

Money collected by a sheriff on execution, and paid over to the clerk of court from which the execution issued, is not subject to garnishment in an action against plaintiff in execution.—Sibert v. Humphries, 4 Ind. 481.

[b] (Sup. 1853)

Bank notes received by a justice in payment of a judgment are not, while in his possession, subject to garnishment on an execution against a judgment plaintiff.—Hooks v. York, 4 Ind. 636.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. §§ 74, 114.

See, also, 20 Cyc. p. 1023.

**§ 60. — Property held under judicial process.**

[a] (Sup. 1853)

Money levied by an officer under an execution, and remaining in his hands, is not sub-

ject to garnishment.—*Winton v. State ex rel. Ezra*, 4 Ind. 321.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. §§ 115, 116.

See, also, 20 Cyc. p. 1024; note, 26 L. R. A. 216, 218.

**§ 61. — Property held by executors, administrators, guardians, or trustees.**

[a] (Sup. 1853)

A foreign administrator may be proceeded against by garnishment.—*Lewis v. Reed*, 11 Ind. 239.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. § 119.

See, also, 20 Cyc. pp. 1027, 1028; notes, 47 L. R. A. 345, 5 L. R. A. (N. S.) 1072.

**III. PROCEEDINGS TO PROCURE.**

In justices' courts, see JUSTICES OF THE PEACE, § 87.

**§ 72. Jurisdiction of person of defendant.**

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. §§ 141, 142.

See, also, 20 Cyc. p. 1033.

**§ 73. — In general.**

[a] (Sup. 1863)

Where the proceeding is *ex parte*, without personal service on or appearance by defendant, the jurisdiction is acquired over him only by an attachment of his property, and, if the latter illegally issues, the proceedings under it will be void, and in the latter case the garnishee is therefore interested to know that the jurisdiction has duly attached, but has no right further to interfere in the proceeding, and he is not responsible for the regularity of the proceeding in the main action.—*Schoppenhast v. Bollman*, 21 Ind. 280.

[b] (Sup. 1866)

In proceedings in attachment the transcript did not show that the attachment defendant was personally served with process, nor that his property had been attached in the county where the action was brought, nor that the garnishee had been summoned in that county. *Held*, that no jurisdiction of the attachment defendant had been obtained by the court, and that the judgment against the garnishee was void.—*Johnson v. Johnson*, 26 Ind. 441.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. § 141.

**§ 76. Jurisdiction of person of garnishee.**

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. §§ 143, 144.

See, also, 20 Cyc. pp. 1034, 1035.

**§ 77. — In general.**

[a] (Sup. 1851)

To authorize a judgment by default in a proceeding in foreign attachment against a garnishee served with process in and being a resident of another county than that in which the writ of attachment was issued, it is necessary, under the statute, that property of the absconding debtor should have been attached, or a garnishee served with process in the latter county.—*Reinhard v. Keith*, 3 Ind. 137.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. § 143.

See, also, 20 Cyc. p. 1034.

**§ 79. Jurisdiction of property or other subject-matter of garnishment.**

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. §§ 145-147.

See, also, 20 Cyc. pp. 1036, 1037.

**§ 80. — In general.**

[a] (App. 1906)

*Burns' Ann. St.* 1901, § 931, authorizes judgment for an attachment plaintiff when the property is attached in the county where the action is brought, or when a garnishee shall have been summoned in that county who has property subject to attachment. Section 949 provides that a return of "no property" found shall not affect proceedings against the garnishee. Section 943 (*Acts* 1897, p. 233, c. 153) authorizes a proceeding against a garnishee whether a writ of attachment has been issued or not. *Held*, that a court has jurisdiction of property of defendant garnished while in the hands of a carrier, though there was no valid levy of a previous writ of attachment against the same property.—*Malott v. Johnson*, 77 N. E. 866, 37 Ind. App. 678.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. § 145.

See, also, 20 Cyc. p. 1036.

**§ 85. Parties.**

[a] (Sup. 1885)

When plaintiff in a garnishment proceeding proves the debt to be owed him by one firm, and the debt due from the garnishee is owed to another firm, all the members of which are not before the court, so that the rights of the garnishee could be fully protected, there cannot be a valid judgment for plaintiff.—*Field v. Malone*, 102 Ind. 251, 1 N. E. 507.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. §§ 150-154.

See, also, 20 Cyc. p. 1039.

**§ 86. Petition or affidavit.**

[a] (Sup. 1865)

The statute does not require a separate complaint to be filed against a person sum-

moned as a garnishee. The affidavit required to procure the summons is all that is necessary.—*Whitaker v. Coleman*, 25 Ind. 374.

[b] (*Sup.* 1887)

Although a complaint may not have been good as against one of several defendants, where not demurred to, such defendant, who has been garnished on proper affidavit, cannot obtain a reversal on the ground of the insufficiency of the complaint.—*Becknell v. Becknell*, 110 Ind. 42, 10 N. E. 414.

[c] (*App.* 1898)

There is no error in overruling a motion for a nunc pro tunc entry alleging that on a certain date additional affidavits in attachment and garnishment were filed with the clerk, and that through the mistake or inadvertence of the clerk no minute of such filing was made by the clerk, where it appears that the additional affidavits were simply filed with the clerk, and were filed while the court had under consideration the original affidavits which were afterwards held to be insufficient by the court.—*Teutonia Loan and Bldg. Co. v. Turrell*, 49 N. E. 852, 19 Ind. App. 469, 65 Am. St. Rep. 419.

While the court has under consideration a motion to quash affidavits in garnishment, additional affidavits cannot be filed with the clerk to take the place of the original.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Garn. §§ 155-166.

See, also, 20 Cyc. pp. 1040-1044.

§ 87. — Form and requisites in general.

[a] (*Sup.* 1881)

Where, in garnishment proceedings, plaintiff's affidavit named defendant as "Jonathan B.," there was no error as against the garnishee in permitting it to be amended by inserting the name of "Johnson B.;" it appearing that the amendment could not have misled or prejudiced the garnishee.—*Baltimore, O. & C. R. Co. v. Taylor*, 81 Ind. 24.

Where, in garnishment proceedings, the defendant made no objection to an amendment of the affidavit and undertaking by striking therefrom the name of "Jonathan," which was charged to be defendant's given name, and substituting for it the name of "Johnson," the garnishee could not complain.—*Id.*

[b] (*Sup.* 1898)

The affidavit required under Acts 1897, p. 233, amending Code Civ. Proc. § 216 (*Burns' Supp.* 1897, § 943; *Horner's Rev. St.* 1897, § 931), before a summons in garnishment can issue, must contain some one or more of the grounds of attachment provided in *Burns' Rev. St.* 1894, § 925 (*Horner's Rev. St.* 1897, § 913).—*Pomeroy v. Beach*, 49 N. E. 370, 149 Ind. 511; *Hart v. O'Rourke*, 51 N. E. 330, 151 Ind. 205.

[c] (*App.* 1898)

When affidavits in garnishment have been held insufficient, no subsequent proceedings based on them can be had.—*Teutonia Loan & Bldg. Co. v. Turrell*, 49 N. E. 852, 19 Ind. App. 469, 65 Am. St. Rep. 419.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Garn. §§ 156-159, 163-166.

See, also, 20 Cyc. p. 1040.

§ 88. — Particular averments.

[a] (*Sup.* 1884)

An affidavit in garnishment, charging that the attachment defendant, at the time of the alleged fraudulent transfer of a note to the garnishee, was notoriously insolvent, and that all his property subject to execution had been sold on execution, is sufficient on motion in arrest of judgment.—*Corbin v. Goddard*, 94 Ind. 419.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Garn. §§ 160-166.

See, also, 20 Cyc. pp. 1040-1042.

IV. WRIT OR SUMMONS AND NOTICE, SERVICE, AND RETURN.

In justices' courts, see JUSTICES OF THE PEACE, § 87.

§ 90. Writ or summons of garnishment.

Service on railroad company, see RAILROADS, § 24.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Garn. §§ 170-199.

See, also, 20 Cyc. pp. 1044-1054.

§ 92. — Issuance.

[a] (*Sup.* 1851)

In a proceeding in foreign attachment, property of the absconding debtor must have been attached in the county where the writ was issued, or a person in that county summoned as a garnishee, before process can issue under the statute to another county against a garnishee resident therein.—*Reinhard v. Keith*, 3 Ind. 137.

[b] (*App.* 1910)

Under *Burns' Ann. St.* 1908, § 966, authorizing the issuance of a garnishee summons where at the time the "action is commenced" plaintiff files with the clerk an affidavit averring that any person has the control of any property of defendant, etc., a garnishee summons may issue on the filing of the complaint, the issuance of summons, returned "Not found," and the filing of an affidavit averring that the party sought to be summoned as garnishee has property of a nonresident defendant; for the quoted words must be taken in their ordinary sense, and not within the definition of the commencement of an action under section 317.—

Northern Indiana R. Co. v. Lincoln Nat. Bank, 92 N. E. 384.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. §§ 170-173.

See, also, 20 Cyc. pp. 1044, 1045.

**§ 93. — Form and requisites.**

[a] (Sup. 1842)

A writ of foreign attachment may issue against partners in the name of their firm.—*Voorhees v. Hoagland*, 6 Blackf. 232.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. §§ 160, 174-180.

See, also, 20 Cyc. pp. 1045-1047.

**§ 96. — Return.**

[a] (Sup. 1881)

The sheriff's return of service of a garnishee summons is conclusive, and the garnishee will be accountable for money in his hands at the time of such service as returned, though he was ignorant of the garnishment and subsequently acquired a good defense.—*Hite v. Fisher*, 76 Ind. 231.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. §§ 189-195.

See, also, 20 Cyc. pp. 1051-1053.

**§ 98. Summons or notice to defendant.**

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. §§ 200-208.

See, also, 20 Cyc. pp. 1054-1056.

**§ 101. — Service.**

[a] (Sup. 1866)

When, in a proceeding in attachment against a nonresident, the writ of attachment is returned "no property found," but a summons in garnishment is served, notice of the pendency of the suit must be given by three successive publications, the last of which must be 30 days before the day of trial.—*Andrews v. Powell*, 27 Ind. 303.

[b] Rev. St. Mo. 1879, § 473, provides that when a person cannot be summoned, and his property has been attached, the court may make an order requiring plaintiff to give him notice by advertisement. *Held*, that such a service does not confer jurisdiction where the only attachment is by garnishment of wages, which are exempt by the laws of Indiana and Missouri; and a judgment suffered by the garnishee in Missouri is no protection, therefore, to an action for such wages in Indiana.—(Sup. 1890) *Terre Haute & I. R. Co. v. Baker*, 122 Ind. 433, 24 N. E. 83; (App. 1892) *Id.*, 4 Ind. App. 66, 30 N. E. 431.

[c] (App. 1898)

An affidavit in attachment, which states that plaintiffs have a cause of action for damages against defendants for fraud in the sale of a horse and for breach of warranty, and alleges that defendants are nonresidents, and

an affidavit in garnishment stating, in addition, that resident third persons are indebted to defendants, are sufficient to warrant the publication of notice to defendants, under *Burns' Rev. St. 1894, § 320* (Rev. St. 1881, § 318), providing for notice of the pendency of actions, *inter alia*, where the action is to enforce the collection of any demand by proceedings in attachment or garnishment.—*Redman v. Burgess*, 50 N. E. 825, 20 Ind. App. 371.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. §§ 202-207.

See, also, 20 Cyc. pp. 1055, 1056.

**§ 104. Appearance of garnishee.**

[a] (Sup. 1866)

If one against whom an affidavit of garnishment has been filed, but on whom no summons has been served, voluntarily appears and answers, he cannot afterwards object that he was not served with process.—*Whitney v. Lehmer*, 26 Ind. 503.

[b] (Sup. 1881)

A garnishee may waive its right to object to process and service by a voluntary appearance to the proceedings.—*Baltimore, O. & C. R. Co. v. Taylor*, 81 Ind. 24.

[c] (App. 1899)

Where a garnishee responds to the summons, and makes oral answer, admitting an indebtedness to the debtor, the court acquires such jurisdiction of his person as entitles it to render a valid judgment against him.—*Alberts v. Baker*, 52 N. E. 409, 21 Ind. App. 373.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. §§ 209-213.

See, also, 20 Cyc. pp. 1056, 1057.

**V. LIEN OF GARNISHMENT AND LIABILITY OF GARNISHEE.**

**§ 109. Transfers of property or rights pending garnishment.**

[a] (Sup. 1860)

Debts due from citizens to a foreign corporation were garnished by foreign creditors. The garnishees did not claim exemption as being indebted on negotiable paper. Afterwards the corporation assigned all of their property in trust for creditors. The assignees appeared and claimed the debts, but did not show that they were on notes. *Held*, that the garnishees were liable to the attaching creditors.—*Stetson v. Cleneay*, 14 Ind. 453.

[b] (Sup. 1862)

A garnishee, at the time of service indebted on notes not negotiable by the law merchant, and which he afterwards, but before filing his answer, sells, is liable to plaintiff to the amount of such notes.—*Simpson's Adm'r v. Potter*, 18 Ind. 429.

[c] (Sup. 1885)

At the time of summons, a garnishee held as collateral security for defendant's indebted-

ness the note of a third person for a much larger amount, which it afterwards sold for the exact amount of the indebtedness. *Held* that, in the absence of showing that this was a proper disposition of the note, the garnishee was chargeable with the excess.—*First Nat. Bank of Indianapolis v. Armstrong*, 101 Ind. 244.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. §§ 227-229.

See, also, 20 Cyc. p. 1064.

**§ 110. Grounds and extent of liability of garnishee in general.**

[a] (Sup. 1873)

A writ of garnishment, issued and served under an original attachment proceeding, holds all money or property belonging to the attachment defendant, in the hands of the garnishee at the time the writ is served, not only for the original plaintiff, but for all creditors who file claims under the original proceeding before the final adjustment thereof.—*Ryan v. Burkam*, 42 Ind. 507.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. §§ 230, 231.

See, also, 20 Cyc. p. 1064.

**§ 112. Delivery of property to defendant or others after garnishment.**

[a] (Sup. 1873)

A person who has been served as garnishee in an original attachment proceeding, and who at the time of service has money in his possession belonging to the attachment defendant, cannot deliver the money to the attorney of defendant on being informed by the attorney of plaintiff that the proceedings have been compromised and dismissed, and by such delivery be released from his liability as garnishee to another creditor of defendant, who has commenced proceedings by filing under the original suit, though the garnishee has not had actual notice of such filing.—*Ryan v. Burkam*, 42 Ind. 507.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. § 235.

See, also, 20 Cyc. p. 1068.

**§ 116. Payment of indebtedness after garnishment.**

[a] (Sup. 1866)

A payment of the debt by the garnishee, after the service of the summons of garnishment, to the attachment defendant, or his general assignee for the benefit of his creditors, will not discharge such garnishee.—*Cleneay v. Junction R. Co.*, 26 Ind. 375.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. § 237.

See, also, 20 Cyc. p. 1069.

**VI. PROCEEDINGS TO SUPPORT OR ENFORCE.**

Competency of garnishee as witness on trial of issue as to assignment of claim against him, see WITNESSES, § 92.

Contracts not to be performed within one year, see ante, § 44.

Effect of supersedeas or stay, see APPEAL AND ERROR, § 487.

**§ 117. Prosecution of principal action.**

[a] (Sup. 1872)

Garnishment proceedings, being incident to the main action, depend on it.—*Robbins v. Alley*, 38 Ind. 533.

[b] (Sup. 1881)

A judgment against a garnishee is not enforceable, if the judgment against the attachment defendant is void.—*Matheney v. Earl*, 75 Ind. 531.

[c] (Sup. 1883)

Where, in a proceeding by attachment, the summons against the principal defendant is returned without service, and no property has been attached, there cannot be a judgment against a garnishee until after notice by publication to the principal defendant; and that such publication has been had should be shown by the record of the judgment.—*Newman v. Manning*, 89 Ind. 422.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. § 238

See, also, 20 Cyc. p. 1070.

**§ 120. Equitable remedies in aid of garnishment.**

[a] (Sup. 1856)

Where creditors, in a suit of foreign attachment, have obtained judgments at law against the principal debtor, the question whether the garnishee or trustee had illegally disposed of the funds of the debtor, after service of the writ, is triable at law, and not in equity.—*St. John v. Harrington*, 8 Ind. 28.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. §§ 241, 242.

See, also, 20 Cyc. p. 1071.

**§ 122. Grounds of objection and defenses by garnishee.**

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. §§ 248-261.

See, also, 20 Cyc. pp. 1073-1080; note, 13 Am. Dec. 341.

**§ 123. — In general.**

[a] (App. 1899)

A release of one garnishee by attachment plaintiffs while retaining all their rights against other garnishees will not affect the other garnishees where their indebtedness is to the principal debtor, and not to the garnishee

released.—*Phenix Ins. Co. v. Jacobs*, 55 N. E. 778, 23 Ind. App. 509.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. §§ 243, 248.

See, also, 20 Cyc. p. 1073.

**§ 124. — Defects in proceedings in principal action.**

[a] (Sup. 1863)

Where defendant in the main action is personally served with process, the garnishment is not the foundation of the jurisdiction; and, in such case, if the garnishment illegally issues, it is the privilege of defendant alone to take advantage of it.—*Schoppenhast v. Bollman*, 21 Ind. 280.

[b] (Sup. 1873)

If defendant in attachment is personally present in court, the garnishee is not required to question the jurisdictional legality of the proceedings, or their regularity as to defendant, nor is he in a condition to do so; but, where defendant in attachment is not personally before the court, the garnishee is required to examine and know that the court has jurisdiction of the subject of the action.—*Ohio & M. R. Co. v. Alvey*, 43 Ind. 180.

[c] (Sup. 1881)

In a suit begun by foreign attachment, the garnishee cannot be heard to question the jurisdiction of the court over the principal defendant, nor the legality of the proceedings as to him; the principal defendant having himself appeared and failed to raise these questions.—*Baltimore, O. & C. R. Co. v. Taylor*, 81 Ind. 24.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. § 249.

See, also, 20 Cyc. p. 1074.

**§ 125. — Defects in garnishment proceedings.**

[a] (Sup. 1881)

Where a defendant appeared in garnishment proceedings, he alone could take advantage of defects in the undertaking, and the garnishee was relieved from all obligations in relation to such matters.—*Baltimore, O. & C. R. Co. v. Taylor*, 81 Ind. 24.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. § 250.

See, also, 20 Cyc. p. 1075.

**§ 127. — Defenses as against defendant in general.**

[a] (Sup. 1872)

A contract recited that certain personal property was sold by A. to B. with a warranty that the value was a certain amount, and that the goods were to be paid for by C., who accepted the contract and agreed to comply with its terms. *Held* that, in an action by D. against

A., in which process of garnishment was taken against C., the latter might set up, as a defense to a note given by him to A. under that contract, the failure of consideration, in that the property was not of the value warranted, although the property had been delivered to B.—*Ball v. Citizens' Nat. Bank*, 39 Ind. 364.

[b] (Sup. 1889)

Plaintiff had knowledge of the pendency of a suit against him in another state, in which defendant was garnished as his debtor, and defendant's attorneys appeared for him and filed his affidavit of exemption, and it did not appear that plaintiff objected to the making of such defense, or requested or authorized defendant or its attorneys to make, or informed them of, any other defense, or that he was not capable of defending. *Held*, that it was not defendant's duty to defend the suit.—*Chicago, St. L. & P. R. Co. v. Meyer*, 117 Ind. 563, 19 N. E. 320.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. § 252.

**§ 129. — Claim to property by garnishee.**

[a] (Sup. 1873)

Where one served as garnishee shows that he in good faith purchased the property and effects of the debtor, and agreed therefor to pay certain debts of debtor, and apply the residue, if any, on a debt to himself from the debtor, and that the proceeds of the property will not be sufficient to pay the debts assumed and his own, plaintiff cannot recover of the garnishee.—*Chapin v. Jackson*, 45 Ind. 153.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. § 254.

See, also, 20 Cyc. p. 1077.

**§ 138. Answer or disclosure of garnishee.**

Estoppel of garnishee to deny liability, see ESTOPPEL, § 58.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. §§ 266-270, 273-279.

See, also, 20 Cyc. pp. 1081-1091.

**§ 139. — In general.**

[a] (Sup. 1907)

Where the principal defendant in a garnishment proceeding has personal knowledge of the suit, the garnishee is not bound to go further than to look to the jurisdiction of the court, act fairly, and make a full disclosure.—*Baltimore & O. R. Co. v. Freeze*, 169 Ind. 370, 82 N. E. 761.

**§ 140. — Persons who may make.**

[a] (Sup. 1886)

Under the general banking law, the president of a bank is the only proper person to an-

swer for the bank on process of garnishment.—*Sturgis v. Rogers*, 26 Ind. 1.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Garn. § 286.

See, also, 20 Cyc. p. 1081.

#### § 144. — Requisites and sufficiency as defense.

[a] (Sup. 1859)

In a suit against a foreign insurance and trust company, a railroad company, who was garnished, answered that it had issued bonds with semiannual interest coupons attached, and that the principal defendant at one time held a number of said bonds, but whether they had at the time of answering been negotiated or not the respondent did not know, and hence could not admit any indebtedness; and, there being nothing in the record showing that at the time of the hearing of the cause the trust company held any of the bonds, the railroad company could not be charged as garnishee.—*Junction R. Co. v. Cleneay*, 13 Ind. 161.

[b] (Sup. 1887)

A plea in abatement by a garnishee defendant, that he is a nonresident of the county, and his land sought to be affected is in another county, is insufficient, where it fails to show that the principal defendant had not been personally served, that no property in that county in which the garnishee lives had been attached, and that no resident garnishee had been summoned in that county.—*Becknell v. Becknell*, 110 Ind. 42, 10 N. E. 414.

[c] (App. 1897)

The special answer of a garnishee, summoned as a judgment debtor of defendant, that the judgment was "compromised and settled," and satisfaction entered in the proper court, before notice to the garnishee, *prima facie*, shows no indebtedness.—*Thompson v. Shewalter*, 46 N. E. 601, 17 Ind. App. 290.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Garn. § 270.

See, also, note, 19 L. R. A. 577.

#### § 148. — Conclusiveness and effect in general.

[a] (Sup. 1866)

It is not competent for a garnishee to contradict his answer as to the time when he paid defendant the debt attached.—*Cleneay v. Junction R. Co.*, 26 Ind. 375.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Garn. §§ 275-279.

See, also, 20 Cyc. pp. 1089-1090.

#### § 156. Delivery of property by garnishee.

[a] (Sup. 1873)

A garnishee may protect himself from liability by delivering the money or property in his possession to the officer serving the writ.

If he fails to do this, he must retain the money or property until the final adjustment of the suit.—*Ryan v. Burkam*, 42 Ind. 507.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Garn. § 286.

See, also, 20 Cyc. pp. 1092, 1093.

#### § 157. Payment into court or to officer by garnishee.

[a] (Sup. 1873)

A person who has been served as garnishee may shield himself from liability by paying the money into court. If he fails to do this, he must retain the money or property until the final adjustment of the suit.—*Ryan v. Burkam*, 42 Ind. 507.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Garn. § 287.

See, also, 20 Cyc. pp. 1092, 1093.

#### § 159. Evidence as between plaintiff and garnishee.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Garn. §§ 298-302.

See, also, 20 Cyc. pp. 1096-1100.

#### § 162. — Presumptions and burden of proof.

[a] (Sup. 1866)

In garnishment of a debt evidenced by commercial paper, before a judgment can be rendered against the garnishee, plaintiff must show that the paper has matured, and that at the time of maturity it was held by the attachment defendant, or that it was not in the hands of a bona fide holder.—*Cleneay v. Junction R. Co.*, 26 Ind. 375.

[b] (Sup. 1885)

The only ground on which a sheriff has the right to proceed against a garnishee in attachment proceedings is that he is the debtor of those against whom the attachment issued. The general denial requires plaintiff to prove this fact.—*Field v. Malone*, 102 Ind. 251, 1 N. E. 507.

Where a general denial is filed by a garnishee, the burden is on plaintiff to prove all the material facts essential to make payment of the judgment in the garnishment a protection in case his creditors should sue him, including the fact that all of the creditors interested in the claim garnished were before the court.—*Id.*

[c] (App. 1905)

The maker of a negotiable note cannot be subjected to garnishment in a suit against the debtor without proof that the debtor is the legal or equitable owner.—*Brown v. Fisher*, 74 N. E. 632, 35 Ind. App. 549.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Garn. § 300.

See, also, 20 Cyc. pp. 1097, 1098.

**§ 164. — Weight and sufficiency.**

[a] (Sup. 1870)

Testimony of numerous witnesses that a garnishee admitted being indebted to defendant debtor in the amount attached will sustain a finding and judgment against the garnishee.—*McKee v. Anderson*, 35 Ind. 17.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. § 302.

See also, 20 Cyc. p. 1100.

**§ 165. Dismissal or discharge of garnishee before trial.**

[a] (Sup. 1843)

A garnishee in foreign attachment admitted, in answer to interrogatories, his indebtedness by judgment to defendant in attachment. The court, without any motion, and against plaintiff's will, dismissed the proceedings against the garnishee; the attachment being still pending. *Held*, that the dismissal was erroneous.—*Halbert v. Stinson*, 6 Blackf. 398.

[b] (App. 1896)

On motion by garnishee to be discharged, facts alleged in the motion, or in the statement in support thereof, cannot be considered, unless set up in the pleadings filed before the motion was presented, such a motion being equivalent at most to a motion for judgment on the pleadings.—*Rigney v. Jacobs*, 45 N. E. 343, 17 Ind. App. 545.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. §§ 303-307.

See, also, 20 Cyc. pp. 1101, 1102.

**§ 166. Trial of issues between plaintiff and garnishee.****FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. §§ 308-314.

See, also, 20 Cyc. pp. 1102-1105.

**§ 173. — Verdict and findings.**

Failure of court to find on particular question, see TRIAL, § 397.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. § 314.

See, also, 20 Cyc. p. 1105.

**§ 174. Judgment against garnishee.**

Default, see JUDGMENT, § 92.

Effect of judgment, and payment or other satisfaction thereof, see post, §§ 234-237.

Foreign judgments, see JUDGMENT, §§ 814-829. Jurisdiction of justices of the peace as dependent on amount in controversy, see JUSTICES OF THE PEACE, § 44.

Res judicata, see JUDGMENT, §§ 540-740.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. §§ 315-364.

See, also, 20 Cyc. pp. 1105-1119; note, 46 Am. Dec. 341.

**§ 175. — Nature and essentials in general.**

[a] (Sup. 1858)

Judgment against the trustee, indebted on a note not yet due, should not be that execution issue on nonpayment at maturity, for there may be a failure of consideration before that. It should forbid transfer or payment until maturity or further order.—*Pursell v. Pappenheimer*, 11 Ind. 327.

[b] (Sup. 1898)

The fact that a judgment rendered against a garnishee is erroneous by reason of no affidavit in attachment being filed as prescribed by Acts 1897, p. 233, and also by reason of the amount due from the garnishee being exempt under said act, does not render it void.—*Hart v. O'Rourke*, 51 N. E. 330, 151 Ind. 205.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. §§ 315-322.

See, also, 20 Cyc. pp. 1105-1109.

**§ 181. — On trial of issues.**

[a] (Sup. 1881)

A mortgage securing a note may be foreclosed in garnishment proceedings instituted against the payee and the maker.—*Sharts v. Awalt*, 73 Ind. 304.

**§ 184. — Protection or indemnity to garnishee.**

[a] (Sup. 1882)

A garnishee is protected by a judgment of a court of competent jurisdiction, though there may be error or irregularity in the proceedings.—*Oppenheim v. Pittsburgh, C. & St. L. R. Co.*, 85 Ind. 471.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. § 325.

**§ 187. — Opening and vacating.**

[a] (Sup. 1860)

Suit was commenced by attachment, and one B. was garnished, and on his answer judgment was rendered against him. At a subsequent term motion was made by the attorney of the defendants on his own affidavit alone to have the judgment against B. set aside. *Held*, that no cause was shown for setting aside the judgment simply on this application.—*Sturges v. Rogers*, 16 Ind. 18.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. §§ 359-364; 30

CENT. DIG. Judgm. § 751.

See, also, 20 Cyc. pp. 1117-1119.

**§ 191. Costs and attorney's fees.**

[a] (Sup. 1881)

Under 2 Rev. St. 1876, p. 109, § 182, where a garnishee had money in its hands due from it to defendant when the proceedings were commenced, and more than enough to pay all judgments against defendant and the costs of the proceedings, there was no error in adjudging

costs against the garnishee.—*Baltimore, O. & C. R. Co. v. Taylor*, 81 Ind. 24.

**FOR CASES FROM OTHER STATES.**

SEE 24 CENT. DIG. Garn. §§ 372-379.

See, also, 20 Cyc. pp. 1121-1125.

**VII. QUASHING, VACATING, DISSOLUTION, OR ABANDONMENT.**

**§ 193. Grounds for quashing, vacating, or dissolving.**

[a] (Sup. 1965)

Where no property has been taken in attachment, and garnishee has, on his own application, procured a continuance of the proceedings against him, after personal judgment against defendant he cannot afterwards insist that plaintiff has abandoned his right to judgment against him.—*Whitaker v. Coleman*, 25 Ind. 374.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. §§ 381, 382.

See, also, 20 Cyc. pp. 1125, 1126.

**§ 194. Motions and proceedings thereon.**

[a] (Sup. 1845)

The defendant, in foreign attachment, may plead in abatement without filing special bail.—*Abbott v. Warriner*, 7 Blackf. 573.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. § 384; 30 CENT.

DIG. Plead. § 219.

See, also, 20 Cyc. p. 1127.

**§ 198. Abandonment.**

[a] (App. 1901)

Where, in an action for divorce, a final judgment for plaintiff is rendered, without an adjudication being had on an issue in ancillary proceedings of attachment and garnishment, that part of the case is abandoned, and the court has no power to afterwards take up the matter of the attachment and garnishment independently, and render a judgment on those issues.—*Sahner v. Sahner*, 60 N. E. 369, 26 Ind. App. 624.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. § 391.

See, also, 20 Cyc. p. 1129.

**VIII. CLAIMS BY THIRD PERSONS.**

Claim by garnishee as defense to garnishment proceedings, see ante, § 129.

**§ 212. Proceedings for establishment and determination of claims.**

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. §§ 405-420.

See, also, 20 Cyc. pp. 1134-1138.

**§ 215. — Parties.**

[a] (Sup. 1861)

When a garnishee sets up an assignment of his indebtedness to defendant, notified to him before service of the garnishment process, if plaintiff desires to dispute the validity of the assignment, it is proper, if not necessary, to bring the assignee before the court.—*Cadwalader v. Hartley*, 17 Ind. 520.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. § 407.

See, also, 20 Cyc. p. 1135.

**§ 216. — Pleading.**

[a] (Sup. 1843)

A summons was served on S. as garnishee in attachment on the 30th of September, who answered that, on the 25th of that month, he gave his obligation to defendant in attachment for a certain sum of money; that he had been informed by letter from the obligee, dated the 2d October, and received a day or two afterwards, that the obligation was assigned to D.; that he had since received notice of its assignment by D. to P. and G.; that the obligation had been presented for payment; and that the assignment to D. was dated the 28th of September. Plaintiff replied (1) that the obligation was not bona fide assigned to D. before service of the summons on the garnishee; (2) that the garnishee had no notice of the assignment till after he was summoned; (3) that the assignment was without consideration, and made to defraud plaintiff and other creditors of the obligee. *Held*, that the replications were insufficient.—*Smith v. Wright*, 6 Blackf. 550.

[b] (Sup. 1850)

Where an obligor summoned in an attachment suit as garnishee answers that the obligation was assigned before he was summoned, the attachment plaintiff cannot reply that the garnishee had no notice of the assignment until after he was summoned.—*Smith v. Blatchford*, 2 Ind. 184, 52 Am. Dec. 504.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. § 408.

See, also, 20 Cyc. p. 1134.

**IX. OPERATION AND EFFECT OF GARNISHMENT, JUDGMENT, OR PAYMENT.**

**§ 229. Effect of garnishment as between defendant and garnishee.**

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. §§ 435-444.

See, also, 20 Cyc. pp. 1140-1146.

**§ 230. — In general.**

[a] (Sup. 1848)

A defendant, pleading to an action of debt that a judgment in attachment had been obtained against him as garnishee, must allege that the judgment was for the same debt, or a

part thereof, for which the present action is brought.—*Cornwell v. Hungate*, 1 Ind. 156.

[b] (*Sup.* 1861)

The answer, in an action on a note, that defendant had been compelled to pay the note to a creditor of plaintiff, to constitute a bar, must show that the note in suit and that under consideration in the garnishment are identical.—*Saugster v. Butt*, 17 Ind. 354.

[c] (*Sup.* 1863)

Though proceedings in attachment were irregular, and the judgment therein erroneous, where such proceedings were not absolutely void, but were such as the garnishee might regard in making payment, a payment so made discharges him from further liability to the principal defendant therein.—*Schoppenhast v. Bollman*, 21 Ind. 280.

A garnishee is entitled to the benefit claimed under a judgment against him as such, without being responsible for the regularity of these proceedings.—*Id.*

[d] (*Sup.* 1864)

If the court have jurisdiction of the subject-matter and the parties, a payment on execution under its judgment will protect the garnishee, though the judgment may have been irregular and reversible on error, and a reversal of it by defendant for irregularity, after payment by the garnishee, will not invalidate the payment. The garnishee should see to it that the court has jurisdiction.—*Richardson v. Ilickman*, 22 Ind. 244.

[e] (*Sup.* 1868)

To an action by an attachment defendant against the garnishee, the judgment on the garnishment is not a bar, but only a good credit to the amount paid.—*Barton v. Allbright*, 20 Ind. 489.

[f] (*Sup.* 1870)

A voluntary payment as garnishee in proceedings in another state, there being no jurisdiction of the principal defendant in these proceedings, is no defense to an action on the debt in this state.—*Toledo, W. & W. R. Co. v. McNulty*, 34 Ind. 531.

[g] (*Sup.* 1873)

A payment by a garnishee is a defense to a suit by the attachment defendant against such garnishee for the same debt, although such attachment proceeding, as between the creditor and debtor, was irregular and reversible.—*Ohio & M. R. Co. v. Alvey*, 43 Ind. 180.

[h] (*Sup.* 1876)

In an action by a mortgagee against the mortgagor to foreclose a mortgage given to secure notes, only a part of which are due, it is a sufficient defense to allege that, prior to the foreclosure suit, in a suit by a third person against such mortgagee, a judgment was rendered against him, from which he appealed to the supreme court, where the appeal is still pending, and that in such suit, on attachment

and garnishment, it was found that the mortgagor was indebted to the mortgagee on such mortgage debt, and a judgment was rendered in favor of such third person against the mortgagor, as garnishee of the mortgagee, for a sum in excess of the amount of the notes due.—*Greenman v. Fox*, 54 Ind. 267.

[i] (*Sup.* 1878)

A judgment against a garnishee is, pro tanto, a good defense to an action against him by the attachment defendant on the same cause of action.—*Canaday v. Detrick*, 63 Ind. 485.

[j] (*Sup.* 1882)

A garnishee is protected by the judgment of a court of competent jurisdiction, although there may be some error or irregularity in the proceedings, such as a defective service.—*Oppenheim v. Pittsburgh, C. & St. L. R. Co.*, 85 Ind. 471.

[k] (*App.* 1892)

When, in attachment against a nonresident defendant, who makes no appearance, judgment is rendered against him without jurisdiction, a garnishee will not be protected by the judgment rendered against himself, or by his payment thereof, when he is subsequently sued by the principal defendant.—*Louisville, N. A. & C. R. Co. v. Lake*, 5 Ind. App. 450, 32 N. E. 590.

[l] (*App.* 1893)

In the absence of jurisdiction in garnishment, both of the subject-matter and the person of the principal debtor, a judgment against the garnishee, and payment thereof, will afford him no protection.—*Debs v. Dalton*, 7 Ind. App. 84, 34 N. E. 236.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Garn. §§ 435-444; 43 CENT. DIG. Sheriffs, § 274.

§ 231. — Other actions and proceedings against garnishee.

[a] (*App.* 1906)

In an action on a note by an assignee the maker answered that plaintiff in the action and the maker and the payee had been sued in a certain action, the maker being summoned as garnishee, and that the money due on the note had been paid into court by its order, but that the action and garnishment proceedings had then been dismissed, and that subsequently another suit was commenced against the payee, the money in court being attached, and that such garnishment proceedings were then pending. It was alleged that the maker had no notice of the assignment when the payment was made. *Held*, that the answer was insufficient, it not appearing on what ground the assignee was made a defendant in the garnishment suit, or that he was a party to the suit alleged to be pending, and hence not showing any adjudication as to the assignee's right, or a payment of the note to its rightful holder.—*Brown v. Fisher*, 74 N. E. 632, 35 Ind. App. 549.

**§ 232. Effect of garnishment as between garnishee and third persons.**

[a] (Sup. 1846)

In a suit by the assignee of a sealed note against the maker, a judgment recovered against the maker on the note as garnishee, in an attachment against the payee, may be pleaded in bar of the suit if the judgment was rendered before the maker had notice of the assignment.—*Covert v. Nelson*, 8 Blackf. 265.

[b] (Sup. 1847)

If defendant, in an action of debt, rely on payment as garnishee in attachment, he should show that the debt paid by him as garnishee was the same debt for which he is sued.—*Harmon v. Birchard*, 8 Blackf. 418.

[c] (Sup. 1861)

Where, in suit by third parties against the payee of a note, making the maker a garnishee, judgment is recovered, this is a defense to a suit against the maker brought by an assignee of the note, if the maker had no notice of the assignment at the time of the rendition of judgment against him as garnishee.—*Shetler v. Thomas*, 16 Ind. 223.

[d] (Sup. 1874)

When a garnishee answers that he is indebted by a nonnegotiable note to the attachment defendant, and judgment is rendered against him, such judgment will protect him against a suit by a bona fide assignee of the note, if the garnishee had no notice of such assignment before the rendition of judgment against him in the attachment proceeding.—*King v. Vance*, 46 Ind. 246.

[e] (Sup. 1879)

A judgment rendered against the maker of a note as garnishee, in an attachment proceeding against the payee, is a good defense to the extent of the judgment, in an action against the maker by an assignee of the note, if, at the date of the judgment, the maker had no notice of the assignment.—*Elston v. Gillis*, 69 Ind. 128.

[f] (Sup. 1881)

In a suit by the assignee of a mortgage against the mortgagee and a subsequent purchaser of the property, the latter answered that, without knowledge of the assignment, he had paid the amount of the mortgage notes into court in a suit against the mortgagee, in which he was summoned as garnishee, to which the plaintiff replied that defendant had knowledge of the assignment before judgment in the garnishment proceedings. *Held*, that the reply was good.—*Daggett v. Flanagan*, 78 Ind. 253.

If a debtor, after notice of assignment of the debt, allow himself to be charged as garnishee of the assignor, he does it at his own peril, and cannot complain if he is compelled to pay twice.—*Id.*

[g] (Sup. 1881)

In an action by the assignee against the maker of a note, it is a good defense that de-

fendant had settled the same by the payment of a judgment against him as garnishee of the payee, although he had notice of the assignment before making the payment.—*Newman v. Manning*, 79 Ind. 218.

[h] (App. 1895)

In an action on account by an assignee thereof, where the defense is that defendant has been garnishee in an action against the assignor, and judgment for the amount of the account taken against him which he has paid, the answer, which fails to allege that a writ of attachment issued in the action against the assignor, and that judgment was rendered against him therein, is insufficient.—*Alberts v. Baker*, 13 Ind. App. 399, 40 N. E. 1119.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Garn. §§ 445-453.

See, also, 20 Cyc. pp. 1147-1149.

**§ 234. Effect of judgment against garnishee and payment or other satisfaction thereof.**

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Garn. §§ 423-427, 439, 443, 444, 450-452.

See, also, note, 47 L. R. A. 131.

**§ 235. — In general.**

[a] (Sup. 1859)

The judgment rendered against one as a garnishee will bar a subsequent action by an assignee who had not given notice of the assignment prior to such judgment.—*Junction R. Co. v. Cleary*, 13 Ind. 161.

[b] (Sup. 1885)

Where, in a garnishment proceeding, the court had jurisdiction of the subject-matter and of the persons of the creditors to whom the claim garnished was due, a judgment against the garnishee would afford him protection; and hence it was not for him to question the regularity of the proceedings.—*Field v. Malone*, 1 N. E. 507, 102 Ind. 251.

[c] (Sup. 1890)

It is the duty of a garnishee defendant to avail itself of all legal means to prevent a judgment against it when garnished, and it is its duty to interpose the defense that the debt sued for is not subject to garnishment, and, on its failure to do so, it cannot have credit for the amount thus unnecessarily paid.—*Terre Haute & I. R. Co. v. Baker*, 24 N. E. 83, 122 Ind. 433.

[d] (App. 1899)

In the absence of fraud, a judgment rendered against a garnishee will protect him from demands of creditors claiming the same debt.—*Alberts v. Baker*, 52 N. E. 469, 21 Ind. App. 373.

[e] (App. 1910)

Where defendant in a garnishment proceeding does not appear, the garnishee must be as-

sured that the court has jurisdiction over the subject-matter and the parties, and where the court has such jurisdiction the judgment protects the garnishee as against a collateral attack.—*Northern Indiana R. Co. v. Lincoln Nat. Bank*, 92 N. E. 384.

**FOR CASES FROM OTHER STATES.**

SEE 24 CENT. DIG. Garn. §§ 423-427, 443, 444, 447, 450-452.

**§ 236. — Judgment on default or admission.**

[a] (App. 1891)

Where one personally summoned as garnishee allows judgment to go against him by default, and pays it, the payment is voluntary, and he cannot recover from the principal debtor on discovering that he owed him nothing.—*Ambs v. Towle*, 27 N. E. 625, 1 Ind. App. 426.

[b] (App. 1893)

When, in an ex parte proceeding in attachment against a nonresident who makes no appearance, judgment is rendered against him without jurisdiction, a garnishee will not be protected by the judgment rendered against himself, or by his payment thereof, when he is subsequently sued by the principal defendant. The garnishee, for his own protection, must see that the court has jurisdiction of the principal defendant.—*Louisville, N. A. & C. R. Co. v. Parish*, 33 N. E. 122, 6 Ind. App. 89.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. § 441.

**§ 237. — Foreign judgment.**

[a] (Sup. 1903)

*Burns' Rev. St.* 1901, §§ 2283, 2284, prohibit the sending of a claim outside the state for the purpose of garnishing money due the debtor. A railroad company garnished in Kentucky for money due an employé caused the employé to be personally notified of the suit, disclosed to the court the nature of the demand, and sought to claim the benefit of the Indiana

exemption laws. The employé was also served with judicial process, but defaulted, and judgment was rendered against him and the company, which the company paid. In a suit by the employé against the company, it appeared that the claim against the employé had been sent out of the state in violation of the statute, but it was not shown that the company had failed in the foreign suit to disclose any defense within its knowledge. *Held*, that the company was protected by the payment of the foreign judgment.—*Baltimore & O. S. W. R. Co. v. Adams*, 66 N. E. 43, 159 Ind. 688, 60 L. R. A. 396.

The fact that after a debtor has been garnished in a sister state, but before judgment there, the creditor has obtained a domestic judgment, will not prevent the payment of the foreign garnishment judgment from operating as a protection to the debtor.—*Id.*

[b] (App. 1905)

A railroad company being liable to garnishment, it may successfully plead that in an action in another state against plaintiff as principal, and the company as garnishee defendant, a judgment was rendered against the company.—*Pittsburgh, C., C. & St. L. R. Co. v. Cox*, 36 Ind. App. 291, 73 N. E. 120, 114 Am. St. Rep. 377.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. § 439.

**X. LIABILITIES ON BONDS OR UNDERTAKINGS.**

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. §§ 455-469.

See, also, 20 Cyc. pp. 1150, 1151.

**XI. WRONGFUL GARNISHMENT.**

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Garn. §§ 470-475.

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

# GAS.

## Scope-Note.

[INCLUDES regulation of the production, supply, and use of gas for illuminating, heating, and like purposes, obtained either from natural sources or by any process of manufacture, whether under franchises granted therefor or directly by municipalities; and rights, powers, duties, and liabilities of gas companies and of municipal corporations in respect of the supply of gas.

[EXCLUDES matters applicable to corporations generally (see *Corporations*); powers of municipal corporations to grant and regulate franchises and to make contracts with gas companies (see *Municipal Corporations*); exercise of the power of eminent domain (see *Eminent Domain*); taxation of gas companies (see *Taxation*); and rights and liabilities of owners of lands containing natural gas, gas wells, etc., leases thereof, and contracts relating thereto (see *Mines and Minerals*). For complete list of matters excluded, see cross-references, post.]

## Analysis.

- § 1. Power to control and regulate.
- § 2. Statutory and municipal regulation in general.
- § 4. Gas companies.
- § 6. — Franchises, privileges, and powers in general.
- § 7. — Rights in streets and other public places.
- § 9. Mains, pipes, and appliances.
- § 12. Supply to municipalities.
- § 13. Supply to private consumers.
- § 14. Charges.
- § 14½. Injuries incident to construction or operation of works in general.
- § 15. Injuries from escape or explosion of gas.
- § 16. — Nature and grounds of liability.
- § 17. — Care required in general.
- § 18. — Defects, acts, or omissions causing injury.
- § 19. — Contributory negligence.
- § 20. — Actions.
- § 21. Injuries to works, mains, pipes or appliances.
- § 22. Penalties for violations of regulations.
- § 23. Offenses incident to production, supply, or use.

## Cross-References.

See—

Condemnation of property for production and supply of as taking for public use. EMINENT DOMAIN, § 34.  
Gas lands, construction and operation of leases. MINES AND MINERALS, §§ 72-81.  
Location and acquisition of claims. MINES AND MINERALS, § 36.  
Nature of leases and agreements. MINES AND MINERALS, § 56.  
Requisites and validity of leases and agreements. MINES AND MINERALS, § 58.  
Statutory regulation as to escape of gas or oil. MINES AND MINERALS, § 91.  
Judicial notice as to existence of in paying quantities. EVIDENCE, § 5.  
Explosive nature of. EVIDENCE, § 7.  
Leakage. EVIDENCE, § 9.  
Mains and pipes in street or highway as additional servitude. EMINENT DOMAIN, § 119.

Mechanics' liens for materials furnished in construction of gas mains, etc. MECHANICS' LIENS, § 130.  
Natural gas. MINES AND MINERALS.  
Jurisdiction of equity to restrain flow of. EQUITY, § 65.  
Laws relating to burning of as encroachment by Legislature on judiciary. CONSTITUTIONAL LAW, § 54.  
Laws relating to waste of as deprivation of right to happiness. CONSTITUTIONAL LAW, § 86.  
Laws relating to waste of as grant of special privileges and immunities. CONSTITUTIONAL LAW, § 205.  
Power of courts to revise legislative determination that certain burning of is waste. CONSTITUTIONAL LAW, § 70.  
Reformation of contract relating to. REFORMATION OF INSTRUMENTS, § 30.

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

## Natural, etc.—(Cont'd).

Regulation of as regulation of commerce, see COMMERCE, §§ 15, 55.

Restraining transportation of. INJUNCTION, § 118.

Review by courts of question as to amount of which may safely go through pipes. CONSTITUTIONAL LAW, § 70.

Shooting gas well as private nuisance. NUISANCE, § 4.

## Natural, etc.—(Cont'd).

Transportation of as public nuisance. NUISANCE, § 75.

Wasting as public nuisance. NUISANCE, § 80.

Plant as nuisance, power of city to declare. MUNICIPAL CORPORATIONS, § 605.

Power of municipality to make improvements in lighting. MUNICIPAL CORPORATIONS, § 272.

Use of as trespass. TRESPASS, § 8.

## § 1. Power to control and regulate.

[a] (Sup. 1891)

Natural gas, owing to its dangerous qualities, is a proper subject for police regulation.—*Jamieson v. Indiana Natural Gas & Oil Co.*, 28 N. E. 76, 128 Ind. 555, 12 L. R. A. 652.

Natural gas because of its local nature and intrinsic qualities cannot be made the subject of general commerce between the states, and for the same reasons it cannot be made the subject of uniform federal legislation so far as local safety is concerned.—*Id.*

## § 2. Statutory and municipal regulation in general.

Denial of due process of law, see CONSTITUTIONAL LAW, §§ 277, 296.

Denial of equal protection of laws, see CONSTITUTIONAL LAW, § 242.

Impairing obligation of contracts, see CONSTITUTIONAL LAW, § 134.

Local and special laws, see STATUTES, § 79.

[a] (Sup. 1892)

Act March 7, 1887 (Acts 1887, p. 36; *Elliott's Supp.* § 800), provides that the board of trustees of towns and the common councils of cities of the state shall have power to provide by ordinance reasonable regulations for the safe supply, distribution, and consumption of natural gas within the respective limits of such towns and cities in view of the title, "An act empowering cities and towns within the state of Indiana to regulate the supply, consumption and distribution of natural gas therein," confers on cities and towns full power to regulate the supply, distribution, and consumption of natural gas, including the fixing of maximum rates to be charged therefor.—*City of Rushville v. Rushville Natural Gas Co.*, 28 N. E. 853, 132 Ind. 575, 15 L. R. A. 321.

## § 4. Gas companies.

Evidence of fraud in sale of gas stock, see SALES, § 52.

Liability to assessment on paid-up stock, see CORPORATIONS, § 175.

Power of city to aid lighting company, see MUNICIPAL CORPORATIONS, § 286.

Supply of gas to consumers, see post, § 13.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gas, §§ 1, 2.

See, also, 20 Cyc. pp. 1154-1159; note, 15 L. R. A. 322.

## § 6. — Franchises, privileges, and powers in general.

Conclusiveness of ordinance granting franchise to gas company, see MUNICIPAL CORPORATIONS, § 103.

Construction of ordinance requiring gas companies to give bond as condition precedent to carrying on business, see MUNICIPAL CORPORATIONS, § 594.

Power of city to grant exclusive franchise to gas company, see MUNICIPAL CORPORATIONS, § 682.

Power of city to grant franchise, see MUNICIPAL CORPORATIONS, §§ 650, 681.

Publication of ordinance, granting franchise for lighting plant, see MUNICIPAL CORPORATIONS, § 110.

Submission of ordinance granting franchise to popular vote, see MUNICIPAL CORPORATIONS, § 108.

[a] (Sup. 1893)

It is incumbent on a board of county commissioners seeking to cancel a grant of authority to a natural gas company to lay its pipes in the highways to allege and prove facts entitling it to a rescission, and the absence of a showing that defendant had not acted on the order in good faith is fatal to the cause, even if the order should be held voidable.—*Board of Com'rs of Hamilton County v. Indianapolis Natural Gas Co.*, 33 N. E. 972, 134 Ind. 209.

[b] (Sup. 1901)

Where a city ordinance, granting a franchise to a gas company to use the city streets to furnish gas to the city and its inhabitants, provides that the city council shall determine the quantity of gas to be used by the city, the city is under no obligation to continue to use such gas.—*Gas Light & Coke Co. v. City of New Albany*, 59 N. E. 176, 156 Ind. 406.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gas, § 1.

## § 7. — Rights in streets and other public places.

Power of municipality to grant right to use streets, see MUNICIPAL CORPORATIONS, § 680.

Restraining laying of gas pipes in streets, see INJUNCTION, §§ 11, 13.

[a] (Sup. 1888)

Although a municipal corporation, by its trustees, has assumed to grant to a natural gas

and oil company the exclusive privilege of laying mains and pipes in its streets for supplying natural gas and oil to the town and its citizens, in violation of the policy of the law against monopolies, and of Acts 1887, p. 36, relative to the supply of natural gas and oil to towns, etc., which requires a general ordinance giving substantially the same privileges to all companies, such grant will not authorize another company to use and occupy the streets, without a general ordinance authorizing it, as provided in the act of 1887; nor will the refusal of the corporation to grant such other company a special privilege give the company that right.—*Citizens' Gas & Mining Co. v. Town of Elwood*, 114 Ind. 332, 16 N. E. 624.

[b] (Supp. 1892)

Defendant city, by ordinance, granted to plaintiff's assignors, for 25 years, the privilege of laying gas mains for supplying illuminating gas along certain of defendant's streets. The ordinance provided that defendant should maintain a certain number of lamp-posts; that it should maintain along said mains "such additional lamp posts and lamps as the city council may from time to time direct, and on the erection of said lamps said city shall take from the gas works \* \* \* sufficient gas to keep said lamps lighted." *Held*, that no exclusive grant of the use of the streets was made by such ordinance.—*City of Vincennes v. Citizens' Gas-light Co.*, 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485.

[c] (Supp. 1892)

The mere fact that a city ordinance specifically and by name grants to a natural gas company the right to use its streets for laying pipe, etc., does not make the license exclusive, and therefore the grant of a monopoly.—*City of Rushville v. Rushville Natural Gas Co.*, 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321.

[d] (Supp. 1893)

The right of gas companies to affect the fee are secured through proceedings in the circuit court against the fee owner, while as affecting the easement they are secured through the commissioners to be chosen guardians of the interest of the public in the highways.—*Board of Com'rs of Hamilton County v. Indianapolis Nat. Gas Co.*, 33 N. E. 972, 134 Ind. 209.

Elliott's Supp. § 1016, et seq., provides a method by which natural gas companies may secure from the owner an easement in land for laying pipe lines, and that, "whenever the board of county commissioners of the proper county shall so direct, said trenches and pipe lines may be constructed and laid along the right of way of any road or highway." *Held*, that the act does not give the board of commissioners power to affect the ownership in fee of the lands over which a highway passes, and a gas company will not be restrained, at the suit of the board of commissioners, from laying a pipe line in a highway without permission from such board

and the abutting landowners, where it does not appear that the rights of the public are being invaded.—*Id.*

[e] (Supp. 1894)

Laying pipe in a highway without permission is unlawful, and persons doing so are liable to others injured thereby.—*Lebanon Light, Heat & Power Co. v. Leap*, 139 Ind. 443, 39 N. E. 57, 29 L. R. A. 342.

[f] (Supp. 1895)

The city of I. passed an ordinance, as empowered by statute, authorizing any corporation for the supply of natural gas to lay mains through the streets, etc., and to take them up for repairs or alterations, and requiring the licensee to file a \$50,000 bond to restore all streets, etc., "to as good condition as they were before," and to maintain them in such condition for one year, etc. *Held*, that the passage of a subsequent ordinance, which prohibited the cutting into any paved street without first securing the consent of the council, and filing a bond, etc., was not a valid exercise of police power as to a licensee which had accepted the former ordinance, and complied with all its conditions.—*City of Indianapolis v. Consumers' Gas Trust Co.*, 140 Ind. 107, 39 N. E. 433, 27 L. R. A. 514, 49 Am. St. Rep. 183.

Where a city, by ordinance, exercises the power given it by statute to regulate the distribution of natural gas, and to require those to whom the privilege of using the streets is granted to pay a reasonable license (Acts 1887, p. 36), and such ordinance authorizes the licensee to lay its mains through the streets, etc., and to take them up from time to time for changes or repairs, a clause in such ordinance which provides that the city attorney shall enforce compliance with such ordinance and all other ordinances thereafter passed does not reserve the right to such city to bind the licensee by a subsequent ordinance, which prohibits it from cutting into a certain macadamized street except on certain onerous conditions.—*Id.*

The fact that macadam pavement was laid after the passage of the ordinance licensing the use of the streets for gas mains, and the acceptance thereof by the licensee, did not restrict the right of the licensee to lay its mains through the streets in a prudent and lawful manner, and from time to time to take them up and repair them, as provided by such ordinance.—*Id.*

[g] (App. 1895)

Where a natural gas company lays its line along a highway without having obtained the right by condemnation or by consent of abutting owners, such an owner may tear up and remove the pipes in front of her premises.—*Consumers' Gas Trust Co. v. Huntsinger*, 14 Ind. App. 156, 39 N. E. 423, 42 N. E. 640.

Act Feb. 20, 1889, subd. 5, giving voluntary associations for piping natural gas the right to dig trenches and lay pipe across roads,

and providing that, when county commissioners so direct, the trenches and pipe lines may be laid along the right of way of a road, authorizes the construction across highways without the consent of the commissioners, but requires their permission where the construction is along a highway.—Id.

[h] (App. 1900)

One who has been granted privilege to place pipes under the soil of a highway must exercise the privilege in such a way as not to interfere with the use of the highway by the public.—Indiana Natural & Illuminating Gas Co. v. McMath, 57 N. E. 593, 59 N. E. 287, 26 Ind. App. 154.

A gas company placing its pipes in a highway must so place them that the right of the public to the use of the entire width of the highway will not be interfered with.—Id.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. GAS, § 2.

See, also, 20 Cyc. pp. 1156-1158.

§ 9. Mains, pipes, and appliances.

Estoppel to object to laying of gas pipe, see ESTOPPEL, § 93.

Mandamus to restrain taking up of pipe lines, see MANDAMUS, § 3.

Revocation of license to lay gas main, see LICENSES, § 58.

[a] (App. 1896)

It must be presumed, until the contrary is made to appear, that natural gas may be safely conducted and transported in receptacles and pipes for an indefinite distance.—Indiana Natural Gas & Oil Co. v. Jones, 42 N. E. 487, 14 Ind. App. 55.

[b] (Sup. 1897)

Rev. St. 1894, § 5108, providing that lands for gas pipe lines shall not be condemned within 75 yards of a dwelling, but permitting pipes to be laid along a highway, without regard to nearness of dwellings, has no application to the sinking of a well and laying pipes on one's own land, between which and dwellings within that distance is a highway.—Windfall Mfg. Co. v. Patterson, 47 N. E. 2, 148 Ind. 414, 37 L. R. A. 381, 62 Am. St. Rep. 532.

[c] (Sup. 1901)

In a suit to prevent the transportation of natural gas by means other than the natural pressure, a complaint not charging that an additional flow of the gas from the wells was induced by means of the machinery used, or that the unnatural flow was a necessary consequence of the use of the machinery, is insufficient.—Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co., 156 Ind. 679, 59 N. E. 169, 60 N. E. 1080.

[d] (Sup. 1903)

Where, in an action to compel a railroad company to permit a natural gas company to lay a pipe line under its right of way, a cross-

complaint to restrain such action alleged that the plaintiff was using artificial means to increase the flow of gas through its pipes in violation of statute, but failed to show that defendant's acts resulted in any damage to plaintiff, or increased the danger of accident by leakage, fire or explosion, such allegation did not entitle defendant to an injunction.—Chicago, I. & N. R. Co. v. Indiana Natural Gas & Oil Co., 156 N. E. 1008, 161 Ind. 445.

Where a railway company granted a license to a natural gas company to maintain its pipe lines under and across the railroad's right of way, and every objection urged in a cross-complaint to prevent the gas company from constructing a fourth pipe line across the right of way existed at the time the license was granted, and it was not averred that the dangers and inconvenience had been increased by any act of the gas company, the cross-complaint was insufficient.—Id.

[e] (Sup. 1905)

Where a natural gas company covenanted in consideration of a conveyance of a right of way for its pipe line to furnish gas to the grantor as long as the line was in operation, the grantor could not enjoin the removal of the line.—Connersville Natural Gas Co. v. Moffet, 73 N. E. 894, 164 Ind. 585.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. GAS, § 3.

See, also, 20 Cyc. p. 1168.

§ 12. Supply to municipalities.

Abrogation of contract, see MUNICIPAL CORPORATIONS, § 252.

Construction of contract, see MUNICIPAL CORPORATIONS, § 250.

Contracts to be submitted to competition, see MUNICIPAL CORPORATIONS, § 236.

Duration of municipal contract, see MUNICIPAL CORPORATIONS, § 233.

Power of city to contract for lighting, see MUNICIPAL CORPORATIONS, § 226.

Power of city to contract for lighting, dependent on limitation of amount of indebtedness, see MUNICIPAL CORPORATIONS, § 864.

Validity of contract by municipal officers binding successors, see MUNICIPAL CORPORATIONS, § 232.

Validity of municipal contract for lighting streets, see MUNICIPAL CORPORATIONS, § 244.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. GAS, § 4.

§ 13. Supply to private consumers.

Appellate jurisdiction of action for refusal to furnish natural gas as dependent on whether construction of statute is involved, see COURTS, § 220 (9).

Complaint for shutting off supply as stating single or separate causes of action, see ACTION, § 38.

Damages for illness and death of child as proximate consequences of breach of contract to supply fuel gas, see **DAMAGES**, § 31.

Filing written instruments with pleading in action for injunction against disconnection of service pipes, see **PLEADING**, § 308.

Injunction to compel furnishing of gas, see **INJUNCTION**, § 57.

Mandamus to compel, see **MANDAMUS**, § 133.

Pleading former adjudication in action for shutting off supply, see **JUDGMENT**, § 949.

Relevancy of evidence in action for cutting off supply, see **EVIDENCE**, § 131.

Restraining breach of contract for furnishing gas, see **INJUNCTION**, § 59.

[a] (**Sup.** 1892)

A provision that natural gas companies shall supply all individuals along their lines requiring it, on payment of reasonable security, is valid, and within the power of a city to impose by ordinance.—*City of Rushville v. Rushville Natural Gas Co.*, 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321.

[b] (**Sup.** 1893)

To entitle the owner of a house to the right of being supplied with natural gas by a natural gas company, occupying the streets of a town or city with its mains, it is not necessary that he should own an interest in the company, different from that held by other citizens.—*Portland Natural Gas & Oil Co. v. State ex rel. Keen*, 135 Ind. 54, 34 N. E. 818, 21 L. R. A. 639.

A natural gas company, occupying the streets of a town or city with its mains, owes to the owners and occupants of houses abutting on such streets the duty of furnishing them with such gas as they may require, where they make the necessary arrangements to receive it, and comply with the regulations of the company; and, on its refusal or neglect to perform such duty, it may be compelled to do so by writ of mandamus.—*Id.*

In mandamus to compel a natural gas company to furnish relator's house with gas, an allegation in the answer that relator is already being provided with natural gas by another company is not sufficient to show that it will be necessary for defendant, in order to supply relator's house, to violate Acts 1891, p. 382, § 1, which makes it unlawful for any one to change, alter, or extend any service or other pipe or attachment owned by a gas company without the latter's consent.—*Id.*

[c] (**Sup.** 1897)

A natural gas company occupying the streets of a city under a franchise must serve all applicants for such service who comply with its reasonable rules, and make reasonable compensation; and, where the contract between the company and the consumer is but a statement of the reasonable conditions under which the company was required to perform its duty, the company's failure to perform the contract is

a tort.—*Coy v. Indianapolis Gas Co.*, 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535.

[d] (**App.** 1900)

One receiving gas under a contract with a company is not entitled to remove the mixer placed in his house by the company, and burn gas without the use of any mixer, without the company's consent, though the company fails to furnish sufficient gas through the mixer.—*Indiana Natural & Illuminating Gas Co. v. Anthony*, 58 N. E. 868, 26 Ind. App. 307.

In an action against a gas company, having, by virtue of certain ordinances, certain privileges and franchises, for damages for wrongfully shutting off plaintiff's gas supply, the ordinance under which the company operates its plant is admissible in evidence to show that defendant had assumed a duty to supply citizens with gas on application and to show the rates it might lawfully charge.—*Id.*

Where plaintiff paid defendant for gas to supply his heating stove in advance, the defendant is legally bound to furnish him with sufficient gas for his stove; and it is no defense in an action for damages for failure to do so, for the company to show that it had furnished all the gas it had, so long as it retained the money received in payment for gas.—*Id.*

The fact that one receiving gas under a contract with a company wrongfully removes the mixer, and burns gas without the use of any mixer, does not prevent a recovery by him from the company for injuries resulting from failure to furnish gas, for which it had received pay in advance.—*Id.*

In an action for damages against a gas company, plaintiff testified to a conversation in which there was a controversy about the rate, when he complained that the rates were too high, and that the amount of gas was not worth the charge made. That defendant said that was the rule; that the bills could be paid in that way, or plaintiff would not burn the gas; and that he could pay what the company asked, or bring in the mixers. *Held* sufficient to show threats by the defendant to shut off the gas if the excessive charges were not paid.—*Id.*

[e] (**Sup.** 1901)

A natural gas company, which a city has permitted to lay its mains in the street to furnish its citizens with gas, cannot refuse to furnish gas to a citizen in front of whose premises the pipes were laid, on the ground that there was an unavoidable deficiency in the amount of gas produced by it, and that if it furnished gas to such citizen it would inconvenience other patrons.—*State ex rel. Wood v. Consumers' Gas Trust Co.*, 61 N. E. 674, 157 Ind. 345, 55 L. R. A. 245.

[f] (**Sup.** 1902)

A natural gas company having laid its mains in town streets, and acquired a monopoly, is impressed with a public character, and it

must serve the inhabitants without invidious discrimination.—*Indiana Natural & Illuminating Gas Co. v. State ex rel. Ball*, 63 N. E. 220, 158 Ind. 516, 57 L. R. A. 761.

[g] (*Sup.* 1904)

A corporation engaged in supplying natural gas to the inhabitants of a city may not refuse to supply one person therewith on the ground that it has not sufficient gas to supply him, and also supply its other customers with their reasonable requirement, or because he may obtain gas from another public service company to which it furnishes a supply.—*Indiana Natural Gas & Oil Co. v. State ex rel. Armstrong*, 71 N. E. 133, 162 Ind. 690.

[h] (*App.* 1904)

A company engaged in furnishing natural gas for fuel purposes may waive its written permission to make a connection for such purposes.—*Citizens' Gas & Oil Min. Co. v. Whipple*, 69 N. E. 557, 32 Ind. App. 203.

If, without the knowledge or consent of a company engaged in furnishing natural gas for fuel, a stove is connected with their pipes, and gas is used, and afterward the company is paid, at its request, the amount demanded therefor, the persons making the connection become consumers from such time, and are entitled to use gas, unless ordered to cease by the company.—*Id.*

[i] (*Sup.* 1905)

The omission of the averment in the complaint in an action against a natural gas company for turning off the gas from plaintiff's residence that plaintiff complied with, or offered to comply with, the reasonable regulations of defendant before or when it shut the gas off, is not supplied by the allegation, by way of conclusion and recital, that, after being tendered its charges therefor by plaintiff, defendant wrongfully and unlawfully turned off the gas from plaintiff's residence.—*Greenfield Gas Co. v. Trees*, 75 N. E. 2, 165 Ind. 209.

[j] (*App.* 1910)

Where the performance of a contract to lay mains and connect them with certain lots was conditioned upon the continued existence of natural gas, upon the failure of the gas, there can be no liability, in the absence of fault, or of some substituted performance provided for.—*Bruce v. Indianapolis Gas Co.*, 92 N. E. 189.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. GAS, §§ 5-9.

See, also, 20 Cyc. pp. 1160-1168; note, 14 L. R. A. 669.

### § 14. Charges.

Conformity of judgment to findings in action for charging excessive rate, see JUDGMENT, § 256.

Denial of equal protection of laws, see CONSTITUTIONAL LAW, § 242.

Impairing obligation of contracts, see CONSTITUTIONAL LAW, § 135.

Relevancy of evidence in action for, see EVIDENCE, § 131.

[a] (*Sup.* 1892)

Act March 7, 1887 (Elliott's Supp. § 800) entitled "An act empowering cities and towns within the state \* \* \* to regulate the supply, consumption, and distribution of natural gas therein, and declaring an emergency," and providing that "the board of trustees of towns and the common council of cities \* \* \* shall have power to provide by ordinance reasonable regulations for the safe supply, distribution and consumption of natural gas within the respective limits of such towns and cities," authorizes, not merely such regulations as conduce to safety, but confers full power to regulate the supply, distribution, and consumption of natural gas, including the power to fix reasonable maximum rates that may be charged on consumers.—*City of Rushville v. Rushville Natural Gas Co.*, 132 Ind. 575, 28 N. E. 853, 14 L. R. A. 321.

The fact that a natural gas company entered into the business under an ordinance containing nothing on the subject of rates does not exempt it from the provisions relative thereto contained in a subsequent ordinance.—*Id.*

[b] (*Sup.* 1893)

Municipal corporations of Indiana have no power, at common law, to fix by ordinance the price at which natural gas shall be supplied to consumers.—*Lewisville Natural Gas Co. v. State ex rel. Reynolds*, 135 Ind. 49, 30 N. E. 702, 21 L. R. A. 734.

Act March 7, 1887 (Elliott's Supp. § 800,) providing "that the boards of trustees of towns, and the common councils of cities \* \* \* shall have power to provide, by ordinance, reasonable regulations for the safe supply, distribution and consumption of natural gas within the respective limits of such towns and cities," does not confer the power to regulate the price at which natural gas shall be furnished.—*Id.*

[c] (*Sup.* 1895)

Rev. St. 1894, § 4306, authorizes a municipal corporation to enact an ordinance regulating the supply and distribution of natural gas, and exacting a fee from companies using its streets in supplying it. *Held*, that where a city passed an ordinance granting the right to lay natural gas mains in its streets, prescribing the maximum price to be charged, and requiring an approved bond that a company accepting such privilege would comply with the ordinance, the price fixed by the ordinance is binding on a company whose bond has been presented to and accepted by the city, and in whose favor the city has waived its right to exact a fee for the use of its streets.—*Westfield Gas & Milling Co. v. Mendenhall*, 142 Ind. 538, 41 N. E. 1033.

## [d] (Sup. 1898)

An ordinance which amends a prior ordinance regulating the prices to be charged by all parties furnishing natural gas, and which increases the prices to be charged by a particular corporation for a certain time, does not repeal the former ordinance, and on the expiration of such time the prior ordinance prevails.—*Thistlethwaite v. State*, 49 N. E. 156, 149 Ind. 319.

## [e] (Sup. 1900)

A natural gas company, doing business under a municipal ordinance granting the right to use the streets for the supply of natural gas to said city and the citizens thereof, for several years furnished gas to consumers, and accepted payment for it, at a uniform rate of 12½ cents per 1,000 cubic feet, whether used for heating or lighting or both. It then adopted a rule charging 20 cents per 1,000 cubic feet for gas when used for fuel and light, without regard to the amount consumed for light, and 12½ cents per 1,000 cubic feet when used for fuel only. Plaintiff had fitted his house to use gas for lighting and heating, and had used and paid for gas for both purposes for a considerable time before the adoption of the new rule. *Held*, that injunction would lie to restrain the company from shutting off plaintiff's supply of gas because of his refusal to pay 20 cents per 1,000 cubic feet therefor, since the rule charging such price was unreasonable, arbitrary, and an unjust discrimination between consumers.—*Richmond Nat. Gas Co. v. Clawson*, 58 N. E. 1049, 155 Ind. 659, 51 L. R. A. 744.

## [f] (Sup. 1901)

Under Acts 1887, p. 36, providing that trustees of towns shall have power to provide reasonable regulations for the safe supply, distribution, and consumption of natural gas, the board of trustees have no power to fix the rate which a company supplying the inhabitants of the town with gas shall charge its patrons.—*City of Noblesville v. Noblesville Gas & Improvement Co.*, 60 N. E. 1032, 157 Ind. 162.

In a suit by a gas company, having a right to charge reasonable rates, to enjoin the enforcement of an ordinance fixing the rates to be charged, the complaint was not bad for failure to allege that the rates charged were reasonable, since, in the absence of a contrary showing, it will be presumed that they were.—*Id.*

Where a gas company, which was supplying the inhabitants of a town with gas under a franchise not prescribing the rates to be charged, accepted the provisions of a later ordinance fixing rates for certain uses of gas, expressly reserving all vested rights under its former franchise, it was entitled to fix its own prices for all uses not specified in the later ordinance.—*Id.*

Where a gas company was supplying the inhabitants of a town with gas under a franchise not fixing the rate to be charged, and voluntarily accepted the provisions of a later ordi-

nance prescribing rates, the legal authorization to charge the rates so fixed was a consideration for the acceptance, so that the company was bound thereby.—*Id.*

## [g] (App. 1902)

The ordinance constituting the franchise of a natural gas company provided a schedule of charges for gas to certain specified consumers, and added for all other purposes gas should be furnished, at the option of the consumer, at certain specified rates, or "by special agreement," or by meter measurement not exceeding 5 cents per 1,000 cubic feet, provided that for 10 years the company might charge 50 per cent. more than such rates. Plaintiff applied for gas for his laundry, and entered into a written contract to pay 12 cents per 1,000 cubic feet meter measurement. Laundries were not mentioned in the schedule, and prior to plaintiff's application there were three in the city, which, as he knew, had by contract been paying the price mentioned in his contract, but the company had voluntarily reduced the price to 10 cents, and always charged plaintiff, and he paid without objection, 10 cents per 1,000 feet for gas used by him. The company charged manufacturers 7½ cents per 1,000 feet, under contracts providing that in cold weather the gas might be shut off on one hour's notice, and such contract was offered to plaintiff, but he refused to accept it. *Held*, that the contract with plaintiff was authorized by the ordinance, and he could not recover the excess paid by him over 7½ cents per 1,000 feet.—*Logansport & W. V. Natural Gas Co. v. Ott*, 65 N. E. 549, 30 Ind. App. 93.

## [h] (Sup. 1903)

A gas company was permitted to use the streets of a city to distribute gas to consumers by virtue of a contract with the city, which fixed the maximum price of gas. *Held* that, if the city could not bring an action on its own account to enforce such contract, it could sue for the benefit of its inhabitants, as it was, in view of the contract, the trustee of an express trust, within the meaning of section 251, Burns' Rev. St. 1901, providing that the trustee of an express trust may sue without joining with him the person for whose benefit the action is prosecuted, and that "a trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another."—*Muncie Natural Gas Co. v. City of Muncie*, 66 N. E. 436, 160 Ind. 97, 60 L. R. A. 822.

It is not necessary for a city to show that it has itself sustained damage, when it sues for the benefit of its inhabitants, but it is enough to show that the act complained of tends to injure the public of the municipality.—*Id.*

The record of the common council of a city, showing its rejection of a schedule of prices submitted by a gas company under its contract with the city, is proper substantive evidence

of the fact of such rejection, where a certified copy of the resolution was served on the company.—Id.

Where a gas company is permitted to use the streets of a city to distribute gas to consumers by virtue of a contract with the city, which fixes the maximum price to be charged for gas, the city may maintain an action by way of injunction to enforce the contract.—Id.

A city ordinance permitting a gas company to use the streets for distributing gas to consumers, and accepted by the company, provided that for heating purposes the price of gas was not to exceed "three-quarters of the present current price of wood or coal for fuel," and that the cost of natural gas for lighting was not to exceed a like ratio to the cost of artificial gas. Then followed a provision that the schedule of charges for heating purposes to be submitted to the council "should not exceed the price above stated." *Held*, that a maximum scale of charges was clearly intended.—Id.

Under Act March 14, 1867 (Burns' Rev. St. 1901, § 3623), providing that "the common council shall have exclusive power over the streets, highways, alleys and bridges within such city," the common council of a city, in permitting a gas company to use the streets for distributing gas to the inhabitants, may protect the latter from extortion by providing that the company shall not charge in excess of certain prices for its service.—Id.

While a gas company continues to use the streets of a city to distribute natural gas to consumers by virtue of a contract with the city which fixes the maximum price to be charged for gas, it cannot question the right of the city to enter into such contract, that being a matter for the state alone.—Id.

[1] (Sup. 1903)

Where, in an action for the price of natural gas, the complaint alleged a liability for gas furnished to three furnaces operated by defendant, at the rate of \$30 a day, and claimed for additional gas alleged to have been surreptitiously used for three other furnaces, of the value of \$20 per day, and that, as no meter had been furnished or used, plaintiff was unable to state the number of feet of gas furnished, a special finding that defendant used 19,737,000 cubic feet of gas during 32 days, worth 7 cents per 1,000 feet, on which judgment was rendered, without any finding that defendant used any gas wrongfully, or that it used gas not embraced within the terms of the contract, was erroneous, as not within the issues.—*Palmer Steel & Iron Co. v. Heat, Light & Power Co.*, 66 N. E. 690, 160 Ind. 232.

[2] (Sup. 1907)

Where a franchise to supply gas is granted without restriction as to price, and is accepted and acted on, cities incorporated under the general law have no authority to regulate by ordinance the price to be charged, except so far as

such power is conferred by the law of 1905, empowering cities to fix by contract or franchise the price of gas.—*City of Richmond v. Richmond Natural Gas Co.*, 168 Ind. 82, 79 N. E. 1031.

The law of 1905, empowering cities to regulate the supply of gas and to fix, "by contract or franchise," the price thereof, does not empower a city to fix by ordinance the price at which a gas company, possessing a franchise, shall supply gas to its consumers, the ordinance not being a contract unless accepted by the company, and not a franchise because not granting to the company a new right or extending an existing one.—Id.

A municipal corporation has no power to fix by ordinance, the price at which a gas company shall supply gas to its consumers, unless a statute or Constitution delegates the power in express terms or by necessary implication.—Id.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gas, §§ 10, 11.

See, also, 20 Cyc. pp. 1165-1168; note, 33 L. R. A. 181.

§ 14½. Injuries incident to construction or operation of works in general.

Duty of gas company to keep guarded trench excavated in highways, see HIGHWAYS, § 194.

Release of gas company from claim for pollution of stream, see RELEASE, § 29.

[a] (Sup. 1894)

A gas company contracted for the construction of a gas plant. The contractor sublet the contract for boring the gas wells. The subcontractor, after boring one well, laid pipe, which was furnished by the contractor, to get gas from the well to use in boring others. Part of the pipe so laid was taken up by the contractor, and the rest used in conducting gas to a town for the use of the company. *Held* that, though the plant had not been turned over to the company, it and both contractors were liable for injuries to others caused by the negligent manner in which the pipe was laid.—*Lebanon Light, Heat & Power Co. v. Leap*, 139 Ind. 443, 39 N. E. 57, 29 L. R. A. 342.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gas, § 12.

See, also, 20 Cyc. p. 1170.

§ 15. Injuries from escape or explosion of gas.

Liability of city for acts of officers in conducting municipal lighting plant, see MUNICIPAL CORPORATIONS, § 747.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gas, §§ 13-17.

See, also, 20 Cyc. pp. 1170-1179; note, 29 L. R. A. 337.

### § 16. — Nature and grounds of liability.

[a] (Sup. 1896)

Sufficient notices of a leak in a natural gas main is given to the owner of such main by the continuance of the leak for several years and direct information given to line walkers.—*Consumers' Gas Trust Co. v. Perrego*, 43 N. E. 306, 144 Ind. 350, 32 L. R. A. 146.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gas, § 13.

See, also, 20 Cyc. p. 1170.

### § 17. — Care required in general.

[a] (App. 1896)

A natural gas company must so operate its pipes as to prevent the escape of gas therefrom, in such quantities as to become dangerous to life and property.—*Alexandria Mining & Exploring Co. v. Irish*, 44 N. E. 680, 16 Ind. App. 534.

[b] (App. 1901)

Where a person or corporation furnishing natural gas to customers negligently causes or permits the pressure to increase beyond the usual and accustomed pressure to the extent that it overheats stoves, etc., of its customers, without the latter's fault, so that damage results to the customers, such act is a positive wrong, and is therefore actionable.—*Indiana Natural & Illuminating Gas Co. v. Long*, 59 N. E. 410, 27 Ind. App. 219.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gas, § 14.

See, also, 20 Cyc. p. 1170.

### § 18. — Defects, acts, or omissions causing injury.

[a] (App. 1891)

Where one furnishing natural gas to the house of plaintiff, without any notice to plaintiff, increased the pressure to double that at which it had been maintained, whereby the fires in plaintiff's house were so increased in intensity as to set fire to the house, the one supplying the gas was guilty of negligence.—*Alexandria Mining & Exploring Co. v. Painter*, 28 N. E. 113, 1 Ind. App. 587.

[b] (App. 1896)

Under Rev. St. 1894, § 7507 et seq., declaring it the duty of gas companies to conduct natural gas only through sound wrought or cast iron pipes and casings, tested to a pressure of at least 400 pounds to the square inch, and that they shall not convey natural gas through such pipes and casings at a pressure exceeding 300 pounds per square inch, failure to apply test at a pressure of more than 100 pounds is negligence, making the company liable for resulting injury.—*Alexandria Mining & Exploring Co. v. Irish*, 44 N. E. 680, 16 Ind. App. 534.

In an action against a natural gas company for injuries caused by an explosion, a con-

tention that there was no charge of negligence in the breaking and bursting of the pipe, in the escaping of the gas, in the percolating of it through the earth, and of its finding its way beneath the building where the explosion occurred, is without merit, as the company was bound to know that such consequences would probably follow the use of the defective pipes, and the turning on of the gas at an excessive pressure.—*Id.*

[c] (Sup. 1897)

Where a gas company, in connecting a house with its main in a city, used a cracked elbow, which it was often called to repair, it was liable for injuries resulting from an explosion of gas leaking through such elbow, where it had failed to remove it, or to close the crack known to exist therein.—*Richmond Gas Co. v. Baker*, 45 N. E. 1049, 146 Ind. 600, 36 L. R. A. 683.

[d] (App. 1899)

In an action to recover loss by fire, the complaint alleged that defendant, a natural gas company, negligently failed to supply gas in a safe manner, in that it failed to control the pressure of the gas, and provided an insufficient regulator to control such pressure, whereby the stoves in the building in which defendant's office was located became red-hot, setting fire to the building, which fire spread to plaintiff's building, and consumed it. The evidence showed that the regulators were in good order, and were examined by defendant on the night in question; that defendant had a desk room in the office in which the fire originated; that the lessee of the room had a gas stove therein, which was not in safe condition to burn natural gas, and that the fire originated from its defective condition. *Held*, that the proximate cause of the loss was the defective condition of the stove, for which defendant was not responsible.—*Westfield Gas & Milling Co. v. Hinshaw*, 53 N. E. 1069, 22 Ind. App. 499.

[e] (App. 1900)

It is unlawful to lay a natural gas pipe on the surface of a highway, and the person maintaining it is liable for an injury resulting therefrom, even if the particular injury could not have been foreseen.—*Indiana Natural & Illuminating Gas Co. v. McMath*, 57 N. E. 593, 59 N. E. 287, 26 Ind. App. 154.

[f] (App. 1904)

A complaint showed that defendant was furnishing natural gas to plaintiffs, and that it negligently failed to regulate the flow into pipes leading to plaintiffs' stove, by reason of which the pressure and quantity were increased beyond that theretofore supplied to such an extent that the stove was overheated, setting fire to plaintiffs' property, without their fault. *Held* to state a cause of action.—*Citizens' Gas & Oil Min. Co. v. Whipple*, 69 N. E. 557, 32 Ind. App. 203.

## [g] (App. 1906)

The manager of a public service natural gas company having turned on the gas at the street valve to let it into the pipes in the house, and then, on discovering that it was leaking somewhere, undertakes to turn it off, was negligent in not turning it off at the street valve, but instead turning it off at the house valve—thus allowing the gas escaping from a break in the pipe between such valves to get through the wall into the cellar, where an explosion occurred—though the plumbing had previously been tested, and then found to be secure.—*Huntington Light & Fuel Co. v. Beaver*, 73 N. E. 1002, 37 Ind. App. 4.

The negligence of the manager of a natural gas company, on discovering that gas was leaking in the pipes of a house, in turning the gas off at the house valve, instead of the street valve—thus allowing the gas to get into the cellar from the leak between the two valves—was a concurrent cause of an explosion occurring while the plumber employed by the owner of the house was searching for the leak; making the company liable for injury to the tenant, who was not at fault, though the agency acting on the gas to cause the explosion is not shown.—*Id.*

Where plumbing has been lately tested and found safe and a gas company turns on the gas but ascertains that there is a leak in the pipes, from which an explosion results, the failure of the company to turn off the gas constitutes negligence.—*Id.*

## § 19. — Contributory negligence.

## [a] (Sup. 1894)

In an action for personal injuries caused by the explosion of natural gas, alleged to have been due to the negligent manner in which the pipe for conducting it was laid, evidence that before the explosion plaintiff had with other boys, though cautioned against doing so, meddled with the pipe after it was laid, so as to cause its joints to become loose, should be considered in determining the question of contributory negligence, it being claimed by the defenses that the accident was the result of such loosening of the joints.—*Lebanon Light, Heat & Power Co. v. Leap*, 139 Ind. 443, 39 N. E. 57, 29 L. R. A. 342.

## [b] (Sup. 1896)

In an action for personal injuries caused by an explosion of natural gas, which, leaking from a sleeve in defendant's pipes, percolated through the ground and accumulated in plaintiff's cellar, 90 feet distant, where it appeared that plaintiff's house was supplied with gas by another company, the failure of the plaintiff to notify the defendant of the leak, even if she knew of its existence, did not constitute contributory negligence.—*Consumers' Gas Trust Co. v. Perrego*, 144 Ind. 350, 43 N. E. 306, 32 L. R. A. 146.

## [c] (Sup. 1897)

Where a gas company, being notified of a leak in a pipe connecting a house with the main, sends one of its agents to repair the leak, and he assures the family that all is safe, and that the smell of gas in the house comes from a leak in the street, a member of the family remaining in the house is not negligent.—*Richmond Gas Co. v. Baker*, 146 Ind. 600, 45 N. E. 1049, 36 L. R. A. 683.

## [d] (App. 1900)

A natural gas pipe on the surface of a highway had been there for years, and was covered by grass and weeds. Plaintiff, who was not a resident of the neighborhood, was injured by an explosion caused by taking a traction engine over the pipe in order to make a turn to enter a field on the other side of the highway. He sent one of his employes ahead to examine the way before he entered the field. The evidence was in conflict as to plaintiff's knowledge of existence of such gas pipe. *Held* sufficient to sustain a finding that plaintiff was not guilty of contributory negligence.—*Indiana Natural & Illuminating Gas Co. v. McMath*, 57 N. E. 593, 59 N. E. 287, 26 Ind. App. 154.

## [e] (App. 1903)

Where natural gas got into plaintiff's cellar from a leak in defendant's pipes, and its superintendent came to locate the cause, and plaintiff went into the cellar, at his request, to admit him, and remained no longer than necessary to point out the supposed leak, and he, without any warning to her, lighted a match, causing an explosion, which injured her, she was not guilty of contributory negligence.—*Tip-ton Light, Heat & Power Co. v. Newcomer*, 67 N. E. 548, 33 Ind. App. 42.

## [f] (App. 1904)

It is not negligence to leave a natural gas stove burning at night, if proper care and caution are used in turning down and adjusting the key valve, and looking after the service pipes and appliances, so as to properly regulate the flow at a safe pressure.—*Citizens' Gas & Oil Min. Co. v. Whipple*, 69 N. E. 557, 32 Ind. App. 203.

## FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. GAS, § 15.

See, also, 20 Cyc. pp. 1174-1179.

## § 20. — Actions.

Expert testimony, see EVIDENCE, §§ 508, 513. For causing death, see DEATH, § 57.

## [a] (Sup. 1891)

A complaint alleged that plaintiff was the owner of a dwelling house in the town of M., and that defendant so negligently laid its pipes in the streets of M. that the gas escaped therefrom into plaintiff's house, and exploded, setting fire to the house. *Held*, that the complaint showed that defendant owed plaintiff a duty, of which its negligence would be a breach, since the averment that defendant laid its pipes

in the streets of M. showed that defendant owed it to the property owners of M. to use reasonable care.—*Mississinewa Min. Co. v. Patton*, 129 Ind. 472, 28 N. E. 1113, 28 Am. St. Rep. 203.

[b] (Sup. 1894)

Where the complaint in an action for injuries caused by an explosion of gas in defendant's street pipes alleged that plaintiff, prior to the injury, was a "strong, active, energetic boy of twelve years of age, in good health, and in full possession of all his faculties," and the evidence tended to support the allegation, it was error to charge that he was not guilty of contributory negligence if, at the time of the accident, he was a child of immature years, tempted by curiosity, and incapable of comprehending the danger of standing near the burning gas and touching or disturbing an exposed part of the pipe.—*Lebanon Light, Heat & Power Co. v. Griffin*, 139 Ind. 476, 39 N. E. 62.

[c] (Sup. 1895)

In an action for injuries resulting from an explosion of gas leaking from defendant gas companies' service pipe, mere evidence that the gas exploded was insufficient to show negligence, without showing what brought about the explosion.—*McGahan v. Indianapolis Natural Gas Co.*, 37 N. E. 601, 140 Ind. 335, 29 L. R. A. 355, 49 Am. St. Rep. 199.

A complaint alleging negligence in defendant gas company's failure to turn off the gas supply for a tenement, after being directed so to do, that a defect in the pipe within the cellar might be located and remedied, and that plaintiff, a plumber, while searching for the defect, was injured by the explosion, does not show that the injury was the proximate result of defendant's negligence, as it will be presumed that there was an intervening responsible agency, for which defendant was not responsible.—*Id.*

[d] (App. 1896)

Where, in an action against a natural gas company for damages to plaintiff's house, caused by the explosion of gas which escaped from its pipe line through the ground into plaintiff's house, there is evidence that defendant was aware for several years of the leak, or could have discovered it by the exercise of reasonable care, a finding that defendant was negligent in the maintenance of its pipe line will not be disturbed.—*Consumers' Gas Trust Co. v. Corbaley*, 14 Ind. App. 549, 43 N. E. 237.

In an action against a gas company for the destruction of property from an explosion of natural gas, there being evidence tending to prove the existence of a leak for several years before the explosion, and that defendant knew, or by the exercise of ordinary care could have known, of the existence of the leak, there was no error in allowing plaintiff to prove the different kind of sleeves used in making connections at the time of the explosion, and whether the sleeve in question was commonly used when the connections were made, was immaterial.—*Id.*

[e] (App. 1896)

A complaint alleging that defendant natural gas company negligently and knowingly suffered its pipe lines to become rotten and incapable of retaining the gas, and continued to use them for conveying gas, knowing of such defective condition, and that, by reason of such carelessness and negligence, one of the pipes sprung a leak in front of the building in which plaintiff's intestate was employed, permitting the gas to escape into the earth, which it permeated, accumulating in said building, and exploding when it came in contact with fire, whereby the building was blown down, causing intestate to be buried under the debris, and to be burned by the fire immediately following the explosion, and to be injured, from the effects of which he died, charges the proximate cause of the death to be the negligence of defendant.—*Alexandria Mining & Exploring Co. v. Irish*, 44 N. E. 680, 16 Ind. App. 534.

A complaint for death caused by an explosion of gas escaping from the pipe line of a natural gas company need not allege that defendant knew gas was escaping from the broken pipes, and percolating through the ground to the place of explosion, or that it knew of the danger of an explosion, it being bound to know that gas would escape, and that there was danger of an explosion, if, as charged, it had knowledge of the imperfect condition of the pipes.—*Id.*

In an action against a natural gas company for death by explosion, evidence tending to show the condition of the pipe line prior to the accident was properly admitted on the theory that the condition of the pipe at the time of the examination, or when the defect was observed, was such as to indicate that the defects had existed prior to the time of the injury complained of.—*Id.*

Where a special verdict found that deceased was free from fault, and was lawfully occupying a building when the explosion occurred which resulted in his death, it was not necessary that it should find that the deceased had no knowledge of the dangerous, defective, or unsafe condition of the pipe line, and that it had burst and gas was escaping therefrom.—*Id.*

[f] (App. 1899)

A complaint against a natural gas company for negligently increasing the pressure, and setting fire to plaintiff's house, showed that plaintiff had control of all the gas appliances within her house, except the mixer; that the company changed, over plaintiff's protest, a No. 5 for a No. 7 mixer, but did not show that it was legally bound to furnish such a mixer as the consumer wished, or that the fire might not have occurred with either mixer; that the gas passed through the mixer into a burner, and in front of the mixer was a valve regulating the flow, and used to turn off the gas, but that the amount of the flow de-

pended on the pressure, which was regulated by the company. It averred, further, that plaintiff had "carefully adjusted the valve to suit the pressure before her absence"; indicating that she knew the pressure was not uniform, and that it was controlled by the valve. *Held* not to show negligence of the company.—*Ibach v. Huntington Light & Fuel Co.*, 55 N. E. 249, 23 Ind. App. 281.

[g] (App. 1899)

In an action against a natural gas company for negligently failing to control the pressure of gas, whereby a consumer's stove was overheated and his house burned, in a city where the pressure was uniform to all consumers, but each had "mixers" to regulate the quality of gas, and keys to regulate the pressure or cut it off altogether, it was error to admit proof that on the night in question certain other consumers noticed that their stoves were overheated; it not being shown that the mixers were the same as that of the consumer whose house was destroyed, nor that the keys were turned to admit the same pressure.—*Indiana Natural & Illuminating Gas Co. v. New Hampshire Fire Ins. Co.*, 53 N. E. 485, 23 Ind. App. 298.

[h] (App. 1900)

A complaint is sufficient which states that defendant negligently maintained a natural gas pipe on the top of the ground on a public highway, and allowed it to be covered by grass and weeds, and that plaintiff, in the exercise of due care, without knowing of such pipe, while going from the highway into a field, with a traction engine, ran over and broke such pipe, and was injured by an explosion caused by the gas being ignited from the fire in the engine.—*Indiana Natural & Illuminating Gas Co. v. McMath*, 57 N. E. 593, 59 N. E. 287, 26 Ind. App. 154.

[i] (App. 1900)

Findings by the jury in an action for damages against a gas company that defendant's pipes were made of the approved kind of material, and such as were in general use, and that defendant maintained a sufficient force of men to keep its lines in repair, are not in irreconcilable conflict with a general verdict which finds that defendant had negligently allowed its lines to become rotten, decayed, and broken, and that the pipes were not properly inspected and repaired.—*Indiana Natural & Illuminating Gas Co. v. Anthony*, 58 N. E. 868, 26 Ind. App. 307.

[j] (App. 1901)

In an action against a gas company by a consumer for setting fire to his premises by too high pressure, plaintiff, in order to show that stoves other than the one causing the injury were overheated by the pressure, was not obliged to show that the conditions were precisely the same, but it was sufficient that he showed that they were substantially the same.

—*Indiana Natural & Illuminating Gas Co. Long*, 59 N. E. 410, 27 Ind. App. 219.

Evidence that certain stoves were supplied from the same low-pressure mains plaintiff's stove, and with mixers furnished defendant, and were used in houses near plaintiff's residence, between which there was nothing to obstruct the flow of the gas, constituted a sufficient foundation to admit testimony that such stoves were overheated from high gas pressure on the night of the fire.—*Id.*

In an action against a gas company by a consumer for setting fire to his premises by too high pressure of the gas, an averment among other things, that the regulators were out of order, not being under the circumstances essential to plaintiff's cause of action, a special finding contrary to the allegation was not inconsistent with a general verdict for the plaintiff.—*Id.*

Plaintiff alleged that his house was destroyed by fire at night through failure of the defendant company, which furnished the gas, to diligently oversee the regulators for reducing the pressure of the gas, and that the regulators were out of repair. The jury, in answer to special interrogatories, found that the regulators were not out of repair, but that defendant had failed to employ a watchman to oversee the pressure in the nighttime. *Held*, that a motion by defendant for a judgment because a general verdict for plaintiff was inconsistent with the answers to the interrogatories was properly overruled, since the answer that defendant failed to oversee the regulators in the nighttime was sufficient to sustain the complaint.—*Id.*

[k] (App. 1902)

The complaint in an action for damages resulting from an explosion of natural gas alleged that defendant company's main from which the gas was alleged to have escaped was weak, and incapable of safely carrying gas, and that defendant continued to operate the main with knowledge thereof. *Held*, that evidence of leaks at other places in the pipes than that at which the accident occurred, and existing before the explosion, was admissible.—*Logansport & W. V. Gas Co. v. Coate*, 64 N. E. 638, 29 Ind. App. 299.

[l] (App. 1904)

In an action for damages alleged to have been caused by defendant's negligence in regulating the flow of natural gas into the pipe leading to plaintiff's stove, any fact showing that defendant's gas system at the time in question was properly managed, that it was not negligent in any particular charged in the complaint, and that the plaintiffs were not without fault, could be shown under the general denial.—*Citizens' Gas & Oil Min. Co. v. Whipple*, 64 N. E. 557, 32 Ind. App. 203.

In an action for buildings burned by reason of negligence in furnishing natural gas fuel, there was evidence that the defendant

was supplying gas at a ten-pound pressure, and that a pressure of about eight ounces was dangerous, and that, while there were regulators to control the pressure, they did not control it until it reached ten pounds; and an instruction declared that if, at the time of the burning, defendant was furnishing plaintiffs natural gas to be used for fuel in a stove in plaintiffs' office, and defendant suffered and permitted its regulator or regulators to be in such condition that it or they did not regulate or control the pressure, and the regulator admitted gas to the stove at a high and dangerous pressure, and plaintiffs' stove was thereby overheated, thereby causing the destruction and damages, without contributory negligence on the part of plaintiffs, defendant was liable. *Held*, that the instruction did not necessarily proceed on the theory that the regulators were out of order, but apparently on the theory that they may have been in proper repair, but were so adjusted as to permit a dangerous quantity of gas to pass through, and there was evidence to which the instruction was applicable.—Id.

In an action for buildings burned by reason of negligence in supplying natural gas thereto, instructions as to the use thereof as a fuel, declaring, in short, that it was a dangerous substance, and that the care must be commensurate with the danger, were not objectionable.—Id.

In an action for buildings burned by reason of negligence in supplying natural gas thereto, an instruction declared that if the jury found that defendant, when plaintiffs' property was burned, was furnishing plaintiffs natural gas for fuel for a valuable consideration, and negligently failed to provide appliances, etc., reasonably necessary to control the amount and pressure, and, on account of such failure, plaintiffs' property was destroyed by fire occasioned by an overheated stove, caused by failure to regulate the pressure, defendant would be liable for resulting damages, unless they found that plaintiffs were guilty of contributory negligence. *Held*, that this did not state what plaintiffs must prove to authorize a recovery, but stated only that certain conduct on defendant's part was actionable negligence.—Id.

In an action for buildings burned by reason of defendant's negligence in furnishing natural gas for fuel, an instruction that a corporation or person furnishing such gas "is bound to exercise such care, skill, and diligence in all its operations as is called for by the delicacy, difficulty, and dangerousness of the nature of its business, in order that injury may not be done to others; that is to say, if the danger, delicacy or difficulty is extraordinarily great, extraordinary skill and diligence is required"—*held* not erroneous, as being controlled by the concluding part thereof.—Id.

[m] (App. 1905)

Where, in an action by a tenant against a gas company for personal injuries resulting

from an explosion of gas, the answers to interrogatories show that defendant's manager turned on the gas at the street valve and soon afterwards informed plaintiff that there was something wrong with the pipes under the house, that within a few minutes it was found gas was escaping into the house, that defendant's manager then told plaintiff that the gas would have to be turned off until the pipes under the house were repaired, and he turned the valve at the house, that the manager told plaintiff to allow no one to touch the house valve, and that when the pipes were repaired he would return and turn on the gas himself, and that plaintiff did not know that the gas had not been turned off at the street valve, and that a plumber employed by the owner of the building, without plaintiff's knowledge, undertook to repair the plumbing, and in doing so ignited the gas, thereby injuring plaintiff, such answers do not conflict with a general verdict for plaintiff.—Huntington Light & Fuel Co. v. Beaver, 37 Ind. App. 4, 73 N. E. 1002.

In an action against a gas company for personal injuries caused by an explosion of gas, answers to interrogatories showing that defendant negligently failed to turn off the gas after discovering a leak, and a failure by plaintiff to prove who ignited the gas which exploded and caused his injuries, do not overthrow a general verdict in favor of plaintiff.—Id.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gas, §§ 16, 17.

See, also, 20 Cyc. pp. 1177-1179; note, 29 L. R. A. 342.

## § 21. Injuries to works, mains, pipes, or appliances.

[a] (App. 1905)

A complaint by a gas company, alleging that defendant opened plaintiff's pipe line, and, without permission, took its gas, is not in trespass, since natural gas extracted from the earth and contained in a pipe line is personal property.—Crystal Ice & Cold Storage Co. v. Marion Gas Co., 74 N. E. 15, 35 Ind. App. 295.

## § 22. Penalties for violations of regulations.

[a] (App. 1900)

A penalty imposed by a city ordinance granting certain privileges to a gas company for failure to comply with its conditions does not preclude one from maintaining an action for damages sustained by the wrongful act of the company.—Indiana Natural & Illuminating Gas Co. v. Anthony, 58 N. E. 868, 26 Ind. App. 307.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gas, § 18.

## § 23. Offenses incident to production, supply, or use.

[a] (App. 1901)

Under Burns' Rev. St. 1894, § 2312, declaring it unlawful for any person to turn off

any valve belonging to any person furnishing gas to consumers without permission of the owner, the doing the act, without consent, is unlawful, without reference to the intent of the doer.—*State v. Moore*, 60 N. E. 955, 27 Ind. App. 83.

Where defendant executed to a company a gas and oil lease on his farm, and the company thereafter constructed a well thereon which produced gas which it piped to consumers without right to do so, and in violation of the contract, the defendant had no right to turn off the gas and prevent its wrongful use in view of *Burns' Rev. St. 1894*, § 2312, forbidding any person to turn off gas or in any manner interfere with any gas line without permission from the person or corporation operating it.—*Id.*

[b] (*Sup.* 1904)

In the early years following the discovery of natural gas, producers and consumers were prodigal in its use and reckless in its waste. Explorers who drilled a well that produced a small and unprofitable quantity of gas left it open, to go to another spot. Where oil and gas were struck in the same district, the gas was permitted to escape, while operations for oil proceeded. To stop this useless waste of gas and unnecessary contamination of the air, the Legislature enacted Acts 1893, p. 300, c. 36 (*Burns' Ann. St.* §§ 7510, 7511, 7512), which provides that it shall be unlawful for any one having control of a natural gas or oil well to allow the flow of gas or oil to escape into the open air, without being confined within such well, for a longer period than two days next after oil shall have been struck in the well, and that thereafter such gas or oil shall be safely and securely confined in such well, pipes, or other proper receptacle. Section 2 of the act provides that, on the abandonment of producing wells, the same shall be securely plugged in a specified manner, so as to effectually stop the escape of gas. Section 3, as amended by Acts 1899, p. 82, c. 61, declares any person violating any provision of the act guilty of a misdemeanor. *Held*, that the act requires three things to be done: (1) Oil or gas properly confined within two days next after it was struck; (2) oil or gas to be confined so long as it continued to flow; (3) abandoned wells to be plugged—and a failure to do any one of these acts is a separate and distinct offense, to which the penalty prescribed by section 3 applies.—*Bailey v. State*, 71 N. E. 655, 163 Ind. 165.

*Burns' Ann. St.* § 7510, requires persons having control of any gas or oil well to confine the same within proper pipes within two days next after gas or oil shall have been struck, and provides that thereafter such gas or oil shall be safely and securely confined in the well or other proper receptacle; and section 7512 makes a violation of any provision of the act a misdemeanor. An indictment in one count charged defendant with having allowed

gas to escape into the open air, without being confined, for a longer period than two days after it was struck, and that he did "then and there" unlawfully fail to securely confine such gas in a well. The state's witness testified that he was at the well on the day when the gas was struck, and on each of the next five days, except one, and that on each visit the well was open and the gas escaping. Defendant's evidence was that gas was struck late Thursday evening, and that the well shot about noon on Saturday, and that the gas was immediately confined, and left confined until Monday morning, when the well was reopened for the purpose of doing further work upon it, during the progress of which the gas was allowed to escape for more than two days. *Held*, that, while if the state's evidence was true, defendant was guilty as charged, yet, under defendant's evidence, he was not guilty of the offense charged in the indictment, and the jury should have been instructed on that theory.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gas, § 19.

See, also, 20 Cyc. p. 1180.

## GATES.

See—

Across highway. HIGHWAYS, § 89.

Private right of way. EASEMENTS, § 58.

Way as affecting implied dedication. DEDICATION, § 21.

Ordinance prohibiting abutting owners from constructing gates swinging outward into street. MUNICIPAL CORPORATIONS, § 667.

Railroad crossing gates. RAILROADS, §§ 306-308.

Toll gates. TURNPIKES AND TOLL ROADS, § 42.

## GENEALOGY.

See—

Determination of right of inheritance. DESCENT AND DISTRIBUTION, §§ 20-65.

Evidence of pedigree, birth, and relationship. EVIDENCE, 285-290.

## GENERAL AGENTS.

Of insurance company, see INSURANCE, §§ 74, 88.

## GENERAL AND SPECIFIC WORDS.

In statute as affecting construction, see STATUTES, § 194.

## GENERAL APPEARANCE.

See APPEARANCE, §§ 7-10.

## GENERAL ASSEMBLY.

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Authority of statehouse commissioners to pay rent for temporary quarters of. **STATES**, § 94.

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See **PLEADING**, §§ 123, 382.

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Authority to make contracts. **RAILROADS**, § 17.

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## GENERAL REMONSTRANCE.

Against grant of liquor license, see **INTOXICATING LIQUORS**, § 68.

## GENERAL SUPERINTENDENT.

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## GEOGRAPHICAL FACTS.

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## GERMAN.

Study of German language in public school, see **SCHOOLS AND SCHOOL DISTRICTS**, § 164.

## GESTURES.

Insulting gestures as provocation for homicide, see **HOMICIDE**, § 45.

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

# GIFTS.

## *Scope-Note.*

[INCLUDES voluntary transfers of property without consideration, whether executed or to take effect on the death of the giver, and acceptance and revocation thereof; nature, requisites, validity, incidents, operation, and effect of such transfers; evidence relating thereto; and rights and liabilities of parties thereto as between themselves and as to others in general.

[EXCLUDES effect of particular personal or confidential relations (see *Husband and Wife*; *Parent and Child*; *Guardian and Ward*; *Executors and Administrators*; *Attorney and Client*); effect of want of consideration as to rights of creditors and subsequent purchasers (see *Fraudulent Conveyances*); deeds of gift (see *Deeds*); and taxation of gifts (see *Taxation*). For complete list of matters excluded, see cross-references, post.]

## *Analysis.*

### **I. Inter Vivos.**

- § 1. Nature of gift in general.
- § 4. Requisites in general.
- § 5. Gifts distinguished from other transactions.
- § 6. Power to make gift.
- § 11. Time of taking effect.
- § 12. Parties.
- § 13. — Capacity to make gift.
- § 14. — Capacity to take.
- § 17. Delivery in general.
- § 20. — Property in possession of donee.
- § 21. — To third person for donee.
- § 22. — Constructive delivery.
- § 25. Parol gift of land.
- § 30. Gifts of deposits in bank.
- § 31. Gifts of negotiable instruments.
- § 32. Gifts of donor's note or check.
- § 33. Forgiveness of debt of donee.
- § 34. Qualified or conditional gifts.
- § 35. Validity.
- § 38. — Fraud, duress, and undue influence.
- § 41. Revocation and rescission.
- § 42. Operation and effect.
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- § 47. — Presumptions and burden of proof.
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### **II. Causa Mortis.**

- § 53. Requisites in general.
- § 54. Gifts causa mortis distinguished from other transactions.
- § 55. — Gifts inter vivos.
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- § 64. Gifts of rights of action in general.
- § 74. Revocation and rescission.
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*Cross-References.**See—*

Acceptance of from person of unsound mind as creating constructive trust. **TRUSTS**, § 94.

Charitable gifts. **CHARITIES**.

Inheritance from donee. **DESCENT AND DISTRIBUTION**, §§ 16, 59-61.

Intoxicating liquors as criminal offense. **INTOXICATING LIQUORS**, §§ 156-163, 215.

Land for seat of justice. **COUNTIES**, §§ 32, 33.

Payment, as gift, of consideration for conveyance to another, as creating resulting trust. **TRUSTS**, § 82.

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Regulations of gifts of intoxicating liquors. **INTOXICATING LIQUORS**, § 119.

Reversion of land on death of donee without issue. **DESCENT AND DISTRIBUTION**, § 16.  
**SPECIFIC PERFORMANCE**, § 85.

*By, between, or to particular classes of persons.*

*See—*

Ancestor as fraud on heirs. **DESCENT AND DISTRIBUTION**, § 69.

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**HUSBAND AND WIFE**, §§ 49-49½.

Limitation on power of municipality to make donations to individuals. **MUNICIPAL CORPORATIONS**, § 871.

Married woman as separate property. **HUSBAND AND WIFE**, § 116.

Testator as ademption of legacy. **WILLS**, § 766.

**I. INTER VIVOS.**

Deed of gift, see **DEEDS**, § 15.

**§ 1. Nature of gift in general.**

[a] (**Sup.** 1906)

"Donation" signifies the act by which the owner of a thing transfers its title and possession to another without receiving any consideration therefor.—*State ex rel. Western Const. Co. v. Board of Com'rs of Clinton County*, 166 Ind. 162, 76 N. E. 986.

FOR CASES FROM OTHER STATES,

See, also, 20 Cyc. p. 1192.

**§ 4. Requisites in general.**

[a] (**Sup.** 1880)

Where the evidence tended to show a purpose on the part of a husband to disclaim and relinquish all right in his deceased wife's estate in favor of her children, but it also appeared that he had parted with no possession, had made no delivery of the property, or assignment of his interest therein, to the alleged donees, and had made no declaration or promise which he was not at full liberty at any time to revoke, *held*, that the gift could not be sustained.—*Daubenspeck v. Biggs*, 71 Ind. 255.

[b] (**Sup.** 1891)

A mere promise to make a gift is not enforceable.—*Gammon Theological Seminary v. Robbins*, 27 N. E. 341, 128 Ind. 85, 12 L. R. A. 506.

[c] (**Sup.** 1896)

A statement made by a life tenant that all his personal property was "to go to" the remainderman, which statement was made prior to the existence of a corn crop, was insufficient to show a gift to such remainderman as against a third person to whom the crop was given by the life tenant during his last sickness.—*Shaffer v. Stevens*, 42 N. E. 620, 143 Ind. 295.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gifts, §§ 3, 17.

See, also, 20 Cyc. p. 1193.

**§ 5. Gifts distinguished from other transactions.**

Advancements, see **DESCENT AND DISTRIBUTION**, §§ 93-118.

Gifts causa mortis distinguished from gifts inter vivos, see post, § 55.

[a] (**Sup.** 1855)

Defendant executed and delivered an instrument under seal for the purposes expressed therein, "to show that I allow to give" a person named therein a specified sum at a certain time. *Held*, that this was a promise to give, and not enforceable.—*Harmon v. James*, 7 Ind. 263.

[b] (**Sup.** 1882)

Where a father and mother conveyed land to their son in consideration of an agreement by him, among other things, to pay a certain sum to a daughter one year after the death of the parents, the provision was not a gift inter vivos, but was a settlement of a portion of the estate upon the daughter which required no express acceptance on her part.—*Henderson v. McDonald*, 84 Ind. 149.

[c] (**Sup.** 1882)

An instrument: "This will certify that I do give to J. \$100, the money to be paid as soon as my financial condition will allow; and, if I do not live to pay it, I wish it paid out of my estate,"—*held* to be a promise to make a gift.—*Johnston v. Griest*, 85 Ind. 503.

[d] (**Sup.** 1884)

A father conveyed an undivided two-thirds of a tract to his daughter as an advancement. Subsequently he conveyed another tract to his son also as an advancement. Subsequently he proposed that, if the daughter would reconvey

the interest given her, he would cause the son to convey to her the land he had received, and, in order to induce her to make the exchange, he offered to pay her \$200. The daughter accepted the terms, which were complied with. Subsequently she conveyed the same to the son, who reconveyed 80 acres of the tract to her paying her \$100. *Held*, that the 80 acres came to the daughter by contract or purchase, and not by gift, and hence a mortgage executed by her and her husband to secure a debt due from her husband was valid under Acts 1879, p. 161, and Act May 31, 1852, § 5, relating to conveyances by married women.—*Frazier v. Clifford*, 94 Ind. 482.

[e] (Sup. 1891)

A writing signed and delivered recited: "I give to the trustees" etc., "the principal of a note for \$700, \* \* \* said sum of \$700 to be given in trust to the said trustees when the said note falls due." The note was not delivered. *Held*, that there was no gift *inter vivos*, but merely an agreement to give when the note became due.—*Gammon Theological Seminary v. Robbins*, 128 Ind. 85, 27 N. E. 341, 12 L. R. A. 506.

[f] (App. 1893)

A will gave \$200 to testatrix's niece. Prior thereto the niece had received money from the testatrix, for which she had receipted "as part of such amount as she may see fit to bequeath to me at her death." After executing the will, testatrix frequently stated that she intended her niece should have \$200 out of her estate at her death. *Held*, that testatrix had before her death converted the payments evidenced by the receipts into absolute gifts.—*Robbins v. Swain*, 7 Ind. App. 486, 34 N. E. 670.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gifts, §§ 22-27.  
See, also, 20 Cyc. pp. 1214, 1215.

## § 6. Power to make gift.

[a] (Sup. 1892)

A person of sound mind has the right to convey his land to his son for any lawful consideration, or even as a gift where the rights of creditors are not involved.—*Batman v. Snoddy*, 32 N. E. 327, 132 Ind. 480.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gifts, §§ 11, 13.  
See, also, 20 Cyc. p. 1193.

## § 11. Time of taking effect.

[a] (Sup. 1882)

A promise without any consideration to pay after death cannot be construed as a gift.—*Hathaway v. Roll*, 81 Ind. 567.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gifts, § 9.  
See, also, 20 Cyc. p. 1209.

## § 12. Parties.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gifts, §§ 10-12.  
See, also, 20 Cyc. pp. 1193, 1194.

## § 13. — Capacity to make gift.

Power of municipal officers, see MUNICIPAL CORPORATIONS, § 225.

[a] (Sup. 1903)

A proper standard in case of a gift *inter vivos* is given by an instruction that one has mental capacity sufficient to make a valid conveyance if he understands what he is doing, the extent and value of his property, and recollects the property he is disposing of to the persons who are the objects of his bounty, and the manner in which he is distributing his property among them.—*Thorn v. Cosans*, 67 N. E. 257, 160 Ind. 566.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gifts, § 11.  
See, also, 20 Cyc. p. 1193.

## § 14. — Capacity to take.

[a] (Sup. 1874)

The owner of real estate permitted, during his life, the use of it by the public as a burying ground, and expected that at some time a church would be erected thereon; but it was not shown that he intended to vest the title in any denomination exclusively. *Held*, that a church organization, not in existence until after the death of the owner, could not recover the real estate of the heirs or their grantees, or compel a conveyance of the same to such organization.—*Hicks v. Danford*, 47 Ind. 223.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gifts, §§ 10, 12.  
See, also, 20 Cyc. p. 1194.

## § 17. Delivery in general.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gifts, §§ 28-42.  
See, also, 20 Cyc. pp. 1195-1208; note, 2 L. R. A. 693.

## § 20. — Property in possession of donee.

[a] (Sup. 1861)

Delivery is necessary to pass the title to a chattel by gift; but if, at the time, the donee is in possession as the donor's agent, he need not surrender it for a redelivery. If the donor relinquishes all dominion and control, and recognizes the donee's possession as being in his own right, and the donee so accepts and retains possession with the donor's consent, it is sufficient.—*Tenbrook v. Brown*, 17 Ind. 416.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gifts, § 35.  
See, also, 20 Cyc. p. 1197.

**§ 21. — To third person for donee.**

[a] (Sup. 1839)

A., on his deathbed and about three days before he died, delivered to B. a certain sum of money for his (A.'s) wife, which B. said he would send to her. *Held*, that a suit for the money could not be sustained on these facts by the administrator of A. against B.—*McGilluddy v. Cook*, 5 Blackf. 179.

[b] (Sup. 1893)

Where one clearly and intelligently manifests an intention to make a gift of personal property to another, and in consummation of his intention makes such a delivery to a third person, for the use of the intended donee, as he is then capable of making, considering the character and situation of the property, a person to whom delivery is thus made will be presumed, in the absence of countervailing circumstances, to take the property as trustee of the intended donee, and not merely as the agent of the donor.—*Martin v. McCullough*, 34 N. E. 819, 136 Ind. 331.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gifts, § 36.

See, also, 20 Cyc. p. 1198.

**§ 22. — Constructive delivery.**

[a] (Sup. 1891)

While a delivery is necessary to the validity of a gift, it is not essential that there should always be a manual delivery of the thing given, but it will be sufficient if the delivery is as complete as the thing and circumstances of the parties will permit.—*Gammon Theological Seminary v. Robbins*, 27 N. E. 341, 128 Ind. 85, 12 L. R. A. 506.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gifts, § 37.

See, also, 20 Cyc. p. 1199.

**§ 25. Parol gift of land.**

[a] (Sup. 1834)

A gift by parol of real estate, the donee being in possession and having made improvements, vests in the donee no interest in the property which a court of law or equity can recognize.—*Adamson v. Lamb*, 3 Blackf. 446.

A father made a parol gift of real estate to his son and the son went into possession. With the son's consent, the father sold the real estate to a third person, promising his son to appropriate part of the purchase money to payment of a note held by the father against the son and pay the balance to the son. The purchase money was received by the father, and he said he considered the note paid, and that he would give it up and pay the balance to his son, but he died without again seeing his son. *Held*, that these facts were no defense to an action on the note brought against the son by his father's administrator.—*Id.*

[b] (Sup. 1884)

A parol gift of land may be so far executed that the donee, who has been put into pos-

session and has made expenditures for lasting improvements, will be entitled to a decree for a conveyance.—*Drum v. Stevens*, 94 Ind. 181.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gifts, §§ 43-48.

See, also, 20 Cyc. pp. 1200, 1201.

**§ 30. Gifts of deposits in bank.**

[a] (Sup. 1867)

A. promised to give a bank certificate to B. Afterwards B. found the certificate in a room usually occupied by him and A. *Held*, that this was not sufficient to show a delivery of the certificate.—*Buschian v. Hughart's Adm'r*, 28 Ind. 449.

[b] (App. 1902)

A gift of a portion of a deposit in a savings bank by the execution by the donor of a written form furnished by the bank, which directs the bank at the donor's death to pay the sum to the donee, and to enter the same in the donor's deposit book, which is given into the possession of the donee, is a sufficient relinquishment of right and title to the chose in action to pass title thereto, and renders it a valid gift inter vivos, as the clause relative to the death of the donor does not prevent the gift from taking effect at once, but only suspends the enjoyment thereof.—*Jacobs v. Jolley*, 62 N. E. 1028, 29 Ind. App. 25.

The return of the book to the donor to enable her to draw her portion of the deposit will not invalidate the gift.—*Id.*

The fact that the donor retains a portion of her deposit, which is evidenced in the deposit book delivered the donee, does not invalidate the gift, as there is as complete a transfer of possession of the portion thereof constituting the subject of the gift as it is capable of.—*Id.*

Where the donor, after the gift of a portion of her bank deposit and the delivery of the book to the donee, states to the latter, "You already have the bank book, and I give it all to you," it is sufficient to constitute a valid gift of the entire deposit, without the formality of a return of the bank book to the donor and its redelivery to the donee.—*Id.*

[c] (App. 1903)

After visiting her son, a mother deposited money in a savings bank for him and in his name, which was placed to his credit on the books, and a passbook in the son's name was issued, which the mother retained. *Held* a sufficient delivery to a third person, in trust for the son, to constitute a gift inter vivos.—*Goelz v. People's Sav. Bank*, 67 N. E. 232, 31 Ind. App. 67.

A mother made a will, leaving her property to her three daughters. Later, after returning from a visit to her son, she deposited a sum in a savings bank for him and in his name, which was placed to his credit on the books. A passbook was issued in the son's name, and given

to the mother, who retained it. A year later she sent the son a written order for him to sign, authorizing the payment of the money to either of them, which he returned unsigned. The mother stated to third persons that she had deposited the money for her son. *Held*, that there was a gratuitous and adequate surrender of dominion by the donor to constitute a gift inter vivos.—*Id.*

Where a completely executed gift of money deposited in a savings bank is shown, it is immaterial that the deposit book had not been delivered to the donee, but remained in the donor's possession.—*Id.*

[d] (App. 1909)

Depositing money to be credited to another and the delivery of the passbook to the other passes title to him.—*Second Nat. Bank v. Gibboney*, 43 Ind. App. 492, 87 N. E. 1064.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gifts, §§ 52-57, 65.

See, also, 20 Cyc. pp. 1204, 1205; notes, 19 L. R. A. 700, 1 L. R. A. (N. S.) 790; note, 23 Am. Dec. 451; note, 39 Am. Rep. 310.

### § 31. Gifts of negotiable instruments.

Gift of donor's note or check, see post, § 32.

[a] (Sup. 1863)

A mother, having sold land, purchased with her share in her former husband's estate, had notes for part of the purchase money made payable to her infant son, and deposited them with his father to keep for him. On the father's decease, the mother, being his executrix, came into possession of such notes, and delivered them to the maker in part payment for land purchased of him by her in her individual name. *Held*, in an action by the son's guardian against her for the amount of the notes, that the gift to her son was operative, and a verdict and judgment in his favor were proper.—*Rinker v. Rinker*, 20 Ind. 185.

A mother, having sold her real estate, purchased with part of her share in her former husband's estate, had notes for part of the purchase money made payable to her infant son, and deposited them with his father to keep for him. Upon the father's death, the mother, being his executrix, came into possession of these notes, and delivered them up to the maker in part payment for land purchased from him by her in her own individual name. The son, by his guardian, sued her for the amount of the notes. *Held* that, even if she really committed a breach of trust in regard to the estate of her former husband in giving the notes to her son, yet she could not question the title of her donee.—*Id.*

[b] (Sup. 1876)

A. delivered certain United States bonds and money to B., with directions for the latter to give the same to certain of his children upon his death. B. received them and agreed to execute the trust. *Held*, that this was a

sufficient delivery to constitute a gift inter vivos.—*Wyble v. McPheters*, 52 Ind. 393.

[c] (Sup. 1881)

A note from a son to his father, given under an agreement that the son would apply the interest, and so much of the principal as was necessary, to the father's support during his life and after his death pay the balance to the son's sisters, is not an executed gift to them during the father's life; and on his death the note passes for collection to his administrator as a part of the assets of his estate.—*Foglesong v. Wickard*, 75 Ind. 258.

[d] (Sup. 1883)

S. delivered notes which she owned to F., directing him to use them and support her out of the proceeds, and on her death to pay her debts, erect a monument to her, and give the balance to his wife. S. reiterated her instructions the day before her death, about two years later. *Held*, that there was no gift to F. or his wife of such notes, or any part of them.—*Smith v. Ferguson*, 90 Ind. 229, 46 Am. Rep. 216.

Delivery of a note to a third person for future delivery to the donee does not constitute a valid gift inter vivos, as the authority to deliver may be revoked.—*Id.*

[e] (Sup. 1890)

The gift of a promissory note is not valid without delivery.—*Bingham v. Stage*, 123 Ind. 281, 23 N. E. 756.

A gift of a note may be made by simple delivery, and without writing.—*Id.*

[f] (Sup. 1893)

A father, desirous of making an antemortem settlement of all his notes and bonds on his children delivered the property to a son, with direction to divide it equally among the children. All the notes and bonds regarded as solvent were accordingly distributed among the children, and the balance was by mutual consent of the children left in the son's hands for collection and subsequent distribution. *Held* that, by thus exercising dominion over the property, the children not only signified an acceptance of the gift, but constituted the son their agent for the collection and distribution of the balance, thus completing the delivery to them of the undistributed portion, and that, therefore, the death of the father before final distribution did not defeat the gift, nor revoke the son's authority to collect and distribute.—*Martin v. McCullough*, 136 Ind. 331, 34 N. E. 819.

[g] (App. 1896)

The fact that a note was payable in a bank did not render it an executed gift where it was made without consideration.—*Mader v. Cool*, 42 N. E. 945, 14 Ind. App. 299, 56 Am. St. Rep. 304.

#### FOR CASES FROM OTHER STATES.

SEE 24 CENT. DIG. Gifts, §§ 58-62.

See, also, 20 Cyc. p. 1206.

**§ 32. Gifts of donor's note or check.**

[a] (Sup. 1881)

Where a testator gives a note simply to rectify an inequality in the provisions of his will in favor of the payee, this is not a sufficient consideration.—*West v. Cavins*, 74 Ind. 265.

[b] (App. 1906)

Where one delivered to plaintiff a check on a bank, which merely ordered the bank to pay plaintiff a certain sum of money, the check being delivered as a gift, and the bank refused payment, plaintiff had no cause of action against the drawer.—*Roney v. Dunleary*, 39 Ind. App. 108, 79 N. E. 398.

**FOR CASES FROM OTHER STATES.**

SEE 24 CENT. DIG. Gifts, §§ 63, 64.

See, also, 20 Cyc. p. 1205; notes, 18 L. R. A. 855, 26 L. R. A. 305.

**§ 33. Forgiveness of debt of donee.**

[a] (Sup. 1876)

A mortgage drawn payable to the mortgagee when called for by him, and to no one else, held not enforceable after death of the mortgagee, unless upon proof of a demand made by him during his lifetime. Without such a demand, the mortgage debt became a gift.—*Sebrell v. Couch*, 55 Ind. 122.

**FOR CASES FROM OTHER STATES.**

SEE 24 CENT. DIG. Gifts, §§ 66, 67.

See, also, 20 Cyc. p. 1208.

**§ 34. Qualified or conditional gifts.**

[a] (Sup. 1870)

A soldier, while at home on furlough, deposited a certain sum with a friend, who gave him a written agreement to return the money if the soldier should return alive; but, if he should die, then the money was to be paid to the soldier's infant sister. The soldier died, leaving the sister and a brother his only heirs. Held, that the brother could not maintain a suit against his sister for one-half of the money received by her.—*Baker v. Williams*, 34 Ind. 547.

[b] (Sup. 1872)

One who had entered the military service during the late war, a short time before starting for the army, in which he died, said to a friend, in regard to a gun which he had loaned to that friend, "Well, if I never return, you may keep the gun as a present from me." Upon a suit by his administrator for the recovery of the gun, held, that the facts did not make a gift inter vivos.—*Smith v. Dorsey*, 38 Ind. 451, 10 Am. Rep. 118.

**FOR CASES FROM OTHER STATES.**

SEE 24 CENT. DIG. Gifts, §§ 68–71.

See, also, 20 Cyc. pp. 1210, 1211.

**§ 35. Validity.****FOR CASES FROM OTHER STATES.**

SEE 24 CENT. DIG. Gifts, §§ 72–74.

See, also, note, 34 L. R. A. 207.

**§ 38. — Fraud, duress, and undue influence.**

[a] (App. 1892)

Gifts obtained by fraud or imposition, as a rule, are voidable only, and by one specially injured.—*Norris v. Norris*, 3 Ind. App. 500, 28 N. E. 1014.

[b] (Sup. 1888)

In the absence of proof of any actual undue influence, the fact that a mother, 91 years of age, but of sound mind except as weakened by years, deeded her farm to an unmarried son, who had always lived at home, and had been most kind and attentive to her wants in her declining years, does not raise the presumption that undue influence or fraud was practiced in inducing the execution of the deed, so as to warrant its being set aside.—*Slayback v. Witt*, 50 N. E. 389, 151 Ind. 376.

**FOR CASES FROM OTHER STATES.**

SEE 24 CENT. DIG. Gifts, § 74.

**§ 41. Revocation and rescission.**

[a] (Sup. 1898)

A mother deeded her son all her property, in consideration that he should pay her grandchildren \$100 each when they became of age, reserving a life estate therein for herself. She also reserved the right to revoke the deed, but by mistake this was not expressed in the deed. The son, on her demand, reconveyed the property in consideration that he should not be required to pay the sums charged on the land. Held, that the grandchildren acquired no vested interest in the gift, as the deed was revocable in equity.—*Richards v. Reeves*, 49 N. E. 348, 149 Ind. 427.

**FOR CASES FROM OTHER STATES.**

SEE 24 CENT. DIG. Gifts, § 20.

See, also, 20 Cyc. pp. 1212, 1213; note, 2 L. R. A. (N. S.) 285.

**§ 42. Operation and effect.****FOR CASES FROM OTHER STATES.**

SEE 24 CENT. DIG. Gifts, §§ 16, 21, 75–78.

See, also, 20 Cyc. pp. 1216, 1217.

**§ 43. — As to parties.**

[a] (Sup. 1862)

The plaintiff, in 1834, laid out a town on his own land, and on the recorded plat thereof he marked one lot "J. P.'s tanyard lot," and in the recorded notes and references were "Lot No. 4, in Square No. 1, is donated by M. H., Jr., to J. P. for the purpose of erecting a tanyard on it." Held, that under Rev. St. 1831, p. 530, § 2, which provided that every donation, noted as such on the plat of the town, should be considered as a general warranty to the donee for his use for the purposes intended by the donor, this had the force of a general warranty of the lot to the said J. P. for the purpose declared.—*Hunt v. Beeson*, 18 Ind. 380.

[b] (App. 1898)

Where one buys a piano to be paid for in monthly installments, the title to remain in the

vendor until final payment, and gives it to another before the price is fully paid, he is estopped, as to the donee, from afterwards claiming the property, on the ground that when he made the gift he had no title to the property, and, after he has paid all the installments, the title becomes absolute in the donee.—*Fredericks v. Sault*, 49 N. E. 909, 19 Ind. App. 604.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Gifts, §§ 21, 76.

See, also, 20 Cyc. p. 1216.

**§ 44. — As to bona fide purchasers.**

[a] (Sup. 1856)

A. gave a mare with foal to B., stipulating that, if she should prove to be with foal, the colt was to be A.'s. B. sold the mare to C. without informing him of the reservation of the colt by A. *Held*, that the reservation of the colt by A. was a valid one.—*Wolf v. Esteb*, 7 Ind. 448.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Gifts, § 77.

See, also, 20 Cyc. p. 1216.

**§ 45. Pleading.**

Pleading matters of fact or conclusions, see PLEADING, § 8.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Gifts, § 80.

See, also, 20 Cyc. p. 1219.

**§ 46. Evidence.**

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Gifts, §§ 81-100; 37 CENT. DIG. Parent and C. § 131.

See, also, 20 Cyc. pp. 1219-1226.

**§ 47. — Presumptions and burden of proof.**

[a] (Sup. 1861)

In an action by a distributee of a testator to obtain a distribution of certain personal property claimed by the testator's son by gift from his father during his lifetime, fraud, undue influence, or unfair dealing will not be presumed because of the relationship existing between the donor and the donee, but must be proved by the plaintiff alleging the same.—*Tenbrook v. Brown*, 17 Ind. 410.

[b] (App. 1892)

Where a son was under obligation to pay his mother \$300 annually, which was a lien on certain land at the time the mother contracted to release the land from the lien in consideration of a payment by the son of \$50 annually, and it was claimed that the release constituted a gift inter vivos from the mother to the son, the burden was on those claiming the benefit thereof to establish that the same was freely executed without fraud or undue influence on the son's part.—*Henes v. Henes*, 31 N. E. 832, 5 Ind. App. 100.

[c] (Sup. 1896)

Notwithstanding a donor is insane, the burden is on one challenging his capacity to make a gift to prove the absence of such capacity.—*Teegarden v. Lewis*, 145 Ind. 98, 4 N. E. 1047, 44 N. E. 9.

The relation of parent and child as to presumption of fraud and the onus of proof rebut the same in business transactions between them does not stand upon the same footing as the relation of trustee and cestui quod trust, guardian and ward, attorney and client, principal and agent, and the like relations.—*Id.*

The burden of showing absence of undue influence is not cast on a daughter and her husband, to whom her father gave property when he was old, weak, and childish, because at the time he was making his home with them and depended on them for such home and for personal care and attention, and depended on the son-in-law to go with him and assist him in transacting all his financial business; there being no finding that they exercised any persuasion to obtain the gift, and it not appearing that he had no other property, or that he, in giving it, dealt unjustly with his other children.—*Id.*

[d] (App. 1903)

Where a mother deposits cash in a savings bank as a gift to her son, his acceptance will be presumed.—*Goelz v. People's Sav. Bank*, 6 N. E. 232, 31 Ind. App. 67.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Gifts, §§ 81-90; 37

CENT. DIG. Parent & C. § 131.

See, also, 20 Cyc. pp. 1219, 1220; notes

28 Am. Rep. 308, 33 Am. Rep. 736, 3

Am. Rep. 148.

**§ 48. — Admissibility.**

Declarations as to fact or nature of gift, see EVIDENCE, § 278.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Gifts, §§ 87-94.

See, also, 20 Cyc. pp. 1221-1223.

**§ 49. — Weight and sufficiency.**

[a] (Sup. 1856)

The commencement of a suit for the recovery and enforcement of a note and mortgage by the mortgagee, who claims as a donee, is sufficient evidence of her acceptance of the gift.—*Mallett v. Page*, 8 Ind. 304.

[b] (App. 1905)

The mother repeatedly asserted that she intended the deposit as a gift, and the son told his own daughter that the mother had given him the money. Later he refused to sign an order authorizing his mother to withdraw and in a suit after his mother's death, in which a creditor sought to reach the money, he hired counsel and defended the action. *Held* to show a sufficient acceptance to constitute a gift inter vivos.

vivos.—*Goelz v. People's Sav. Bank*, 67 N. E. 232, 31 Ind. App. 67.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gifts, §§ 95–100.

See, also, 20 Cyc. pp. 1223–1226.

### § 51. Instructions.

[a] (Sup. 1861)

In a suit by a distributee for personal property of the testator claimed by the testator's son to have been given to him by his father in his lifetime, the plaintiff asked an instruction that if the son held the property as his father's agent prior to the time of the gift claimed, and there was no apparent change of ownership, there was no valid gift. For the latter words the court substituted, "It is evidence tending to prove that there was no valid gift." *Held*, that the charge as asked was properly refused, and that as given it was as favorable to the plaintiff as he could legally claim.—*Tenbrook v. Brown*, 17 Ind. 410.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gifts, § 102.

See, also, 20 Cyc. p. 1227.

## II. CAUSA MORTIS.

Deposit of deed for delivery on death of grantor, see DEEDS, § 61.

### § 53. Requisites in general.

[a] (Sup. 1890)

A gift causa mortis is consummated when a person in peril of death, and under the apprehension of approaching dissolution from an existing disorder, delivers or causes to be delivered, to another, or affords the other the means of obtaining possession of any personal goods for his own use upon the express or implied condition that, in case the donor shall be delivered from the peril of death, the gift shall be defeated.—*Devol v. Dye*, 24 N. E. 246, 123 Ind. 321 7 L. R. A. 439.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gifts, § 104.

See, also, 20 Cyc. pp. 1228, 1229.

### § 54. Gifts causa mortis distinguished from other transactions.

Will distinguished from gift causa mortis, see WILLS, § 90.

[a] (Sup. 1882)

Where a father and mother conveyed land to their son in consideration of an agreement by him, among other things, to pay a certain sum to a daughter one year after the death of the parents, the provision was not a donation causa mortis, but was a settlement of a portion of the estate upon the daughter which required no express acceptance on her part.—*Henderson v. McDonald*, 84 Ind. 149.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gifts, §§ 119–121.

See, also, 20 Cyc. p. 1230.

### § 55. — Gifts inter vivos.

[a] (Sup. 1890)

The chief distinction between gifts inter vivos and those causa mortis is that, while the former are consummated by delivery, the title to the property is irrevocably vested, while in the latter the title is ambulatory and inchoate until the death of the donor occurs.—*Devol v. Dye*, 24 N. E. 246, 123 Ind. 321, 7 L. R. A. 439.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gifts, § 120.

See, also, 20 Cyc. p. 1230.

### § 59. Expectation of death.

[a] (Sup. 1872)

One who had entered the military service during the late war, a short time before starting for the army, in which he died, said to a friend, in regard to a gun which he had loaned to that friend, "Well, if I never return, you may keep the gun as a present from me." *Held*, that the facts did not make a gift causa mortis, as the gift was not made under immediate apprehension of death.—*Smith v. Dorsey*, 38 Ind. 451, 10 Am. Rep. 118.

[b] (Sup. 1894)

A transfer of land does not constitute a gift causa mortis, in the absence of evidence that at the time it was made decedent was in expectation or apprehension of death.—*Brunson v. Henry*, 140 Ind. 455, 39 N. E. 256.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gifts, § 108.

See, also, 20 Cyc. pp. 1235–1237.

### § 62. Delivery in general.

[a] (Sup. 1890)

Before his death, deceased had placed \$2,000 in gold coin in a sack, in a bank vault, marked: "\$2,000. This belongs to P. G. D." Three days before his death, with knowledge of its probability, deceased declared that it had always been his purpose to give D. \$5,000. He then directed the bank cashier to whom he had delivered the keys to his drawer in the vault, to place \$3,000 more in another sack, to be similarly marked, and to place \$1,000 in currency in an envelope for another person, to be marked with his name. When informed that his directions had been fulfilled, deceased replied approvingly. *Held* a sufficient delivery of the property to the cashier, as trustee for the donees, to constitute a valid gift causa mortis.—*Devol v. Dye*, 123 Ind. 321, 24 N. E. 246, 7 L. R. A. 439.

In the case of gifts causa mortis, the delivery need not be made to the donee personally, but may be made to another as his agent or trustee. A delivery thus made is as effectual as though it had been made directly to the donee.—*Id.*

[b] (App. 1899)

A wife, on her deathbed, called for her nephew, and, being told he was not present, informed her husband that she gave the nephew all her property, and directed him to deliver the nephew all her property, which he agreed to do. There was no manual delivery of the property, it being already in the husband's possession. *Held* to be a sufficient delivery of a gift causa mortis.—*Caylor v. Caylor's Estate*, 52 N. E. 465, 22 Ind. App. 666, 72 Am. St. Rep. 331.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gifts, §§ 122-132.

See, also, 20 Cyc. pp. 1231-1234; note, 18 L. R. A. 170; note, 50 Am. Rep. 178.

#### § 64. Gifts of rights of action in general.

[a] (Sup. 1883)

Delivery of a note to a third person for future delivery to the donee, where the donor is not in apprehension of death, does not constitute a valid gift causa mortis, although subsequently the donor, while in apprehension of death, charges such third person to carry out all previous instructions.—*Smith v. Ferguson*, 90 Ind. 229, 46 Am. Rep. 216.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gifts, §§ 133, 139-144.

See, also, 20 Cyc. p. 1237.

#### § 74. Revocation and rescission.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gifts, §§ 115-118.

See, also, 20 Cyc. pp. 1243-1245; note, 54 C. C. A. 143.

#### § 76. — Agreement or act of parties.

[a] (Sup. 1894)

A gift causa mortis is not revoked by a subsequent will of the donor bequeathing the same property to another.—*Brunson v. Henry*, 140 Ind. 455, 39 N. E. 256.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gifts, § 118.

### GIG.

Validity of statute making it illegal to take fish from water with gig, see *FISH*, § 8.

### GILL NET.

Validity of statute making it unlawful to have in possession a gill net, see *FISH*, § 8.

### GIVING COLOR.

To matter pleaded, see *PLEADING*, § 133.

### GLASS.

Judicial notice of character of, see *EVIDENCE*, § 7.

### GLASS WORKS.

Pollution of stream by glass factory, see *WATERS AND WATER COURSES*, § 68.

### GOOD BEHAVIOR.

See—

Reduction of term of imprisonment for—  
*PRISONS*, § 15.

*REFORMATORIES*, § 8.

Security therefor. *BREACH OF THE PEACE*, §§ 15-22.

### GOOD CHARACTER.

Accused as evidence for defense, see *CRIMINAL LAW*, § 377.

### GOOD FAITH.

See—

Adverse possession. *ADVERSE POSSESSION*, § 84.

Cancellation of instrument as against purchaser in good faith. *CANCELLATION OF INSTRUMENTS*, § 31.

Defense to proceedings for violation of injunction. *INJUNCTION*, § 226.

Reformation of instrument as against purchaser in good faith. *REFORMATION OF INSTRUMENTS*, § 29.

Representations as essential to ownership of mark or name. *TRADE-MARKS AND TRADE-NAMES*, § 22.

*Of particular classes of persons.*

See—

Attorney in dealing with client. *ATTORNEY AND CLIENT*, §§ 122, 123.

Grantee in fraudulent conveyance. *FRAUDULENT CONVEYANCES*, §§ 8, 9, 76, 164-170, 185, 186.

Of purchaser at foreclosure sale. *MORTGAGES*, § 553.

Mortgagee—

*CHATTEL MORTGAGES*, § 139.

*MORTGAGES*, §§ 152-157.

Occupant of land, as affecting right to compensation for improvements. *EJECTMENT*, § 142.

Party asking equitable relief. *SPECIFIC PERFORMANCE*, §§ 87-101.

Property owners signing petition for public improvements. *MUNICIPAL CORPORATIONS*, § 292.

Purchaser at administration sale. *EXECUTORS AND ADMINISTRATORS*, § 388.

From devisees or legatees. *WILLS*, § 845.

From grantee in fraudulent conveyance. *FRAUDULENT CONVEYANCES*, §§ 192, 198.

From insolvent corporation. *CORPORATIONS*, § 543.

Of bill or note. *BILLS AND NOTES*, §§ 481, 497, 509, 525.

Of bill or note secured by mortgage. *MORTGAGES*, § 258.

Of goods. *SALES*, §§ 234-239.

## Purchaser, etc.—(Cont'd).

Of land. **VENDOR AND PURCHASER, §§ 220-244, 265.**

Of land given to secure loan of school funds. **SCHOOLS AND SCHOOL DISTRICTS, § 18.**

Of mortgaged property. **MORTGAGES, §§ 174, 244, 298.**

Of municipal bonds or other securities. **MUNICIPAL CORPORATIONS, §§ 940-948.**

Of partnership property. **PARTNERSHIP, § 183.**

Of property sold on execution. **EXECUTION, §§ 14, 270-273.**

Of property sold on foreclosure. **MORTGAGES, § 536.**

Of rights in public lands. **PUBLIC LANDS, § 138.**

Of trust property. **TRUSTS, § 357.**

## Purchaser, etc.—(Cont'd.)

Of warehouse receipt. **WAREHOUSEMEN, § 17.**

Trustee authorized to sell trust property. **TRUSTS, § 196.**

**GOODS.***See—*

**ABANDONMENT.**

**CONFUSION OF GOODS.**

**FINDING LOST GOODS.**

**Hiring. BAILMENT.**

**Mortgage. CHATTEL MORTGAGES.**

**Payment of debt in goods or specific articles.**

**PAYMENT, § 30.**

**PLEDGES.**

**PROPERTY.**

**SALES.**

**Taxation of household goods. TAXATION, § 67.**

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# GOOD WILL.

## Scope-Note.

[INCLUDES nature and incidents of rights of property in the custom or patronage of an established business or trade in general, and sales and other contracts relating thereto.

[EXCLUDES rights of partners in respect of the good will of the firm business (see *Partnership*); and contracts in restraint of trade (see *Contracts*). For complete list of matters excluded, see cross-references, post.]

## Analysis.

- § 2. Elements and incidents.
- § 4. Sale or other transfer.
- § 5. — Requisites and validity.
- § 6. — Rights and liabilities of parties.
- § 7. Actions.

## Cross-References.

See—

Partnership good will. **PARTNERSHIP**, § 229.  
Taxation. **TAXATION**, §§ 41, 67.

### § 2. Elements and incidents.

[a] (*Sup.* 1883)

The good will is merely an incident of other property, and as a general rule is not an incident of a stock of merchandise, but of locality of the storeroom or place of business.—*Rawson v. Pratt*, 91 Ind. 9.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Good Will, § 1.

See, also, note, 15 L. R. A. 462.

### § 4. Sale or other transfer.

Contracts in restraint of trade, see **CONTRACTS**, §§ 115-117.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Good Will, §§ 2-5.

See, also, 20 Cyc. pp. 1277-1282; note, 5 L. R. A. (N. S.) 1077.

### § 5. — Requisites and validity.

[a] (*Sup.* 1879)

The good will of a business, like a trademark, is a species of property subject to sale by the proprietor, and which may be sold by order of court.—*Smock v. Pierson*, 68 Ind. 405, 34 Am. Rep. 269.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Good Will, § 2.

### § 6. — Rights and liabilities of parties.

[a] (*Sup.* 1885)

Where the seller of a stock of goods agrees with the buyers not to engage in a competing business for a certain time, the contract is binding, although the buyer does not continue

the business in the same premises as occupied by the seller.—*Johnson v. Gwinn*, 100 Ind. 466.

[b] (*Sup.* 1886)

A bill of sale of a stock of goods recite that the vendor sells certain goods for a certain sum paid, and that the vendor will not engage in the same business within a certain distance of his former place of business. *Held*, that the consideration paid was not only for the goods, but also for the agreement not to engage in the business.—*Eisel v. Hayes*, 141 Ind. 41, 40 N. E. 119.

[c] (*App.* 1896)

In an action for breach of a contract whereby defendants sold their house-moving appliances to plaintiff, together with the good will of the business, and agreed not to compete with him thereafter in said occupation at that place, a finding that within a few days after the sale defendants, in violation of their contract, bought new tools and went into competition with plaintiff for work in said business, and performed contracts for house moving, and were taking contracts and moving houses in said city up to date, etc., is sufficient to show a breach of contract.—*Van Valkenburgh v. Dean* (Ind. App.) 44 N. E. 652, 15 Ind. App. 693.

In such action it will be presumed, in the absence of any finding to the contrary, that plaintiff continued to conduct his business after his purchase from defendants, and did not voluntarily abandon it.—*Id.*

[d] (*App.* 1904)

Property, consisting of machinery used in a printing office, was mortgaged, and thereafter the wife and brothers of the mortgagor installed

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another printing plant owned by them, and the wife commenced the publication of two newspapers, instead of the two which had been formerly printed on the mortgaged machinery; the papers being sent to the subscribers of the old ones. Previously the property covered by the mortgage was separated from the other property and placed in a different building. *Held*, that, though the mortgage included the good will of the business, the mortgagee could not enjoin the wife from carrying on the business in her name and with her property, with her husband as agent.—*Vinall v. Hendricks*, 71 N. E. 682, 33 Ind. App. 413.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Good Will, §§ 2-5; 11 CENT. DIG. Contracts, § 920.

See, also, 20 Cyc. pp. 1278-1281; note, 48 Am. Rep. 223.

**§ 7. Actions.**

[a] (*Sup.* 1883)

The measure of damages for a breach of a contract of sale of the good will of a business, where the actual sales were represented to be about \$30,000 annually, and the sales were in fact only \$15,000 per year, is the difference between the rental value of a store where the annual sales of such business amount to \$30,000, and of a store where such annual sales are only \$15,000.—*Rawson v. Pratt*, 91 Ind. 9.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Good Will, §§ 6-9.

See, also, 20 Cyc. pp. 1281, 1282.

**GOVERNMENT.**

*See—*

Distribution of governmental powers. CONSTITUTIONAL LAW, §§ 50-80.

Judicial notice of matters relating to government and its administration. EVIDENCE, §§ 23-25, 27-32, 34, 35, 37.

Lands. PUBLIC LANDS.

STATES.

UNITED STATES.

**GOVERNOR.**

*See—*

Appointment of public officers—

CONSTITUTIONAL LAW, § 80.

OFFICERS, § 8.

Approval or veto of legislative bills. STATUTES, §§ 25-34.

EXTRADITION, §§ 21-41.

Mandamus to. MANDAMUS, § 64.

As encroachment by judiciary in executive.

CONSTITUTIONAL LAW, § 73.

Pardoning power. PARDON, § 4.

Remission of fines. FINES, § 18.

STATES, §§ 41, 68.

Transfer of control of swamp lands. PUBLIC LANDS, § 61.

**GRACE, DAYS OF.**

*See—*

BILLS AND NOTES, § 130.

Computation of time. TIME, § 8.

**GRADE.**

*See—*

Change of grade of street. MUNICIPAL CORPORATIONS, §§ 269, 656.

Compensation to abutting owners under law of eminent domain. EMINENT DOMAIN, § 101.

Damages to abutting owners. MUNICIPAL CORPORATIONS, § 385.

**GRADE CROSSINGS.**

*See—*

RAILROADS, §§ 86, 94, 99.

STREET RAILROADS, § 41.

**GRADED SCHOOLS.**

See SCHOOLS AND SCHOOL DISTRICTS, §§ 56, 71.

**GRAIN.**

*See—*

AGRICULTURE.

CROPS.

Elevators. WAREHOUSEMEN.

Lien on grain deposited for safe keeping for loan to depositor. LIENS, § 5.

Mixture of as affecting nature of contract of sale. SALES, § 4.

Speculation. GAMING, §§ 10-14.

**GRAMMAR.**

*See—*

Mistakes in—

CONTRACTS, § 157.

INDICTMENT AND INFORMATION, § 79.

PLEADING, § 30.

STATUTES, §§ 189, 200.

WILLS, § 464.

**GRANDCHILDREN.**

*See—*

Inheritance. DESCENT AND DISTRIBUTION, § 28.

Insurable interest in life of grandparent.

INSURANCE, §§ 116, 767.

Rights under wills. WILLS, § 497.

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# GRAND JURY.

## *Scope-Note.*

[INCLUDES bodies of persons sworn to inquire into and make presentment of public offenses; nature and constitution of such juries; qualifications, selection, summoning, and compensation of grand jurors; challenges and objections; organization, powers and duties, and general conduct of business of grand juries; secrecy as to their proceedings; liabilities of grand jurors for misconduct, etc.; and liabilities of others for interference with grand juries.

[EXCLUDES matters relating to juries in general (see *Jury*); and necessity, finding, filing, and requisites of indictments and presentments (see *Indictment and Information*). For complete list of matters excluded, see cross-references, post.]

## *Analysis.*

- § 2. Constitutional and statutory provisions.
- § 3. Number of jurors.
- § 5. Qualifications of jurors.
- § 6. Exemptions from service.
- § 7. Authority to select and summon jurors.
- § 8. Selection of jurors.
- § 9. Summoning jurors in general.
- § 11. Excusing and discharging jurors.
- § 12. Summoning talesmen.
- § 15. Competency of jurors.
- § 17. Challenge to panel.
- § 18. Challenge to polls.
- § 19. Waiver of objections to jurors.
- § 20. Impaneling and organization in general.
- § 23. Charge.
- § 24. Powers and duties.
- § 26. — Offenses and accusations.
- § 28. Term of service and sessions.
- § 29. — In general.
- § 30. — Term of court.
- § 31. — Adjournments.
- § 33. Conduct of proceedings in general.
- § 34. Participation of prosecuting attorney.
- § 36. Attendance and examination of witnesses.
- § 38. Presence and use of stenographers.
- § 39. Effect of presence or participation of unauthorized persons.
- § 40. Minutes or record of proceedings.
- § 41. Secrecy as to proceedings.
- § 43. Liabilities of jurors.

## *Cross-References.*

### *See—*

Allegations in indictment or information as to matters not known to. **INDICTMENT AND INFORMATION, § 69.**  
Competency of as juror on trial of action for malicious prosecution. **JURY, § 95.**  
As juror on trial of the indictment found. **JURY, § 95.**  
As witnesses as to proceedings before them. **WITNESSES, § 72.**  
Competency of bailiff of as juror on trial of indictment returned by them. **JURY, § 83.**

Defects and irregularities in proceedings as ground for quashing indictment or information. **INDICTMENT AND INFORMATION, § 137.**  
Description of in caption of indictment. **INDICTMENT AND INFORMATION, § 25.**  
False swearing before as perjury. **PERJURY, § 6.**  
Finding of indictment or presentment. **INDICTMENT AND INFORMATION, § 10.**  
Impeachment of witness by showing conflicting statements before. **WITNESSES, § 393.**

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**INDICTMENT AND INFORMATION.**

Irregularity in drawing or impaneling as ground for plea in abatement. **CRIMINAL LAW**, § 278.

Liability to action for malicious prosecution. **MALICIOUS PROSECUTION**, § 42.  
Showing as to proceeding of in record on appeal. **CRIMINAL LAW**, § 1086.

**§ 2. Constitutional and statutory provisions.**

Subjects and titles of acts, see **STATUTES**, § 118.

**[a] (Sup. 1882)**

Act April 15, 1881, providing a new mode for selecting grand jurors, did not have the effect of terminating the existence and powers of grand juries then serving in courts in session at the time when the act took effect.—*Williams v. State ex rel. Gudgel*, 86 Ind. 400.

Act April 15, 1881, providing a new mode for selecting grand jurors, and repealing "all laws within the purview of this act, and inconsistent with it," did not repeal 2 Rev. St. 1876, p. 419, § 12, providing that no plea in abatement or other objection shall be taken to any grand jury duly charged and sworn for any alleged irregularity in their selection, unless such irregularity in the opinion of the court amounts to corruption, in which case such plea or objection shall be received.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Gr. Jury, §§ 1, 17.

**§ 3. Number of jurors.**

Number necessary to finding, see **INDICTMENT AND INFORMATION**, § 10.

**[a] (Sup. 1824)**

By statute the names of 18 jurors must be drawn from the box to be summoned as grand jurors. The jury, however, when convened, may consist of any smaller number not less than 12.—*Hudson v. State*, 1 Blackf. 317.

**[b] (Sup. 1853)**

It is no objection to an indictment that one of the grand jury was discharged, and another sworn and sent to the grand jury room in his stead, when there were still 14 grand jurors left, and it is not shown that the juror sworn in the place of the one discharged acted with the others in finding the indictment.—*State v. Wingate*, 4 Ind. 193.

**[c] (Sup. 1875)**

A grand jury of 12 persons selected at the first regular session of the board of county commissioners in 1875, in accordance with the law then in force, was the legal grand jury at the July term, 1875, of the criminal circuit court of the county, and authorized to find an indictment after the taking effect of Act March 13, 1875 (Acts 1875, Sp. Sess. p. 54), providing that the number of grand jurors shall be composed of 6 residents of the county, etc.; the proviso of such act that it shall not be construed to affect in any way pending indictments, or indictments which may be found by any grand jury "before this act takes effect," mean-

**[d] (Sup. 1875)**

Where no grand jury had been selected by the board of county commissioners for a term of criminal circuit court commencing on the first Monday of January, 1876, and the grand jury selected by the board at their December session in 1874 for the term commencing on the first Monday of July, 1875, and, continuing six months, had been finally discharged by the court on December 16, 1875, and the court on the first day of the January term, 1876, caused a grand jury to be selected by the sheriff and impaneled, the grand jury so selected properly consisted of 12 men as a grand jury consisting of six men could not be selected under the act of 1875 until the March session of the board of county commissioners, and until that time the number was regulated by former laws.—*State v. Myers*, 51 Ind. 145.

**[e] (Sup. 1876)**

Act March 4, 1852, § 9 (2 Rev. St. 1876, p. 417), "to limit the number of grand jurors," etc., is merely directory, and for the purpose of getting a grand jury into court.—*Hughes v. State*, 54 Ind. 95.

**[f] (Sup. 1877)**

Act March 13, 1875, regulating the number of grand jurors and the manner of their selection, did not go into effect until the regular decision of the board of commissioners of the county in March, 1876; and until that time a legal grand jury of the county consisted of 12 men.—*Meiers v. State*, 56 Ind. 336.

**FOR CASES FROM OTHER STATES,**

SEE 24 CENT. DIG. Gr. Jury, §§ 3-6; 27 CENT. DIG. Ind. & Inf. § 481.

See, also, 20 Cyc. pp. 1317, 1318; note, 27 L. R. A. 846.

**§ 5. Qualifications of jurors.**

Mode of making objection to indictment or information on ground of disqualification of grand jurors, see **INDICTMENT AND INFORMATION**, § 133.

Waiver of objections, see post, § 19.

**[a] (Sup. 1839)**

A person selected as a talesman to serve on a grand jury must be either a freeholder or householder.—*State v. Herndon*, 5 Blackf. 75.

If a grand juror have not all the qualifications required by statute, it is a good cause of challenge, or the defendant, before issue joined, may plead the objection in avoidance.—*Id.*

[b] (Sup. 1879)

Under 2 Rev. St. 1876, p. 417, note 1, reputable householders, as such, who are not also reputable freeholders of the county, are not competent grand jurors, either as members of the regular panel or as talesmen.—Wills v. State, 69 Ind. 286.

[c] (Sup. 1882)

Section 2216, Rev. St. 1881, does not require that grand jurors returning an indictment for a crime committed before the act of 1881 took effect shall have the qualifications required by the law in force at the date of the offense.—Powers v. State, 87 Ind. 144.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gr. Jury, §§ 8-13, 15.

See, also, 20 Cyc. pp. 1296-1303; notes, 28 L. R. A. 195, 38 L. R. A. 214.

### § 6. Exemptions from service.

[a] (Sup. 1826)

Persons over 60 years of age are not disqualified, when they consent to act as grand jurors, since the provision of the statute is merely an exemption which may be waived.—State v. Miller, 2 Blackf. 35.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gr. Jury, §§ 14, 15.

See, also, 20 Cyc. p. 1304.

### § 7. Authority to select and summon jurors.

[a] (Sup. 1905)

Burns' Ann. St. 1901, § 1443, authorizing the circuit court to hold an adjourned term where there is business pending at the close of the regular term for the transaction of business during the pleasure of the court and while the business requires it, and section 1717b, authorizing the judge of a circuit court to issue a venire for a grand jury to sit in any county whenever he deems it necessary, authorize a circuit judge to impanel a grand jury at an adjourned term.—Donahue v. State, 74 N. E. 906, 165 Ind. 148.

[b] (Sup. 1905)

Burns' Ann. St. 1901, § 1449, authorizes the appointment of jury commissioners, and section 1456 disqualifies persons interested in a cause pending in the county court, triable by jury, during the calendar year succeeding his appointment. Sections 1450 and 1452 provide for the preparation of jury lists and the drawing of grand and petit juries, and section 1457 provides a per diem compensation for such commissioners. *Held* that, where a jury commissioner was appointed in good faith in the belief that he was qualified, he was a de facto officer, whose acts were not subject to collateral attack by plea in abatement to an indictment found by a grand jury drawn by him on the ground that he was disqualified to serve.—State v. Sutherland, 75 N. E. 642, 165 Ind. 339.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gr. Jury, §§ 2, 16, 21.

See, also, 20 Cyc. pp. 1295, 1314.

### § 8. Selection of jurors.

[a] (Sup. 1840)

The record of the board of county commissioners must show that grand jurors finding a certain indictment were selected according to the provisions of the statute, or the indictment will be quashed.—State v. Conner, 5 Blackf. 325.

[b] (Sup. 1843)

An indictment alleged that the defendant, being a justice of the peace, solemnized a marriage, and neglected to file in the clerk's office, for more than three months thereafter, a certificate of the marriage. It was pleaded in abatement that the names of the grand jurors who found the indictment were not selected by the county board, at their May session, from the list of taxable persons. *Held*, that the indictment was good, and the plea bad, since the jurors need not be selected as contended by defendant.—State v. Cain, 6 Blackf. 422.

[c] (Sup. 1876)

The fact that the grand jury, selected under 2 Rev. St. 1876, p. 417, were selected after the commencement of the term of the circuit court at which the indictment was found, is not fatal to the indictment.—Kelley v. State, 53 Ind. 311.

[d] (Sup. 1877)

Irregularity, not amounting to corruption, in the selection or reassembling of a grand jury is not ground for a plea in abatement of their indictment.—Sater v. State, 56 Ind. 378; Dorman v. Same, *Id.* 454.

[e] (Sup. 1882)

Act April 15, 1881, provided a new mode of selecting grand jurors by commissioners. All laws within the purview of the act, and inconsistent with it, were declared repealed. *Held*, that section 12 of the law formerly in force was not repealed, because neither within the purview of, nor inconsistent with, the act of 1881, and that therefore no objection could be taken to a grand jury, duly charged and sworn, for any irregularity in their selection, short of corruption.—Williams v. State ex rel. Gudgel, 86 Ind. 400.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gr. Jury, §§ 16-20;

27 CENT. DIG. Ind. & Inf. § 55.

See, also, 20 Cyc. pp. 1305-1311.

### § 9. Summoning jurors in general.

[a] (Sup. 1875)

Where no grand jury had been selected by the board of county commissioners for a term of criminal circuit court, commencing on the first Monday of January, 1876, and the grand jury selected by the board at their December session in 1874, for the term commencing on

the first Monday of July, 1875, and continuing six months, had been finally discharged by the court on December 16, 1875, it was proper for the court, on the first day of the January term, 1876, to cause a grand jury to be selected by the sheriff, and impaneled.—*State v. Myers*, 51 Ind. 145.

[b] (Sup. 1876)

Where grand jurors regularly selected are returned into court on a day subsequent to the first day of the term for which they were selected on a venire that day issued for them, or without the issuing or service of the venire they appear at such time and are impaneled, sworn, and charged, such want of venire and service thereof will not sustain a plea in abatement to an indictment found by such grand jurors.—*Hughes v. State*, 54 Ind. 95.

If a grand jury regularly selected, without a venire having been issued, without being summoned, and without any notice whatever, is returned into court, impaneled, sworn, and charged, their subsequent proceedings would not be irregular merely because they had not been summoned according to a directory statute.—*Id.*

[c] (Sup. 1877)

Where a grand jury has been illegally impaneled at the beginning of the term, the court may, at any time during the term, discharge it, and impanel another according to law.—*Meiers v. State*, 56 Ind. 336.

[d] (Sup. 1881)

The restriction of Act March 10, 1873 (2 Rev. St. 1876, p. 418), against the clerk issuing, without an order of the judge, a venire for the attendance of grand jurors already properly chosen by the county board, does not deprive the court of the power to organize the panel from those in attendance, though they have come in response to a summons issued without the required order.—*Hess v. State*, 73 Ind. 537.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gr. Jury, §§ 21-26.

See, also, 20 Cyc. pp. 1311-1315; notes, 27 L. R. A. 779, 780, 783.

§ 11. Excusing and discharging jurors.

[a] (Sup. 1891)

When, under Rev. St. § 1649, authorizing courts to excuse jurors for certain reasons, a grand juror is excused, and the record does not show the reason, it will be presumed to be for one of the grounds prescribed by the statute.—*Burrell v. State*, 129 Ind. 290, 28 N. E. 699.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gr. Jury, §§ 28, 29.

See, also, 20 Cyc. pp. 1331, 1332.

§ 12. Summoning talesmen.

[a] (Sup. 1875)

In March, 1874, the board of county commissioners selected two grand juries, one for the March term of 1874, and one for the June

term of the same year, but selected none for the October term of 1874, or for the January term of 1875. At the October term of 1874, on order of court that the grand jury be summoned to appear, the grand jury selected for the June term of 1875 assembled for the January term of 1875. *Held*, that the order for January, 1875, was sufficient, under 2 Gav. & H. St. p. 433, § 10, providing that a panel of grand jurors may be filled in whole or in part when necessary, by summoning the requisite number of freeholders or householders of the proper county under the direction of the court, unless in consequence of delay in filling the panel, or for other satisfactory reasons, the court shall otherwise direct.—*Willey v. State*, 52 Ind. 246.

[b] (Sup. 1877)

Where, either on being first assembled, or, having been assembled and discharged, on being reassembled by order of court, any or all of the members of a grand jury fail to appear, the court may direct it to be filled from bystanders, even though the selection of such grand jury by the board of commissioners was irregular.—*Dorman v. State*, 56 Ind. 454.

[c] (Sup. 1891)

The fact that the court failed to interrogate a bystander called as a grand juror before permitting him to become one of the panel, as required by Rev. St. 1881, § 1651, providing that "before any talesman is accepted and sworn the court must inquire of him under oath as to his qualifications," is not sufficient cause for abating the prosecution if the juror was in fact qualified.—*Sage v. State*, 127 Ind. 15, 26 N. E. 667.

[d] (Sup. 1891)

The power to excuse grand jurors confers upon the court, by implication, the power to fill the vacancy.—*Burrell v. State*, 129 Ind. 290, 28 N. E. 699.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gr. Jury, §§ 30-32.

See, also, 20 Cyc. p. 1321.

§ 15. Competency of jurors.

Waiver of objections, see post, § 19.

[a] A grand juror who cannot conscientiously find a man guilty of an offense that would subject him to death is disqualified.—(Sup. 1831) *Jones v. State*, 2 Blackf. 475; (1850) *Gross v. State*, 2 Ind. 329.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gr. Jury, §§ 35-41.

See, also, 20 Cyc. pp. 1296-1303.

§ 17. Challenge to panel.

[a] (Sup. 1841)

An objection to the mode in which the board doing county business discharged its duty, as to the selecting and drawing grand jurors, must be made by way of challenge before the grand jurors are sworn.—*Bellair v. State*, 6 Blackf. 104.

[b] An accused cannot afterwards plead in abatement the same grounds or facts upon which he has challenged the array of the grand jury.—(Sup. 1877) *Meiers v. State*, 56 Ind. 336; (1881) *McClary v. State*, 75 Ind. 260.

[c] (Sup. 1877)

Irregularity in the selection of a grand jury, not amounting to corruption, is not sufficient ground to sustain a challenge to the array.—*Meiers v. State*, 56 Ind. 336.

[d] (Sup. 1879)

An objection that the record did not show that the grand jury was drawn in the mode prescribed by law, or that the grand jurors were reputable freeholders and residents of the proper county, may properly be raised by challenging the array, or by plea in abatement.—*Miller v. State*, 69 Ind. 284.

[e] (Sup. 1881)

A challenge to the array of a grand jury must be supported by an affidavit setting forth the cause relied on in support of the challenge, under 2 Rev. St. 1876, p. 419, § 11; an oral statement of such cause being insufficient.—*McClary v. State*, 75 Ind. 260.

[f] (Sup. 1883)

An accused who has had no opportunity of challenging the grand jury may plead in abatement any matter which would have been sufficient cause of challenge to that tribunal, or any member thereof.—*Pointer v. State*, 89 Ind. 255.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gr. Jury, §§ 42-47, 52.  
See, also, 20 Cyc. pp. 1325-1327.

#### § 18. Challenge to polls.

[a] (Sup. 1824)

Grand jurors may be challenged by any person previous to his being indicted, provided he be at the time under a prosecution for an offense about to be submitted to the jury.—*Hudson v. State*, 1 Blackf. 317.

[b] (Sup. 1825)

A person under prosecution for a crime may challenge any of the grand jurors by whom the charge is to be examined, but he or his counsel must claim the privilege.—*Ross v. State*, 1 Blackf. 390.

[c] (Sup. 1831)

A person under a prosecution for a capital offense about to be submitted to a grand jury may challenge any of the grand jurors for cause, but not peremptorily.—*Jones v. State*, 2 Blackf. 475.

[d] (Sup. 1875)

Any person under prosecution for crime, and in custody or on bail, may, before he is indicted, challenge, for good cause, any person returned or placed upon the grand jury.—*Mer-shon v. State*, 51 Ind. 14.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gr. Jury, §§ 48-52.  
See, also, 20 Cyc. pp. 1327, 1328.

#### § 19. Waiver of objections to jurors.

[a] (Sup. 1841)

Illegality of the proceedings of the court board in selecting and drawing grand jury cannot be made the ground of a motion to set aside the indictment, since it must be made way of challenge before the grand jurors are sworn.—*Bellair v. State*, 6 Blackf. 104.

[b] (Sup. 1845)

The objection that the grand jury was legally selected is waived if not made by way of challenge before the jurors are sworn.—*State v. Hensley*, 7 Blackf. 324.

[c] (Sup. 1875)

Where a defendant was neither in custody nor under recognizance when the grand jury which indicted was impaneled, and so had opportunity to challenge the grand jury, may take advantage of the disqualification of any one or more of them by plea in abatement to the indictment.—*Mer-shon v. State*, 51 Ind. 14.

[d] (Sup. 1879)

If objections to the manner of drawing the grand jury, or that the record failed to show them to be reputable freeholders and residents of the county, are not raised by challenge to the array or plea in abatement, they are waived.—*Miller v. State*, 69 Ind. 284.

[e] (Sup. 1890)

Where, after the return of an indictment and before asking for a change of venue, a defendant entered his plea of guilty, he thereby waived any irregularity in the organization of the grand jury.—*O'Brien v. State*, 25 N. H. 137, 125 Ind. 38, 9 L. R. A. 323.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gr. Jury, §§ 53-55.  
See, also, 20 Cyc. p. 1328; note, 34 Am. Rep. 705.

#### § 20. Impaneling and organization of grand jury, general.

[a] (Sup. 1870)

The fact that a grand jury was discharged until a certain future day, and did not appear on that day, but upon the day after, and without being reimpaneled, returned an indictment, does not vitiate the indictment, since a grand jury cannot dissolve itself by disregarding an order of the court.—*Clem v. State*, 33 Ind. 418.

[b] (Sup. 1873)

Act March 10, 1873, p. 158, regulating the convening of grand jurors, did not prohibit the impaneling of a grand jury summoned previous to its enactment.—*Bell v. State*, 42 Ind. 335.

[c] (Sup. 1877)

Matters relative to organizing, discharging and reconvening the grand jury are largely

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within the discretion of the circuit court; and its acts will be revised on appeal only in case of a gross abuse of such discretion.—*Meiers v. State*, 56 Ind. 336.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gr. Jury, §§ 56-58.

See, also, 20 Cyc. p. 1315; note, 27 L. R. A. 776.

### § 23. Charge.

[a] (Sup. 1865)

It is the duty of the court to instruct the grand jury, but the omission to do so does not affect the validity of their presentment or indictment.—*Stewart v. State*, 24 Ind. 142.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gr. Jury, § 61.

See, also, 20 Cyc. pp. 1320, 1321.

### § 24. Powers and duties.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gr. Jury, §§ 62-66.

See, also, 20 Cyc. pp. 1334-1337.

### § 26. — Offenses and accusations.

[a] (Sup. 1860)

Under our statutes, the grand jury is a local tribunal, and cannot inquire into offenses committed out of its jurisdiction.—*Beal v. State*, 15 Ind. 378.

[b] (Sup. 1899)

Where a person held by a justice of the peace to answer a charge of felony, under Burns' Rev. St. 1894, § 1703 (*Horner's Rev. St. 1897*, § 1634), gives a recognizance to appear at the November term of the circuit court, the grand jury at the September term after the recognizance was given has no jurisdiction to investigate the offense by virtue of the proceeding before the justice; hence their indorsement of "Ignoramus" on the papers does not terminate the prosecution.—*Stark v. Bindley*, 52 N. E. 804, 152 Ind. 182.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gr. Jury, §§ 64, 65.

See, also, 20 Cyc. p. 1335.

### § 28. Term of service and sessions.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gr. Jury, §§ 67-69.

See, also, 20 Cyc. pp. 1332-1334.

### § 29. — In general.

[a] (Sup. 1842)

Grand jurors, by statute, can only serve for one year from the time they are selected.—*Barger v. State*, 6 Blackf. 188.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gr. Jury, § 67.

See, also, 20 Cyc. p. 1332.

### § 30. — Term of court.

[a] (Sup. 1826)

St. 1825, p. 21, authorizing special sessions of the circuit court, does not warrant the finding of an indictment at the special term against any other person than the one for whose trial the court was convened.—*Wilson v. State*, 1 Blackf. 428.

[b] (Sup. 1860)

Under 2 Rev. St. p. 363, providing that, whenever the grand jury is dismissed before final adjournment of the court, they may be summoned to attend again at the same term if necessary, an indictment may be found at an adjourned term.—*Ulmer v. State*, 14 Ind. 52.

[c] (Sup. 1873)

The law does not provide for a grand jury for a criminal court for each month during which, or any part of which, the court may be in session, but it does provide for a grand jury for each term; and, if the court at the same term can legally be in session in two or more months, the same grand jury may sit in each month.—*Harper v. State*, 42 Ind. 405.

[d] (Sup. 1874)

Where the grand jury has been dismissed before the final adjournment of the court, it may, if necessary, be resummoned to attend again at the same term.—*Long v. State*, 46 Ind. 582.

[e] (Sup. 1879)

An objection that the judge had no power to convene the grand jury in vacation may properly be raised by challenging the array, or by pleading in abatement; but, if not so raised, it is waived.—*Miller v. State*, 69 Ind. 284.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gr. Jury, § 68.

### § 31. — Adjournments.

[a] (Sup. 1873)

The criminal court in Floyd county can, under the act organizing that court (*Davis' Rev. St. Supp. 1870*, p. 178, § 1) and the act of February 12, 1855 (2 Gav. & H. Rev. St. p. 11), adjourn from a regular term of said court to some other certain time, and, if such time is in a month within which the grand jury has not already been in session 10 days, the grand jury may legally meet in connection with the court, and find and return indictments.—*Harper v. State*, 42 Ind. 405.

#### FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gr. Jury, § 69.

See, also, 20 Cyc. p. 1333.

### § 33. Conduct of proceedings in general.

[a] (Sup. 1865)

It is not necessary that a grand jury should take evidence in every case.—*Creek v. State*, 24 Ind. 151.

[b] (Sup. 1903)

Defendant cannot complain because the grand jury heard evidence as to a matter of de-

fense after the indictment was returned, even if witnesses subsequently called by him were contradicted by their testimony before the grand jury.—*Copenhaver v. State*, 67 N. E. 453, 160 Ind. 540.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gr. Jury, §§ 70, 71, 79, 80.

### § 34. Participation of prosecuting attorney.

[a] (Sup. 1859)

The prosecuting officer may attend the sittings of the grand jury, examine witnesses, and advise in matters of law.—*Shattuck v. State*, 11 Ind. 473.

As the prosecuting officer may attend the sitting of the grand jury and advise in matters of law, where it is alleged that he advised, it will be presumed to have been merely on matters of law.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gr. Jury, §§ 73, 85.  
See, also, 20 Cyc. pp. 1338-1340.

### § 36. Attendance and examination of witnesses.

Contempt proceedings, see CONTEMPT, § 66.

Disobedience to subpoena as contempt, see CONTEMPT, § 31.

False swearing before grand jury as perjury, see PERJURY, § 6.

[a] (Sup. 1890)

Though no statute in express terms authorizes the clerk to issue subpoenas for witnesses to appear before the grand jury, the power is clearly implied under Rev. St. 1831, § 1664, giving the court power to compel the attendance of witnesses before the grand jury, and section 5854, fixing the fees of the clerk for issuing subpoenas therefor.—*Baldwin v. State*, 126 Ind. 24, 25 N. E. 820.

[b] (Sup. 1902)

The grand jury examining a witness under oath need not inform the witness of his constitutional privilege to refuse to testify in matters tending to incriminate him.—*State v. Comer*, 62 N. E. 452, 157 Ind. 611.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gr. Jury, §§ 75-78;  
50 CENT. DIG. Witn. § 38.  
See, also, 20 Cyc. pp. 1342-1350.

### § 38. Presence and use of stenographers.

[a] (App. 1892)

It is no objection to an indictment that a stenographer, at the request of the prosecuting attorney, attended before the grand jury and took the testimony of witnesses, where it does not appear that the accused was prejudiced thereby.—*Courtney v. State*, 5 Ind. App. 356, 32 N. E. 335.

[b] (Sup. 1897)

The mere fact that a stenographer employed by the prosecuting attorney was present in the grand-jury room, and took down in shorthand the evidence on which the indictment was based, for the use of the prosecution, is not ground for quashing the indictment, unless it appears that the accused was prejudiced thereby.—*State v. Bates*, 48 N. E. 2, 148 Ind. 610.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gr. Jury, § 81.  
See, also, 20 Cyc. p. 1341.

### § 39. Effect of presence or participation of unauthorized persons.

[a] (Sup. 1859)

Though the grand jury should exclude everybody while voting, yet the mere omission so to do will not vitiate an indictment.—*Shattuck v. State*, 11 Ind. 473.

[b] (App. 1892)

The fact that a stenographer, at the request of the prosecuting attorney, attended before the grand jury and took the testimony of witnesses, is no ground for quashing the indictment, where it does not appear that the accused was prejudiced thereby.—*Courtney v. State*, 5 Ind. App. 356, 32 N. E. 335.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gr. Jury, § 82; 27 CENT. DIG. Ind. & Inf. § 484.  
See, also, 20 Cyc. p. 1341.

### § 40. Minutes or record of proceedings.

[a] (Sup. 1840)

Since the board of county commissioners is a court of record, and its acts can only be proved thereby, if the record of such board does not show that the grand jury who found an indictment were selected according to the statute, the indictment will be quashed on motion.—*State v. Conner*, 5 Blackf. 325.

[b] (Sup. 1865)

The return of an indictment into court by the grand jury, duly indorsed by the foreman, is evidence that the proper number have concurred in the finding.—*Creek v. State*, 24 Ind. 151.

[c] (Sup. 1863)

Giving the initial only, instead of the full Christian name, of one of the grand jurors, in the record, held no objection to the indictment.—*Stone v. State*, 30 Ind. 115.

[d] (Sup. 1877)

A record stating that the regular grand jury for said term of said court, having been duly impaneled and sworn, returned into open court, the indictment against defendant sufficiently shows the proper presentment of the indictment, and that it was found by a legal grand jury.—*Beavers v. State*, 58 Ind. 530.

[e] (Sup. 1883)

Where the record certified shows a due impaneling of the grand jury, it is sufficient, with-

out a specific statement of the fact in the clerk's certificate.—*App v. State*, 90 Ind. 73.

[f] (*Sup.* 1883)

Where it is shown by the record that the indictment was returned by the grand jury into open court, and the indictment itself recites that the grand jury were duly impaneled, charged, and sworn, the impaneling is sufficiently shown.—*Stout v. State*, 93 Ind. 150.

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gr. Jury, §§ 83-85;  
27 CENT. DIG. Ind. & Inf. § 111.

See, also, 20 Cyc. p. 1356; note, 69 C. A. 488.

§ 41. Secrecy as to proceedings.

Competency of jurors as witnesses as to proceedings before them, see WITNESSES, § 72.

[a] (*Sup.* 1838)

Grand jurors may be required to testify as to the evidence given before the grand jury.—*Burnham v. Hatfield*, 5 Blackf. 21.

[b] (*Sup.* 1859)

Although the sittings of the grand jury are secret, their proceedings may be disclosed in evidence.—*Shattuck v. State*, 11 Ind. 473.

[c] (*Sup.* 1865)

The consultations of a grand jury are secret, and it is not competent to inquire into the amount of evidence on which they acted.—*Stewart v. State*, 24 Ind. 142.

[d] (*Sup.* 1873)

The oath of grand jurors does not prevent the public or individuals from proving by one of them in a court of justice what passed before the grand jury.—*Burdick v. Hunt*, 43 Ind. 381.

[e] (*Sup.* 1897)

The oath to grand jury, "And that you will not disclose any evidence given or proceedings had before the grand jury," does not prevent proof by one of them in court of what passed before them.—*Hinshaw v. State*, 147 Ind. 334, 47 N. E. 157.

Rev. St. 1894, § 1731 (Rev. St. 1881, § 1662), providing that a member of the grand jury may be required by any court to disclose the testimony of a witness examined before the grand jury "for the purpose of ascertaining whether it is consistent with that given by the witness before the court, or to disclose the testimony given before them by any person upon a charge against him for perjury in giving his testimony or upon his trial therefor," is not intended to cut off the right to require grand jurors to disclose testimony given before them in any other than the two cases specified, but rather to extend the power to require such disclosure to those two cases, under the supposition that the law did not already extend thereto.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gr. Jury, §§ 86, 87.  
See, also, 20 Cyc. pp. 1351-1355.

§ 43. Liabilities of jurors.

[a] (*Sup.* 1872)

No action will lie against grand jurors in consequence of any finding by them, even though it may appear to be dictated by malice or without foundation.—*Hunter v. Mathis*, 40 Ind. 356.

Grand jurors are protected, during the entire time occupied by their sitting, from the consequences of any finding by them; and they may avail themselves of such protection under a general denial in an action against them for maliciously making such findings.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 24 CENT. DIG. Gr. Jury, § 89.  
See, also, 20 Cyc. p. 1356.

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**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

# GUARANTY.

## *Scope-Note.*

[INCLUDES collateral promises to answer for the payment of a debt or performance of a duty or contract or other obligation by another, liable therefor in the first instance, in the event of his failure to pay or perform the same; nature, requisites, validity, incidents, construction, operation, and effect of such promises in general; and rights, liabilities, and remedies of guarantors, principal debtors, and creditors.

[EXCLUDES contracts of suretyship (see *Principal and Surety*), and of indemnity (see *Indemnity*); guaranties by particular classes of persons (see *Infants*; *Insane Persons*; and other specific heads), partners (see *Partnership*), and corporations (see *Corporations*); and requirements of statute of frauds (see *Frauds, Statute of*). For complete list of matters excluded, see cross-references, post.]

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## I. REQUISITES AND VALIDITY.

## § 1. Nature of obligation.

[a] (Sup. 1890)

When an instrument resolves itself into a promise or undertaking of the person executing it to do a particular thing which another is bound to do, in the event such other person does not perform the act himself, it is an original undertaking, and not a strict or collateral guaranty.—Nading v. McGregor, 23 N. E. 283, 121 Ind. 465, 6 L. R. A. 686.

[b] (App. 1900)

In a strict or collateral guaranty, the obligation of the guarantor is that the principal shall perform his undertaking, or, if he fail, that the guarantor will pay the resulting damages; but, when the promise of the guarantor is to do what another is bound to do if he shall not do it himself, this is not a strict or collateral guaranty, but is distinguished as an original undertaking in the nature of suretyship.—Woody v. Haworth, 57 N. E. 272, 24 Ind. App. 634.

[c] (App. 1910.)

The word "guaranty" has an established meaning, and ordinarily implies an undertaking

by one person that another will perform some engagement (citing 4 Words and Phrases, 3179).—Bailey v. Miller, 91 N. E. 24.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guar. § 1.

See, also, 20 Cyc. pp. 1397-1400.

## § 3. Express and implied guaranties.

[a] (App. 1892)

An agreement by defendant "to stand good to plaintiff for the board of her son does not imply a guaranty or suretyship.—McNabb Clipp, 5 Ind. App. 204, 31 N. E. 858.

[b] (App. 1898)

Where the trustee of a school township wrote on its note, "The within warrant is K., and will be paid promptly when due," and signed his name thereto, such words do not constitute a guaranty, and the trustee is not liable to one who purchased the note on the faith of said written representation.—Fowler N. Bank of Lafayette v. Brown, 49 N. E. 833, Ind. App. 433.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guar. § 2.

**This Digest is compiled on the Key-Number System. For explanation, see page**

#### § 4. Guaranty distinguished from other contracts.

Indorsement distinguished from guaranty, see **BILLS AND NOTES, § 246.**

Suretyship distinguished from guaranty, see **PRINCIPAL AND SURETY, § 6.**

##### [a] (Sup. 1853)

One who, six days after the execution of a note, indorses thereon, "I guaranty payment of this note and costs, if any are made on it," is an absolute promisor, and not a guarantor.—*Burnham v. Gallentine*, 11 Ind. 295.

##### [b] (Sup. 1853)

Plaintiff lent his horse to B. under a parol promise by defendant that he would make good any agreement B. might make with plaintiff with regard to the horse. *Held*, that defendant's liability was only collateral.—*Billingsley v. Dempewolf*, 11 Ind. 414.

##### [c] (Sup. 1850)

A bond for the assumption and guaranty of payment of a promissory note given by the obligee is an original undertaking, and not a contract of indemnity merely, and implies a debt due the obligee from the obligor, which the latter agrees to pay by paying said note.—*Kirk v. Ft. Wayne Gaslight Co.*, 13 Ind. 56.

##### [d] (Sup. 1876)

Defendants indorsed an order for goods by writing thereon, "We, the undersigned, do hereby recommend" the vendee, naming him, "for the inclosed bill," to which indorsement their names were signed. *Held*, that they were liable, if at all, only as guarantors, collaterally, and could not be held liable on the original debt.—*Richwine v. Scovill*, 54 Ind. 150.

##### [e] (Sup. 1876)

An indorsement of a note by the payee. "For value received, I assign this note and guaranty payment of the same when due," is not a guaranty, but a direct agreement by the payee to pay the note when due.—*Studabaker v. Cody*, 54 Ind. 586.

##### [f] (Sup. 1880)

Where a retiring partner, with others as sureties, executed an agreement to the remaining three partners, agreeing and guarantying to hold such partners harmless against one-fourth of the loss sustained by the firm up to date, and agreeing on his part to furnish security for the payment of one-fourth of such loss, when the agreement should be surrendered to him, was a contract for payment by him of his share of the loss, and not a contract of indemnity merely.—*Lee v. Davis*, 70 Ind. 464.

##### [g] (Sup. 1880)

A guaranty is a collateral undertaking, while a contract of indemnity is an original one.—*Anderson v. Spence*, 72 Ind. 315, 37 Am. Rep. 162.

##### [h] (Sup. 1885)

The bond of a bank cashier for the faithful performance of the duties of his office is a contract of guaranty that, in the event of

failure, the guarantor will answer the consequences; and it is not a contract of suretyship, where the promisor engages to perform the original undertaking if the principal fails.—*La Rose v. Logansport Nat. Bank*, 102 Ind. 332, 1 N. E. 805.

##### [i] (Sup. 1886)

Where a debtor executes a bond with sureties conditioned for the performance of a previous contract by him, stipulating that the principal shall well and truly perform such contract, and that the bond shall be a continuous guaranty, the contract is in its nature and by its very terms a contract of guaranty.—*Weed Sewing Mach. Co. v. Winchel*, 107 Ind. 260, 7 N. E. 881.

##### [j] (Sup. 1889)

An instrument in the form of a promissory note, with an additional clause stating that it is given to secure the payment of a debt, does not thereby become a contract of guaranty.—*Clanin v. Esterly Harvesting Mach. Co.*, 118 Ind. 372, 21 N. E. 35, 3 L. R. A. 863.

##### [k] (App. 1894)

An indorsement by defendant on an order for goods by one A., reciting that defendant, in consideration of A.'s being allowed 30 days for payment, "hereby guaranties payment of the amount within 30 days," is an original, and not a collateral, undertaking, and defendant is liable at once on his direct promise to pay.—*Shearer v. R. S. Peale & Co.*, 9 Ind. App. 282, 36 N. E. 455.

##### [l] (App. 1896)

Where one agrees to hold himself responsible for any goods purchased of another by a third person, his contract is an original undertaking.—*Lane v. Mayer*, 15 Ind. App. 382, 44 N. E. 73.

##### [m] (App. 1897)

A letter written by defendant to plaintiffs, stating that "L. desires to make purchases from your firm. I will engage to secure sales you make [him] in the sum of \$300,"—is not a guaranty, but an original undertaking to become binding on its delivery; so that notice of its acceptance is not necessary.—*Newcomb Bros. Wall-Paper Co. v. Emerson*, 17 Ind. App. 482, 46 N. E. 1018.

#### FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guar. §§ 3-6.

See, also, 20 Cyc. pp. 1400-1403.

#### § 6. Offer and acceptance in general.

##### [a] (Sup. 1887)

The acceptance of a guaranty and the performance of the condition on which it rests are all that are essential to make the contract complete and enforceable.—*Snyder v. Click*, 13 N. E. 581, 112 Ind. 293.

#### FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guar. § 8.

See, also, 20 Cyc. p. 1404; note, 1 L. R. A. (N. S.) 305.

**§ 7. Notice of acceptance.**

[a] Where a guaranty is absolute, for the payment of the debt if the debtor does not pay, no notice of acceptance is necessary.—(Sup. 1845) *Jackson v. Yandes*, 7 Blackf. 526; (1880) *Kline v. Raymond*, 70 Ind. 271; (1887) *Snyder v. Click*, 112 Ind. 293, 13 N. E. 581; (1890) *Nading v. McGregor*, 121 Ind. 465, 23 N. E. 283, 6 L. R. A. 686.

[b] Where a guaranty is an offer to become responsible for a credit which may or may not be given, the guarantor is not bound, unless notified within a reasonable time of the acceptance of the guaranty.—(Sup. 1879) *Milroy v. Quinn*, 69 Ind. 406, 35 Am. Rep. 227; (1881) *Wills v. Ross*, 77 Ind. 1, 40 Am. Rep. 279.

[c] (Sup. 1881)

Where a guaranty of an existing debt is definite as to time, amount, and the extent of the liability, the guarantor is not entitled to notice of acceptance.—*Wills v. Ross*, 77 Ind. 1, 40 Am. Rep. 279.

[d] (Sup. 1887)

Where a guaranty is for the fulfillment of a contract already, or contemporaneously, made, or for the payment of an existing debt, or upon a consideration distinct from the credit extended to the principal, and moving directly between the guarantor and guarantee, notice of acceptance is unnecessary.—*Furst & Bradley Mfg. Co. v. Black*, 111 Ind. 308, 12 N. E. 504.

Where there is a mere proposal on the part of those sought to be charged as guarantors to guarantee the faithful performance of some obligation which another may enter into, provided credit shall be extended or a duty undertaken, the contract remains incomplete until the original obligation is entered into and the proposition of guaranty accepted and due notice thereof given.—*Id.*

[e] (Sup. 1890)

An order reading "Please let my daughter, Mrs. H., have what goods she wants, and I will stand good for the money to settle the bills," given after a refusal to give the daughter credit, is an absolute, continuing guaranty, and requires no notice of its acceptance.—*Wright v. Griffith*, 121 Ind. 478, 23 N. E. 281, 6 L. R. A. 639.

When the contract of guaranty is executed contemporaneously with and is part of the consideration for the transaction guaranteed, the law imputes notice to all the parties immediately related to the transaction of its character and extent, and no further notice of the acceptance of the guaranty is required.—*Id.*

Where, on a fair construction of an instrument, it appears to be the personal undertaking of the guarantor to pay for goods sold or to be sold to a third person, it will be regarded as an absolute promise or conclusive guaranty, which when acted on makes the promisor immediately liable, and no notice is necessary of the acceptance of the guaranty.—*Id.*

[f] (App. 1891)

The plaintiff wired the defendant: "Send us order under your signature authorizing us to collect from you for M.'s order on completion. Amount, about \$270." The defendant answered: "Fill M.'s order. I will guaranty payment within 30 days." *Held*, that the promise given varied from the one requested, and the defendant was entitled to notice of acceptance.—*Hasselman v. Japanese Development Co.*, 2 Ind. App. 180, 27 N. E. 318, 23 N. E. 207.

[g] (Sup. 1892)

Where a contract of guaranty is executed on the same paper as the contract whose performance is guaranteed, and is an absolute contract to pay on failure of the contracting party, it must be regarded as being executed contemporaneously with such contract, and no notice of acceptance thereof is necessary.—*Bechtold v. Lyon*, 29 N. E. 912, 130 Ind. 194.

[h] (App. 1892)

Notice of the acceptance of an offer of guaranty need not be given by the guarantee himself, if it be not so stipulated; but it is sufficient if the guarantor receive information thereof from any source.—*Webster v. Smith*, 4 Ind. App. 44, 30 N. E. 139.

[i] (App. 1899)

In case of an absolute guaranty, no notice of acceptance by the guarantee is necessary.—*Wheeler v. Rohrer*, 52 N. E. 780, 21 Ind. App. 477.

A bond "to indemnify or make good any loss by reason of nonpayment of goods" sold the principal on such bond, and one conditioned that the parties thereto shall indemnify the obligee "against any and all loss that may arise \* \* \* and all persons interested in said contract are hereby secured," are original undertakings and not collateral guaranties, and notice of acceptance thereof is unnecessary.—*Id.*

[j] (App. 1899)

A bond guaranteeing payment of money collected by an employé until notice from the obligor is absolute and continuous, and notice of the obligee's acceptance thereof need not be given.—*Tapper v. New Home Sewing-Mach. Co.*, 53 N. E. 202, 22 Ind. App. 313.

[k] (Sup. 1904)

Where a contract of a guarantor on a building contractor's bond was executed contemporaneously with and as a part of the consideration of the transaction guaranteed, notice of acceptance was not required.—*Closson v. Billman*, 69 N. E. 449, 161 Ind. 610.

[l] (Sup. 1906)

An instrument addressed to plaintiff, signed by defendant, and stating, "Please let the bearer \* \* \* have whatever he wants at any time, and I will see that the same is paid for," is a direct and original promise by defendant to pay for goods which plaintiff might sell to the person named therein, and became,

when accepted by plaintiff, a binding contract of guaranty on which defendant was liable without any notice of plaintiff's acceptance thereof.—*Stewart v. Knight & Jillson Co.*, 76 N. E. 743, 166 Ind. 498.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guar. § 9.

See, also, 20 Cyc. pp. 1404-1412; note, 39 Am. Rep. 221.

**§ 8. Written guaranties.**

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guar. §§ 10-12.

**§ 10. — Execution in general.**

[a] (Sup. 1881)

An agreement to guaranty an existing debt, if the creditor will give the debtor a little more time, is valid, without describing the debt particularly.—*Wills v. Ross*, 77 Ind. 1, 40 Am. Rep. 279.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guar. § 10.

**§ 11. — Conditional signature.**

[a] (Sup. 1880)

In an action upon a guaranty, it is no defense that an agreement was made between the guarantor and the party for whose sake it was executed that other names should be added to it before its delivery, and that such names were not so added, unless it is also shown that the guarantee had notice of such an agreement.—*Kline v. Raymond*, 70 Ind. 271.

[b] (Sup. 1882)

Where the guarantors of a lease to a partnership signed it and delivered it to one of the firm, with instructions not to deliver it to the lessor until all the firm had signed, and one refused so to do, they are not liable, though the lease is delivered; the failure of all the parties named in the lease to join therein being notice to the lessor of the condition.—*Markland Min. & Mfg. Co. v. Kimmel*, 87 Ind. 560.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guar. § 11.

**§ 13. Consideration.**

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guar. §§ 13-20.

See, also, 20 Cyc. pp. 1413-1418.

**§ 16. — Sufficiency.**

[a] (Sup. 1860)

The surrender of railroad bonds previously sold and guarantied by the guarantor is a good consideration for a written guaranty given in exchange for the bonds, irrespective of the question of the validity of the bonds.—*Butler v. Edgerton*, 15 Ind. 15.

[b] (Sup. 1881)

Where goods are sold in reliance on a verbal guaranty of payment, the obligation there-

by incurred by the guarantor is a sufficient consideration to support a subsequent written guaranty of payment for the same goods.—*Wills v. Ross*, 77 Ind. 1, 40 Am. Rep. 279.

A promise to forbear to sue a third person may be a good consideration for defendant's promise to pay the third person's debt to plaintiff even though no definite term of forbearance is set; for the law would hold the creditor to forbear for a reasonable time.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guar. §§ 14-17.

**§ 20. Fraud, duress, and undue influence.**

[a] (Sup. 1868)

There can be no recovery on a guaranty of payment of the price of articles sold where the seller was guilty of false and fraudulent representations in making the sale.—*Webster v. Metropolitan Washing Mach. Co.*, 29 Ind. 453.

[b] (App. 1894)

A guaranty secretly executed in favor of one creditor, to enable a debtor to effect a composition with all of them, is invalid for fraud, and the guarantor may set up that fraud in an action on the guaranty.—*Morrison, Plummer & Co. v. Schlessinger*, 10 Ind. App. 665, 38 N. E. 493.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guar. § 22.

See, also, 20 Cyc. p. 1418; note, 21 L. R. A. 409.

**§ 21. Estoppel or waiver as to defects or objections.**

[a] (Sup. 1885)

The fact that a bank cashier was addicted to drunkenness, gambling, and similar vices, notice of which was given the bank, will not discharge his guarantors from liability for a defalcation, if they knew at the time they executed the bond that the cashier was so addicted.—*La Rose v. Logansport Nat. Bank*, 102 Ind. 332, 1 N. E. 805.

[b] (Sup. 1887)

One who signs a guaranty, and intrusts it to the person for whom he thus becomes responsible, is estopped from claiming that he did not authorize its delivery to the obligee.—*Snyder v. Click*, 112 Ind. 293, 13 N. E. 581.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guar. § 23.

See, also, 20 Cyc. p. 1422.

**§ 24. Revocation.**

[a] Unless its terms forbid, a contract of continuing guaranty may be revoked on notice to the guarantee.—(App. 1891) *Conduitt v. Ryan*, 3 Ind. App. 1, 29 N. E. 160.

A promise of guaranty cannot be revoked by the guarantor so as to prejudice the other party in so far as he has already acted upon it,

but only as to other or additional liability thereafter.—Id.

A notice of revocation of a guaranty by the guarantor need not be in writing.—Id.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guar. §§ 26, 27.

See, also, 20 Cyc. p. 1479.

## II. CONSTRUCTION AND OPERATION.

Parol evidence to identify subject-matter, see EVIDENCE, § 460.

### § 27. General rules of construction.

[a] (Sup. 1881)

Contracts of guaranty are to be read by the light of the circumstances surrounding them.—Wills v. Ross, 77 Ind. 1, 40 Am. Rep. 279.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guar. § 28.

See, also, 20 Cyc. pp. 1423-1425.

### § 32. Negotiability and transfer of guaranty.

[a] (Sup. 1878)

On the back of a negotiable note, there was indorsed a guaranty of its prompt payment, signed by the guarantors. It was addressed to no particular person. An indorsement "pay to the order of" a certain bank, transferring the paper was below the guaranty. The instrument was delivered to the assignee. *Held*, that there was an assignment of the guaranty, as well as the note, in view of the Code provision relating to assignments of contracts.—Cole v. Merchants' Bank of Watertown, N. Y., 60 Ind. 350.

A contract of guaranty is assignable under the Code.—Id.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guar. § 35; 7 CENT.

DIG. Bills & N. § 372.

See, also, 20 Cyc. pp. 1431-1435.

### § 33. Nature of liability.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guar. §§ 36, 37.

### § 34. — In general.

[a] (Sup. 1890)

An order reading: "I have made a contract with D. for a lot of staves. Any white or burr oak timber you may sell him I will stand good for, or, in other words, will guaranty the pay for it,"—is an absolute undertaking.—Nading v. McGregor, 121 Ind. 465, 23 N. E. 283, 6 L. R. A. 686.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guar. § 36.

### § 36. Scope and extent of liability.

[a] (Sup. 1860)

In general, the liability of a guarantor is measured by that of his principal, unless a

lesser or greater liability is expressly assumed by the guarantor.—Smith v. Rogers, 14 Ind. 224.

[b] (Sup. 1860)

A. and B. executed a chattel mortgage to secure certain debts owing by them jointly to C. Subsequently D. wrote to C., requesting, for the benefit of B., a release of the property, and promising, in case he would release it, to pay the amount of C.'s claim. In suit upon the guaranty, *held*, that the guarantor was not liable for a private debt owing by A. to C., especially if such debt accrued after the date of the guaranty, but that the guaranty must be construed to embrace the mortgage debt only.—Yater v. Judah, 15 Ind. 228.

[c] (Sup. 1879)

A written agreement set forth that A. assigned to B. a judgment bearing a specified rate of interest, and that C. guarantied payment at a certain time, and if not paid at that time guarantied 3 per cent. additional interest from that date. *Held*, that C. was bound by the contract to pay the judgment as well as interest.—Frash v. Polk, 67 Ind. 55.

[d] (Sup. 1892)

Defendant guarantied a contract by which, among other things, one F. agreed to return a stock of dry goods to plaintiff. The latter thereafter directed F. to ship the goods to him by a certain steamboat line, and F. employed a drayman for the purpose, who delivered the goods to a wharfman, who took charge of shipments generally, but did not represent or have any connection with the steamship line. The goods were left upon the wharf overnight, insufficiently protected, were damaged by rain, and were subsequently delivered to plaintiff in their damaged condition. *Held*, that F. was responsible for the goods while in the hands of the wharfman, and that defendant was liable for the damages sustained.—Bechtold v. Lyon, 130 Ind. 194, 29 N. E. 912.

[e] (App. 1894)

Plaintiff hired M. as salesman on commission, to pay his own expenses, and took from defendants a written guaranty of payment of all sums which M. might collect for plaintiff, and all moneys which plaintiff might from time to time advance to M., and any indebtedness which might thereafter become due from M. to plaintiff; defendants to accept a verified copy of plaintiff's books as correct and final between plaintiff and M. *Held* that, as against defendants, plaintiff must show, as to cash charges against M., that the money was advanced to enable him to carry on his work for plaintiff, and also, as to credits, that plaintiff had credited M. his proper commissions.—John A. Tolman Co. v. McClure, 10 Ind. App. 28, 37 N. E. 289.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guar. §§ 38-45.

See, also, 20 Cyc. pp. 1435, 1436.

**§ 38. Continuing guaranty.**

[a] (Sup. 1890)

Unless the words in which a guaranty is expressed fairly implies that the liability of the guarantor is to be limited, it continues until the guaranty is revoked.—*Wright v. Griffith*, 23 N. E. 281, 121 Ind. 478, 6 L. R. A. 639.

[b] (App. 1891)

A guaranty reciting, "I hereby guaranty the payment, when due, of all bills of goods sold, or that may be sold, on and after this date, by C. & Sons \* \* \* to B.," is a continuing guaranty of the absolute kind.—*Conduitt v. Ryan*, 3 Ind. App. 1, 29 N. E. 160.

[c] (Sup. 1894)

A guaranty of payment "for all sales which may be made" to one who was about to engage in selling periodicals, and providing that the liability thereon shall not "exceed in any event" a sum named, will be treated as a continuing guaranty, in the absence of anything to show a contrary intention of the parties.—*Trustees of the Presbyterian Board of Publication and Sabbath-School Work v. Gilliford*, 139 Ind. 524, 38 N. E. 404.

[d] (App. 1896)

Defendant signed and delivered to plaintiff a writing as follows: "I hereby agree to hold myself responsible for, and agree to pay for, any goods and merchandise which may be purchased of you by L., to the amount of \$500." L. purchased of plaintiff a bill of goods amounting to more than \$500, and paid for them. Afterwards he purchased other goods, and failed to pay for them. *Held*, that the liability of defendant was a continuing one, limited in amount only, but not in time, and was not terminated by the first purchase by L.—*Lane v. Mayer*, 15 Ind. App. 382, 44 N. E. 73.

[e] (App. 1899)

A bond guarantying payment of money collected by an employé until notice from the obligor is absolute and continuous.—*Tapper v. New Home Sewing-Mach. Co.*, 53 N. E. 202, 22 Ind. App. 313.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guar. § 47.

See, also, 20 Cyc. pp. 1438-1441; note, 55 Am. Rep. 701.

**§ 42. Conditions.**

[a] (Sup. 1885)

The guarantors of the faithful performance by a bank cashier of his duties are not relieved from liability on default of the cashier because the latter did not have exclusive possession of funds and moneys of the bank, access thereto being given to other officers, though a by-law provided that the cashier should be held liable for the funds and moneys of the bank.—*La Rose v. Logansport Nat. Bank*, 102 Ind. 332, 1 N. E. 805.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guar. §§ 51, 52.

**§ 44. Default of principal.**

Notice of default to guarantor as fixing liability, see post, § 46.

[a] (Sup. 1904)

A building contract required the contractor to furnish all materials, and it was provided that a portion of the contract price should be paid on presentation of receipted bills for materials furnished, and the balance after completion of the work. The contract called for a bond conditioned on the construction and completion of the work according to the contract. *Held*, that the guarantor on the bond was liable for a failure of the contractor to pay for materials, whereby a lien was filed on the building.—*Closson v. Billman*, 69 N. E. 449, 161 Ind. 610.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guar. § 54.

See, also, 20 Cyc. pp. 1446-1458.

**§ 45. Demand on principal.**

Condition precedent to action against guarantor, see post, § 77.

[a] (Sup. 1841)

Where a letter of credit states that the writer will guaranty the payment for goods to be afterwards sold to another, or that he will see the goods paid for, the plaintiff must, in order to sustain a suit on such promise, show that he had, within a reasonable time after the note became due, demanded payment of the principal debtor.—*Smith v. Bainbridge*, 6 Blackf. 12.

[b] (Sup. 1878)

No demand is necessary to charge an absolute guarantor of payment.—*Taylor v. Taylor*, 64 Ind. 356.

[c] (Sup. 1881)

Guarantors in a note are not liable except upon proof of a demand on the maker, and notice of nonpayment within a reasonable time after default or proof that no harm had or reasonably could have accrued to them on account of the failure to make the demand and give them notice thereof.—*Kealing v. Vansickle*, 74 Ind. 529, 39 Am. Rep. 101.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guar. § 55.

See, also, 20 Cyc. pp. 1458, 1459.

**§ 46. Notice of default to guarantor.**

Failure to give notice as discharge of guarantor, see post, § 67.

[a] Where the guaranty is of a future indebtedness of uncertain amount, notice of default is required.—(Sup. 1841) *Smith v. Bainbridge*, 6 Blackf. 12; (1879) *Milroy v. Quinn*, 69 Ind. 406, 35 Am. Rep. 227.

[b] (Sup. 1860)

Where a surety binds himself to a direct performance of the contract of his principal

for the payment of goods to be sold the principal, it is not necessary for the creditor to notify the surety of the principal's failure to pay to render him liable.—*Kirby v. Studebaker*, 15 Ind. 45.

[c] A guarantor is entitled to reasonable notice of nonpayment.—(Sup. 1860) *Virden v. Ellsworth*, 15 Ind. 144; (1873) *Gaff v. Sims*, 45 Ind. 262.

[d] Notice to the guarantor of nonpayment of the debt is not necessary, when his undertaking to pay is absolute.—(Sup. 1878) *Taylor v. Taylor*, 64 Ind. 356; (1880) *Kline v. Raymond*, 70 Ind. 271; (1890) *Nading v. McGregor*, 121 Ind. 465, 23 N. E. 283, 6 L. R. A. 686.

[e] (Sup. 1879)

Where defendants guaranteed the payment of a judgment on a certain day, and also agreed that, if it was not paid at that time, they guaranteed the payment of additional interest from that date, it was not necessary in order to recover on the guaranty that defendants should have had notice of the judgment.—*Frash v. Polk*, 67 Ind. 55.

[f] (Sup. 1881)

Where a debt is due, and absolute, when the guaranty is given, no notice of default is necessary.—*Wills v. Ross*, 77 Ind. 1, 40 Am. Rep. 279.

[g] (Sup. 1887)

Where the guaranty is of the performance of a contract by the principal, which cannot be performed by the guarantor on the principal's default, but for which he is only to respond in damages, which are not liquidated, he is entitled to notice of default, to the end that he may be advised of the nature and extent of the unliquidated and unascertained liability of the principal.—*Furst & Bradley Mfg. Co. v. Black*, 111 Ind. 308, 12 N. E. 504.

Direct engagements on the part of guarantors or sureties themselves to pay or perform absolutely, and, at all events, the contract of their principal, are, in their nature, original, direct, and absolute, and the promisor must himself take notice of the default of his principal.—*Id.*

[h] (Sup. 1906)

Where a guarantor has unqualifiedly promised to pay for goods sold to his principal, and the contract of guaranty has been accepted by the obligee, the guarantor is not entitled to notice of his principal's default in order to fix his liability for goods sold to his principal.—*Stewart v. Knight & Jillson Co.*, 76 N. E. 743, 166 Ind. 498.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. GUAR. §§ 56, 57.

See, also, 20 Cyc. pp. 1461-1470; note, 20 L. R. A. 257.

### III. DISCHARGE OF GUARANTOR.

#### § 49. Subsequent release or agreement.

[a] (App. 1893)

The waiver, by the guarantor of a note, of the right to pay the note, and sue the maker, and collect it, made at the request of the holder, who is desirous of saving the maker from the annoyances of suit, is a sufficient consideration to uphold a release of the guarantor from all liability to the holder.—*Ditmar v. West*, 7 Ind. App. 637, 35 N. E. 47.

[b] (Sup. 1906)

Where defendant promised to pay for goods sold by plaintiff to a third person, and plaintiff, after furnishing goods to the third person for some time, delivered the instrument containing defendant's promise to the third person, telling him that it was "no good" and directing him to take it to defendant and have a change made therein, defendant was discharged from any liability as surety for goods thereafter furnished by plaintiff to the third person, and his liability could not be revived by any subsequent arrangement made without his consent between plaintiff and the third person, such as by a mere redelivery of the instrument by the latter to the former.—*Stewart v. Knight & Jillson Co.*, 76 N. E. 743, 166 Ind. 498.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. GUAR. § 60.

#### § 53. Change in obligation or duty of principal.

[a] (Sup. 1886)

Where, after breach of a contract, the performance of which is guaranteed, the creditor and principal debtor, without the consent of the sureties, enter into a new contract, the creditor accepting notes for the damages, payable at a future time, and upon terms differing from the original contract, the new contract supersedes the old, and the sureties will be released.—*Weed Sewing Mach. Co. v. Winchel*, 107 Ind. 260, 7 N. E. 881.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. GUAR. §§ 64, 66.

See, also, 20 Cyc. pp. 1443-1445.

#### § 54. Alteration of instrument.

[a] (Sup. 1880)

An alteration made in a guaranty after its delivery whereby "we guaranty" was changed to "I guaranty," is immaterial, so far as the person who has signed before delivery is concerned.—*Kline v. Raymond*, 70 Ind. 271.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. GUAR. § 65.

#### § 55. Extension of time for payment or other performance.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. GUAR. §§ 67, 68.

See, also, 20 Cyc. pp. 1472-1474.

**§ 57. — Consideration.**

[a] (Sup. 1868)

An agreement, made while the Indiana interest law of 1865 was in force, by a creditor with the principal debtor, without the consent of the surety or the guarantor, to give a limited time after the debt became due, in consideration of the payment in advance of 4 per cent. in excess of 6 per cent. interest, released the surety and the guarantor.—Cross v. Wood, 30 Ind. 878.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guar. § 68.

**§ 58. Payment or other satisfaction by principal.**

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guar. §§ 69, 70.

See, also, 20 Cyc. pp. 1474–1476.

**§ 60. — Application of payments.**

[a] (App. 1899)

Payments on an open running account, not intended for any particular item, should be applied to the first debts due, though part of it is guaranteed.—Tapper v. New Home Sewing-Mach. Co., 53 N. E. 202, 22 Ind. App. 313.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guar. § 70; 39 CENT. DIG. Paymt. § 128.

See, also, 20 Cyc. p. 1476.

**§ 61. Taking additional security.**

[a] (Sup. 1894)

The taking of other security by a guarantor from the debtor does not release the guarantor.—Trustees of the Presbyterian Board of Publication and Sabbath-School Work v. Gilliford, 139 Ind. 524, 38 N. E. 404.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guar. § 71.

See, also, 20 Cyc. p. 1476.

**§ 67. Neglect to give notice of default to guarantor.**

Necessity of notice to fix liability, see ante, § 46.

[a] Where at the time of default the principal was solvent, and afterwards became insolvent, failure to give notice of default will discharge the guarantor.—(Sup. 1841) Smith v. Bainbridge, 6 Blackf. 12; (1873) Gaff v. Sims, 45 Ind. 262.

[b] A guarantor will not be discharged by failure of the guarantee to give him notice of default, unless there is a resulting injury, and then only to the extent of the injury.—(Sup. 1869) McMillan v. Bull's Head Bank, 32 Ind. 11, 2 Am. Rep. 323; (1885) Ward v. Wilson, 100 Ind. 52, 50 Am. Rep. 763; (1887) Furst & Bradley Mfg. Co. v. Black, 111 Ind. 308, 12 N. E. 504.

[c] (Sup. 1870)

Certain persons guarantied that the lessee should perform agreements which he had entered

ed into a lease, one of which agreements was that he should execute two notes for rent at a certain time. He failed to do so, and the guarantors were not notified of his default for 10 months thereafter. *Held*, that the neglect of the lessor to notify them at an earlier date was no defense to their liability on the guaranty.—Leonard v. Shirts, 33 Ind. 214.

[d] (Sup. 1873)

Certain parties guarantied the performance of a contract for the purchase of a lot of cattle and the payment therefor. For 18 months after the maturity of the contract the principal was solvent, but afterward, and before suit, he became insolvent. No notice of his default was given to the guarantors. *Held*, that the guarantors were discharged.—Gaff v. Sims, 45 Ind. 262.

[e] (Sup. 1878)

Unless neglect to give notice of the principal's default produced some loss or prejudice to the guarantor, such neglect is no defense to an action on the guaranty.—Cole v. Merchants' Bank of Watertown, N. Y., 60 Ind. 350.

[f] (Sup. 1885)

A failure of the guarantee to give notice of the default of the principal, and damage resulting therefrom, must both concur in order that the guarantor may be discharged.—Ward v. Wilson, 100 Ind. 52, 50 Am. Rep. 763.

[g] (Sup. 1885)

In an action on a guaranty a failure to give notice, except in cases governed by commercial rules, is a matter of defense, and with such failure resulting damages must concur in order to work a discharge of the guarantor.—La Rose v. Logansport Nat. Bank, 1 N. E. 805, 102 Ind. 332.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guar. § 77.

See, also, 20 Cyc. pp. 1465, 1466.

**§ 69. Neglect to act or proceed against principal.**

Proceeding against principal as condition precedent to action on guaranty, see post, § 77.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guar. §§ 78–81.

See, also, 20 Cyc. pp. 1446–1458.

**§ 70. — In general.**

[a] (Sup. 1841)

A guarantor will not be liable under a letter of credit stating that he will guaranty the payment of goods to be afterwards sold to another, or that he will see the goods paid for, without demand on his principal and notice to him, if it appears that the principal debtor was solvent when the debt fell due and afterwards became insolvent.—Smith v. Bainbridge, 6 Blackf. 12.

[b] (App. 1899)

Where, in consideration of plaintiff's releasing certain lots from a mortgage, defendant

guaranteed that a note secured thereby would be paid, it was not necessary, in an action on such guaranty, to allege diligence, and a failure to collect the note from the maker, since the consideration for the guaranty was distinct from the credit extended to the principal debtor, and moved directly to the guarantor.—*Hernley v. Brannum*, 53 N. E. 512, 23 Ind. App. 388.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guar. §§ 78-80.

#### § 71. — After request of guarantor.

[a] (Sup. 1874)

One who indorses a guaranty on a note is not discharged by failure of the holder to use diligence to collect the note of the maker, although the guarantor requested him to sue the maker.—*Sample v. Martin*, 46 Ind. 226.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guar. § 81.

### IV. REMEDIES OF CREDITORS.

Joinder of causes of action as affected by parties, see ACTION, § 50.

#### § 75. Nature and form.

[a] (Sup. 1841)

If a letter of credit state that the writer will guaranty the payment of goods to be afterwards sold to another, or that he will see the goods paid for, or that he will be security for their payment, the promise is only collateral. In such cases, the person to whom the goods are sold is liable on a general count for goods sold and delivered; but the writer of the letter can only be sued on the special contract.—*Smith v. Bainbridge*, 6 Blackf. 12.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guar. § 85.

See, also, 20 Cyc. p. 1482.

#### § 76. Rights of action.

[a] (Sup. 1845)

A guaranty directed to Messrs. B. & D. may be sued on by A. B., C. D., and E. F. D.; the declaration averring the promise to have been made to the plaintiffs by the name of Messrs. B. & D.—*Jackson v. Yandes*, 7 Blackf. 526.

[b] (Sup. 1858)

Suit upon a lease, assignment, and guaranty. The lessee agreed to make certain improvements on the premises. The lessor assigned the lease or agreement, and guarantied that the lessee would perform his part of the contract within \$10 worth of work. The assignee sued the lessor. *Held*, that the lease, assignment, and guaranty were a sufficient cause of action.—*Harper v. Pound*, 10 Ind. 32.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guar. § 86.

#### § 77. Conditions precedent.

[a] (Sup. 1878)

Suit against the principal is not a condition precedent to action on an absolute guaranty of payment.—*Taylor v. Taylor*, 64 Ind. 356.

[b] (Sup. 1885)

A guarantor of a lease is entitled to notice of default; but this is not a condition precedent to an action upon the guaranty, and the failure to give it discharges only to the extent of damage suffered in consequence, and must be pleaded.—*Ward v. Wilson*, 100 Ind. 52, 50 Am. Rep. 763.

[c] (Sup. 1887)

If loss results to a guarantor on account of failure to give notice of the nonperformance of the contract guarantied, the fact of such loss and want of notice constitutes matter of defense, and notice and demand are therefore not necessary before an action can be brought on the contract of guaranty.—*Stanley v. Stanley*. 112 Ind. 143, 13 N. E. 261.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guar. §§ 87-90.

#### § 82. Parties.

[a] (Sup. 1860)

Where one guaranties the payment of rent by the lessee, by an indorsement on the back of the lease, the undertaking of the guarantor is distinct from that of the lessee, and they cannot be properly joined in the same suit.—*Virden v. Ellsworth*, 15 Ind. 144.

[b] (Sup. 1869)

A guarantor cannot be sued with his principal, for his engagement is not jointly with the latter, but is strictly an individual contract.—*McMillan v. Bull's Head Bank*, 32 Ind. 11, 2 Am. Rep. 323.

[c] (Sup. 1878)

Under 2 Rev. St. 1876, p. 35, § 6, a contract of guaranty on a promissory note is assignable, and the payee of such note is not a necessary party defendant in an action thereon.—*Cole v. Merchants' Bank of Watertown*, N. Y., 60 Ind. 350.

C. executed a note, payable to a sewing machine company, and having on the back a stipulation signed by L. and P., "We jointly or severally, for value received, hereby guaranty the prompt payment of the within note," below which was an indorsement signed by J., as treasurer, "Pay to the order of the M. Bank." *Held*, in an action against C., L., and P. jointly, brought by the bank in the county where L. and P., but not C., resided, that L. and P. were guarantors only, and, their contract being distinct from the note, they could not be sued thereon jointly with C., over whom the court had no jurisdiction.—*Id.*

[d] (Sup. 1906)

In an action on a promise to pay for goods sold by plaintiff to a third person, the third

person was not a necessary party defendant.—*Stewart v. Knight & Jillson Co.*, 76 N. E. 743, 166 Ind. 498.

#### FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guar. § 97; 32 CENT. DIG. Land. & Ten. § 902; 37 CENT. DIG. Parties, § 34.

See, also, 20 Cyc. p. 1484.

#### § 83. Pleading.

Bill of particulars, see PLEADING, § 328.

#### FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guar. §§ 98–101.  
See, also, 20 Cyc. pp. 1486–1489.

#### § 85. — Declaration, complaint, or petition.

[a] (Sup. 1858)

The consideration of the assignment of a lease need not be set out in a suit on a guaranty made by the assignor for the lessee at the time of the assignment.—*Harper v. Pound*, 10 Ind. 32.

[b] (Sup. 1874)

A complaint by the assignee against the assignor of a note, upon a parol agreement by the latter to guaranty prompt payment thereof, and to collect the note and pay the amount over to the assignee, if not paid by the maker, is insufficient, where it contains no averment of a consideration for such promise, further than that it was "for a full and valuable consideration."—*Leach v. Rhodes*, 49 Ind. 291.

[c] (Sup. 1878)

A complaint in an action on a note, alleging nonpayment by the maker and due notice thereof to the guarantors, sufficiently states a cause of action against the latter.—*Cole v. Merchants' Bank of Watertown, N. Y.*, 60 Ind. 350.

[d] (Sup. 1879)

Where a written agreement sets forth that one party has assigned to the other a judgment bearing a specified rate of interest, and that a third party guaranties payment at a given time, and, if not then paid, guaranties 3 per cent. additional interest from that date, a complaint thereon by the assignee against the guarantor need not allege notice to the latter of the nonpayment of the judgment, nor contain an offer to assign the judgment to the guarantor.—*Frash v. Polk*, 67 Ind. 55.

[e] (Sup. 1885)

Although a guarantor is entitled to notice of the principal's default, yet, in an action upon his contract, a guarantor cannot demur to the complaint on account of its failure to aver such notice.—*La Rose v. Logansport Nat. Bank* 102 Ind. 332, 1 N. E. 805.

[f] (App. 1899)

From an averment that a guaranty bond was executed and delivered, its acceptance will

be implied.—*Tapper v. New Home Sewing-Mach. Co.*, 53 N. E. 202, 22 Ind. App. 313.

[g] (App. 1899)

Where the complaint in an action against guarantors of a note alleged that defendants had failed and refused to comply with their contract to pay plaintiff the sum of \$1,000 on a certain date, and that such sum was due, it being due on such note, and remaining wholly unpaid, such allegation constituted a sufficient averment that the note guarantied was unpaid to the amount of \$1,000.—*Hernly v. Brannum*, 55 N. E. 512, 23 Ind. App. 388.

Plaintiff was the holder of P.'s note for \$1,523.81, secured by a mortgage on certain lots on which payments had been made reducing the amount due to about \$1,000. Defendants, in consideration of plaintiff's releasing certain of the lots from the mortgage, guarantied that a note executed by P. for \$1,000, payable to plaintiff's order on a certain date, would be paid. In an action on such guaranty the complaint charged that plaintiff held P.'s note for \$1,523.81, which was the only note due plaintiff from P., executed on the date referred to in the guaranty, and that there remained due and unpaid on such note about \$1,000. *Held*, that the complaint was not subject to demurrer, as failing to show that the note described was the note guarantied, in the absence of an averment of mistake or fraud or a prayer for the reformation of the contract of guaranty, since it appeared from the allegations that the note sued on was that intended to be guarantied.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guar. § 99.

See, also, 20 Cyc. pp. 1486–1488.

#### § 86. — Plea or answer and subsequent pleadings.

[a] (Sup. 1874)

An answer raising the defense that the guarantor has been discharged by an extension of time of payment of the principal must allege that the extension was for a definite time and on a valuable consideration.—*Sample v. Martin*, 46 Ind. 226.

#### FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guar. § 100.

See, also, 20 Cyc. p. 1488.

#### § 87. — Issues, proof, and variance.

[a] (Sup. 1885)

In an action on a guaranty of a lease, the guarantor cannot defend on the ground that no notice of default was given without pleading it.—*Ward v. Wilson*, 100 Ind. 52, 50 Am. Rep. 763.

[b] (Sup. 1887)

In an action on a guaranty, evidence is not admissible of the failure of the plaintiff to give

notice of nonpayment, where no allegation of such failure is made in the complaint.—*Furst & Bradley Mfg. Co. v. Black*, 111 Ind. 308, 12 N. E. 504.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guar. § 101.

See, also, 20 Cyc. p. 1489.

**§ 88. Evidence.**

Competency of purchaser as witness in suit against guarantor for the price, see WITNESSES, § 98.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guar. §§ 102-104.

See, also, 20 Cyc. pp. 1489-1491.

**§ 89. — Presumptions and burden of proof.**

[a] (Sup. 1887)

The failure to give notice of default to a guarantor, and resulting damages, are matters of defense, as to which the burden of proof is upon the guarantor, in an action on the guaranty.—*Snyder v. Click*, 112 Ind. 293, 13 N. E. 581.

[b] (Sup. 1904)

On an issue as to the liability of the guarantor on a building contractor's bond, the burden was on the guarantor to show omission to give notice of default, and that he was damaged by the omission.—*Closson v. Billman*, 69 N. E. 449, 161 Ind. 610.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guar. § 102.

See, also, 20 Cyc. p. 1489.

**§ 91. — Weight and sufficiency.**

[a] (App. 1894)

In an action for the value of three car loads of goods on a written guaranty by defendants that S. & D., who were agents for the sale of plaintiff's goods, and had received them, would fulfill their agreements, there was evidence that plaintiff refused to deliver any goods to S. & D. to fill their orders unless they gave a guaranty; that when the guaranty, signed by defendants, was handed plaintiff's officer, he did not express his satisfaction with it, but said that he would investigate, and that "your three cars are loaded and stand on the switch," and that the company would ship them immediately; that defendants refused to indorse notes of S. & D. for goods ordered, and plaintiff refused to make any more shipments. In a previous action on the notes, plaintiff's officers testified that they shipped the three cars in reliance on a verbal agreement of S. & D. to secure indorsers on the notes. *Held*, that there was evidence from which the jury could find that plaintiff never accepted the guaranty or acted upon it.—*Currie Fertilizer Co. v. Byfield*, 9 Ind. App. 180, 34 N. E. 451, 36 N. E. 438.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guar. § 104.

See, also, 20 Cyc. p. 1491.

**§ 92. Trial.**

Right to open and close, see TRIAL, § 25.

[a] (Sup. 1845)

In a suit on a guaranty, whether the notice to the defendant of the principal debtor's nonpayment was reasonable, or not, is a question for the jury.—*Jackson v. Yandes*, 7 Blackf. 526.

[b] (Sup. 1858)

The question whether credit is given to the principal or guarantor is for the jury.—*Billingsley v. Dempewolf*, 11 Ind. 414.

[c] (App. 1891)

A guaranty of sales to M. to the amount of \$270 was given by defendant March 18th. On the 25th plaintiff wired: "M. orders \$100 more. Will you guaranty on same terms?" Defendant replied: "Will not assume payment for any more." On the 26th plaintiff again wired: "M. has exceeded guaranty \$107. You must guaranty that amount in addition, or will attach at once." Defendant answered: "\$270 is the full amount of goods we will take and pay for on our account." The court found generally for plaintiff, and, special findings having been requested, it recited therein these telegrams, and found that there was no notice of acceptance, except such as might be implied from the telegrams. *Held*, that the telegrams were merely evidence of acceptance, which should have been found as an ultimate fact; that the special findings could not be disregarded, and the judgment sustained, on the general findings; but that it should be reversed, and entered for defendant on the special facts, properly found.—*Hasselmann v. Japanese Development Co.*, 2 Ind. App. 180, 27 N. E. 318, 28 N. E. 207.

[d] (Sup. 1904)

In an action on a written guaranty of a note, where the answer of the maker of the note pleaded an individual set-off, it was not the duty of the court, in a charge on the right to recover on the set-off, to charge that the defendant pleading it must prove that he was the principal and his codefendant surety on the guaranteed note, where he charged that all the material averments of the set-off must be proved, and the complaint alleged that the contract in suit was security for the separate note of the defendant pleading the set-off.—*Long & Allstatter Co. v. Barnes*, 69 N. E. 454, 162 Ind. 22.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guar. §§ 105, 106.

See, also, 20 Cyc. pp. 1491-1493.

**§ 94. Judgment.**

[a] (Sup. 1878)

A complaint on a guaranty of rent stated a cause of action against the guarantor alone.

An occupant of the premises was made a party defendant on her own petition, and answered. A verdict was rendered against "the defendant," but in rendering judgment the words "the defendants" were inadvertently used. *Held*, that the occupant could not on appeal secure a reversal of the judgment on the ground that the complaint stated no cause of action against her, but the verdict and judgment would be deemed to run against the guarantor alone.—*Taylor v. Taylor*, 64 Ind. 356.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guar. § 108.

**§ 96. Appeal and error.**

Appellate jurisdiction as dependent on amount in controversy, see APPEAL AND ERROR, § 46.

**V. RIGHTS AND REMEDIES OF GUARANTOR.**

Subrogation of guarantors, see SUBROGATION, §§ 5-9.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guar. §§ 111-117.

See, also, 20 Cyc. pp. 1494-1498.

**GUARANTY INSURANCE.**

See INSURANCE, § 513.

**GUARDIAN AD LITEM.**

See—

DRUNKARDS, § 8.

Failure to appoint as ground for setting aside judgment of foreclosure. MORTGAGES, § 496. INFANTS, §§ 76-87.

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

# GUARDIAN AND WARD.

## *Scope-Note.*

[INCLUDES general guardianship, particularly of the persons and estates of infants, by nature or under parental or judicial appointment; rights, powers, duties, and liabilities of guardians in respect of the persons and property of their wards; and legal proceedings relating thereto.

[EXCLUDES guardianship of insane or otherwise incompetent persons (see *Insane Persons*; *Drunkards*; *Spendthrifts*); guardians ad litem and special guardians (see *Infants*; *Insane Persons*; and other specific heads); and matters relating to infants and their property irrespective of guardianship (see *Infants*). For complete list of matters excluded, see cross-references, post.]

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*Cross-References.**See—*

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**I. GUARDIANSHIP IN GENERAL.**

Mother as natural guardian of illegitimate child, see BASTARDS, § 15.

**§ 2. Power to control guardianship.**

[a] (Sup. 1828)

The guardianship of minor heirs and the adjustment of their accounts form a conspicuous branch of chancery jurisdiction, and, although particular statutes have given a common-law remedy in many cases, they have not

excluded the jurisdiction of the court of chancery.—Peck v. Braman, 1 Blackf. 344.

[b] (Sup. 1894)

The circuit court has, independently of statute, jurisdiction of the subject of the guardianship, custody, and control of minors.—Board of Children's Guardians of Marion County v. Shutter, 139 Ind. 268, 34 N. E. 665, 31 L. R. A. 740.

FOR CASES FROM OTHER STATES,  
 SEE 25 CENT. DIG. Guard. & W. § 2.

**§ 3. What law governs.**

[a] (Sup. 1847)

Where an orphan female ward, domiciled in a state where the age of majority is 18, removes during her minority to a state where such age is 21, and there a guardian is appointed and the ward chooses it as a permanent home, the law of her chosen domicile controls, and she cannot appoint an attorney or make a settlement with her guardian while under the age of 21.—*Hiestand v. Kuns*, 8 Blackf. 345, 46 Am. Dec. 481.

[b] (Sup. 1854)

Rev. St. 1852, p. 324, § 9, making it the duty of the guardian to file inventories within three months after his appointment, is applicable to all guardians, appointed before or since its publication, and regulates the time within which they shall file inventories.—*Markel v. Phillips*, 5 Ind. 510.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guard. &amp; W. § 3.

**§ 4. Guardians by nature.**

[a] (Sup. 1865)

The father is the natural guardian of his infant child, and is entitled to the custody of it, if he is a suitable person.—*State ex rel. Sharpe v. Banks*, 25 Ind. 495.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guard. &amp; W. §§ 4, 5.

See, also, 21 Cyc. pp. 14, 15.

**§ 6. Volunteer and de facto guardians.**

[a] (Sup. 1856)

Where a stranger enters into and occupies an infant's lands without claim of right, the infant has a right to regard him as his guardian.—*Breeding v. Shinn*, 8 Ind. 125.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guard. &amp; W. § 7.

See, also, 21 Cyc. p. 20.

**§ 7. Estoppel to deny guardianship.**

[a] (App. 1891)

The execution of a guardian's bond by the husband of an infant ward estops him from denying that he was her legal guardian.—*State ex rel. Haines v. Parrish*, 1 Ind. App. 441, 27 N. E. 652.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guard. &amp; W. § 8.

See, also, 21 Cyc. p. 20.

**II. APPOINTMENT, QUALIFICATION, AND TENURE OF GUARDIAN.**

Estoppel to dispute authority of court to make appointment, see ESTOPPEL, § 91.

Foreign appointment, see post, § 166.

Liability of clerk of court on official bond for loss of estate caused by illegal issue of letters of guardianship, see CLERKS OF COURTS, § 74.

Termination of guardianship pending action by or against, see post, § 128.

**§ 8. Jurisdiction of courts.**

[a] (Sup. 1869)

Under Rev. St. 1824, p. 314, the equity side of the circuit court had complete original jurisdiction of the relation of guardian and ward. By Acts 1825, p. 55, the act of 1824 was so amended that the associate judges should constitute a court of probate to hear and determine all matters in relation to the estates of deceased persons. In 1826 it was enacted that in the appointment of a guardian it should not be lawful for a circuit court or a probate court to appoint as a guardian the administrator or executor of an estate in which the ward was interested. *Held*, that the probate court had jurisdiction to appoint guardians for infants.—*Dequindre v. Williams*, 31 Ind. 444.

[b] (Sup. 1873)

A guardian may be appointed for minors having real estate in the county where the real estate lies, though the minors may be nonresidents.—*Maxwell v. Campbell*, 45 Ind. 360.

[c] (Sup. 1881)

Under the statute authorizing the court of common pleas to appoint guardians for minors resident in the county, that court has no authority to appoint a guardian of the "unknown heirs of A." Such appointment is void, and sales by such guardian will pass no title.—*State ex rel. Ross v. McLaughlin*, 77 Ind. 335.

In a proceeding to appoint a guardian, the infancy of the ward is a jurisdictional fact to be ascertained by the court.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guard. &amp; W. §§ 9, 13-18.

See, also, 21 Cyc. pp. 23-26.

**§ 10. Persons who may be appointed.**

[a] (Sup. 1862)

A married woman should not be appointed a guardian, unless it be made to appear that her husband consents thereto and that he is also a suitable person to act as such.—*Ex parte Maxwell*, 19 Ind. 88.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guard. &amp; W. §§ 23-33.

See, also, 19 Cyc. pp. 1250, 21 Cyc. pp. 32-38.

**§ 13. Proceedings for judicial appointment.**

[a] (Sup. 1813)

The informal appointment of a guardian cannot be assigned for error.—*Findley v. Buchanan*, 1 Blackf. 12.

[b] (*Sup.* 1864)

The requirement in the statute that, before any one shall be appointed guardian, he shall file a statement of the ward's estate, is directory only, and failure to file such statement will not of itself render an appointment void.—*Lee v. Ice*, 22 Ind. 384.

[c] (*Sup.* 1881)

Where it affirmatively appears that the court, in appointing a guardian, had not before it the means of ascertaining the heirs for whom the guardian was to be appointed, their age, etc., such appointment will be held void.—*State ex rel Ross v. McLaughlin*, 77 Ind. 335.

[d] (*Sup.* 1894)

In a proceeding for the appointment of a guardian of an infant, service of process on her parents will give jurisdiction of her person, without service on her.—*Board of Children's Guardians of Marion County v. Shutter*, 139 Ind. 268, 34 N. E. 665, 31 L. R. A. 740.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. *Guard. & W.* §§ 40–52.

See, also, 21 Cyc. pp. 38–45.

### § 15. Bond.

Disqualification of guardian, see post, § 24.

Estoppel by recitals in bond, see ESTOPPEL, § 22.

Liabilities on bonds, see post, §§ 173–182.

Special bond for sale of property under order of court, see post, § 92.

[a] (*Sup.* 1864)

It is the duty of the court of common pleas to require a guardian to execute an additional bond, if the first bond given by him was in a sum too small to cover the assets in his hands, or to remove him.—*Potter v. State ex rel. Thompson*, 23 Ind. 550.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. *Guard. & W.* §§ 56–64.

See, also, 21 Cyc. pp. 45–48; note, 33 L. R. A. 759.

### § 17. Operation and effect of appointment.

[a] (*Sup.* 1855)

Where one was appointed "guardian of N. C., infant and minor heir of J. C.," under the act of 1838, and the ward, before arriving at majority, became insane; and the same guardian continued to act as such, styling himself "guardian of N. C., an idiot," and was so regarded by the probate court, which had appointed him guardian, it was held that the guardian's trust expired with the minority of the ward, and that all his subsequent acts as guardian were illegal.—*Coon v. Cook*, 6 Ind. 268.

[b] (*Sup.* 1866)

An inquiry as to whether infants were at the time of appointment of their guardian resi-

dents of this or another state could not be raised collaterally.—*Dequindre v. Williams*, 31 Ind. 444.

Where a guardian, who has received his appointment from a court of superior jurisdiction having authority to make such appointment and jurisdiction of guardians' petitions to sell lands, but without jurisdiction to make the particular appointment, sells land of his ward under an order of such court to one who purchases and pays for the land, relying in good faith on such order, the purchaser will be protected in the title so acquired, if the guardian applies the proceeds properly.—*Id.*

[c] (*Sup.* 1880)

An assignee from the mother of a judgment against the putative father of a bastard child cannot collaterally attack an order appointing a guardian for such child and removing it from the custody of its mother, in a suit by such guardian for the possession of money paid into court by the father upon such judgment.—*Heritage v. Hedges*, 72 Ind. 247.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. *Guard. & W.* §§ 66–70.

See, also, 21 Cyc. p. 49.

### § 18. Revocation of appointment.

Effect of termination of guardianship on pending action, see post, § 128.

[a] (*Sup.* 1859)

The court of common pleas cannot revoke letters of guardianship in vacation.—*Lunger v. State ex rel. Hathaway*, 12 Ind. 483.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. *Guard. & W.* § 71;

13 CENT. DIG. *Courts*, § 269.

See, also, 21 Cyc. p. 50.

### § 20. Majority of ward.

[a] (*Sup.* 1855)

The fact that, though the probate court appointed a person as guardian on account (as was alleged in the order of appointment) of the infancy of his ward, yet that it always regarded him as guardian of an idiot, is a circumstance of no weight in determining the validity of acts done by him after the arrival of the ward at full age.—*Coon v. Cook*, 6 Ind. 268.

A guardian appointed by the probate court, on account of the infancy of his ward, cannot, after the arrival of the ward at full age, continue under such appointment to act as guardian by reason of the insanity of such ward.—*Id.*

[b] (*Sup.* 1883)

In general guardianship of an infant terminates when the ward attains the age of 21 years.—*Jones v. Jones*, 91 Ind. 378.

FOR CASES FROM OTHER STATES,

See, also, 21 Cyc. p. 50.

**§ 21. Marriage of ward.**

[a] (Sup. 1873)

Under Davis' Rev. St. Supp. 1870, p. 233, providing that the marriage of a female ward to a person of full age puts an end to the guardianship and authorizes the guardian to account, the marriage puts an end to the guardianship and requires the guardian to account.—*Kidwell v. State ex rel. Boyden*, 45 Ind. 27.

[b] (Sup. 1874)

An infant female when married to a man of full age can have no guardian, and she may receive her estate from her guardian, and may also receive her distributive share of her father's estate, with the assent of her husband.—*State ex rel. Wade v. Joest*, 46 Ind. 233; *State ex rel. Hutson v. Same*, Id. 235.

[c] (Sup. 1874)

A married woman, though an infant, cannot have a general guardian of her person and property, if her husband be of lawful age.—*Ex parte Post*, 47 Ind. 142.

[d] (Sup. 1880)

The fiduciary relation of a guardian ceases upon the marriage of his ward, and the maturity of her claim for a settlement following such marriage; and the guardian is thereafter merely a debtor for the balance remaining in his hands not previously accounted for.—*Spicer v. Hockman*, 72 Ind. 120.

[e] (App. 1891)

Where a female ward marries, the fiduciary relation ceases, and her guardian becomes her debtor for the balance in his hands not previously accounted for.—*State ex rel. Haines v. Parrish*, 27 N. E. 652, 1 Ind. App. 441.

The marriage of a female ward to a man of full age terminates the guardianship, and the guardian must then account.—Id.

[f] (Sup. 1896)

Rev. St. 1894, § 2690 (Rev. St. 1881, § 2526), providing that the marriage of any female ward to a "person of full age" shall operate as a legal discharge of the guardianship, necessarily implies that, if the husband is a minor, the marriage shall not discharge the guardianship.—*Decker v. Fessler*, 146 Ind. 16, 44 N. E. 637.

Under Rev. St. 1894, § 2673 (Rev. St. 1881, § 2512), providing that the court having probate jurisdiction in each county shall appoint guardians of minors resident in such county, or having estate therein, the circuit court has jurisdiction to appoint a guardian for the estate of a female minor having a husband who is also a minor.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guard. &amp; W. § 73.

See, also, 21 Cyc. p. 51.

**§ 23. Resignation and discharge.**

Of guardian of habitual drunkard, see **DRUNKARDS**, § 2.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guard. &amp; W. § 77.

See, also, 21 Cyc. p. 52.

**§ 24. Disqualification.**

[a] (Sup. 1875)

Upon the marriage of a female guardian, it is not necessary that her husband should file in court his written consent to her continuation as such guardian.—*Hardin v. Helton*, 50 Ind. 319.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guard. &amp; W. §§ 73-85.

See, also, 21 Cyc. p. 53.

**§ 25. Removal.**

Appealability of order of, see **APPEAL AND ERROR**, § 77.

Removal as condition precedent to action on bond, see post, § 182.

[a] The probate court cannot remove a guardian, except in cases relating to the faithful performance of his trust, or to the sufficiency of the security given by him.—(1841) *Morgan v. Anderson*, 5 Blackf. 503; (1844) *Pickens v. Clayton*, 7 Blackf. 321.

[b] (Sup. 1854)

A large discretion is necessarily left to the courts having original jurisdiction of removing guardians for a breach of their duties, and their decision will not be interfered with unless their discretion has been grossly abused.—*Young v. Young*, 5 Ind. 513.

[c] A guardian appointed by the court while the minor is under 14 is not necessarily removed at the instance of such minor when he attains that age. He can only be removed for good cause shown. Five days' notice must be given, and any action of the court removing the guardian without notice or appearance is a nullity.—(1856) *Dibble v. Dibble*, 8 Ind. 307; (1857) 9 Ind. 161.

[d] (Sup. 1859)

The failure of a guardian to make his inventory at the proper time, though he afterwards makes it before his removal is asked, together with his neglect to account for interest, may be cause for his removal.—*Barnes v. Powers*, 12 Ind. 341.

[e] (Sup. 1859)

A judge of the common pleas has no authority to hear and determine during vacation an application to revoke letters of guardianship.—*Lunger v. State ex rel. Hathaway*, 12 Ind. 483.

[f] (Sup. 1859)

Under 2 Rev. St. § 11, p. 325, authorizing the removal of a guardian who has left the county, a guardian who removes from the state becomes liable to be removed from his office.—*Nettleton v. State*, 13 Ind. 159.

[g] (Sup. 1861)

Where application is made for the removal of a guardian, and he appears in court, and takes no exception to the order for his removal, the judgment will be affirmed on appeal.—*Myers v. Pearsoll*, 17 Ind. 405.

[h] (Sup. 1864)

Where a guardian is appointed by the clerk in vacation, the court, at its next term, without notice, may remove him and appoint another; but a guardian appointed by the court in term, or by the clerk in vacation, and afterwards approved by the court, cannot be removed by the court without notice.—*Lee v. Ice*, 22 Ind. 384.

[i] (Sup. 1870)

The failure of a guardian to give a bond sufficient to secure to his ward, when the period of his wardship shall terminate, the amount of a pension coming to the ward from the government, is a sufficient cause for the removal of the guardian, without regard to the fact that the amount of the pension may be needed for the maintenance and education of the ward.—*West v. Forsythe*, 34 Ind. 418.

[j] (Sup. 1874)

On the trial of a proceeding to remove a guardian for failure to file, within three months after his appointment, an inventory, verified by oath, of the real and personal estate of his ward, the clerk testified that no inventory had been found among the papers, and that it was not his habit to make a record of the filing of such inventories, but merely to mark them filed. *Held* that in the absence of evidence showing affirmatively that such inventory had been filed, this sufficiently showed that none had been filed.—*Kimmel v. Kimmel*, 48 Ind. 203.

[k] (Sup. 1876)

A complaint, in an action by a minor against his guardian, asked the court to discharge and remove the guardian, and did not allege that he had any specific money in his hands; and the court found that it would be for the interest of the ward to have the guardian removed. *Held*, that the court could not order the guardian to immediately pay into court any assets in his hands.—*Hancock v. Heaton*, 53 Ind. 111.

[l] (Sup. 1881)

A guardian should not be removed on the sole ground that he has failed to furnish suitable homes for his wards, where he has done as well as he could in that regard under the circumstances.—*Rooker v. Wise*, 75 Ind. 306.

[m] (Sup. 1882)

A guardian's failure to keep proper and separate accounts for each ward, because of ignorance and illiteracy, is sufficient ground for removal.—*Wood v. Black*, 84 Ind. 279.

Rev. St. 1881, § 2521, providing that "it shall be the duty of every guardian to file an

inventory," is imperative, and a person neglecting so to do should be removed.—*Id.*

[n] (Sup. 1882)

An order for the removal of a guardian, the original entry of which was read in evidence without objection, will be presumed to have been made before suit brought, where the date of the order is not shown in the bill of exceptions on appeal from a judgment rendered in a suit on the guardian's bond.—*Moody v. State ex rel. Burton*, 84 Ind. 433.

[o] (Sup. 1884)

The Supreme Court will not interfere in the matter of removing or refusing to remove a guardian, unless it appears that the trial court has abused its discretion in regard thereto.—*Johnson v. Metzger*, 95 Ind. 307.

A guardian will not be removed for failure to file an inventory within three months from his appointment, as required by Rev. St. 1881, § 2521, if no personalty had come to his hands, or rents from the realty which had been leased under order of the court.—*Id.*

[p] (Sup. 1888)

A guardian is personally liable for the costs of the proceeding for his removal.—*Bernhamer v. Miller*, 114 Ind. 501, 17 N. E. 115.

Rev. St. 1881, § 2524, providing that guardians may be removed for any cause which, in the opinion of the courts of probate jurisdiction, or the judges thereof in vacation, renders it for the interest of the ward that the guardian shall be removed, gives a large discretion to such courts, and their act in this respect will not be disturbed unless that discretion is abused.—*Id.*

[q] (App. 1902)

Burns' Rev. St. 1901, § 2688, provides that the court by whom any guardian has been appointed may remove such guardian, on application of his ward, for habitual drunkenness, neglect of his duties, incompetency, fraudulent conduct, removal from the state, "or any other cause which, in the opinion of said court, renders it for the interest of the ward that such guardian shall be removed." An application by a ward stated the manner in which the guardian had acted detrimental to the estate, and he demurred, and on an overruling of the demurrer refused to answer. *Held*, that his removal was proper.—*Voliva v. Moffit*, 65 N. E. 754, 30 Ind. App. 225.

[r] (Sup. 1906)

Where a guardian of a minor whose parents are dead is not a fit person to have the custody of the minor, the proper remedy is by the removal of the guardian on petition of the ward or any person in his behalf, as expressly authorized by Burns' Ann. St. 1901, § 2688.—*Cottrell v. Booth*, 76 N. E. 546, 166 Ind. 469.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 78-98.  
Sec. also, 21 Cyc. pp. 53-61.

### § 26. Death of guardian.

[a] (Sup. 1828)

An infant, after his guardian's death, has a right to compel a settlement of his accounts, as if he were of age; the guardian's trust being personal, and terminating at his death.—*Peck v. Braman*, 2 Blackf. 141.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. GUARD. & W. § 75.

See, also, 21 Cyc. p. 51.

## III. CUSTODY AND CARE OF WARD'S PERSON AND ESTATE.

Actions by or against guardians, see post, §§ 117-135.

Agreement by guardian to pay board as within statute of frauds, see FRAUDS, STATUTE OF, § 16.

Agreement by guardian to pay, taxes on ward's estate as within statute of frauds, see FRAUDS, STATUTE OF, § 16.

Apprenticing minor ward, see APPRENTICES, §§ 8, 19.

Authority to accept claim in favor of estate in payment of legacy to ward, see EXECUTORS AND ADMINISTRATORS, § 304.

Consent of guardian to adoption of ward, see ADOPTION, § 7.

Custody and care of funds by clerks of courts, see DEPOSITS IN COURT, § 8.

Custody and control of child, see PARENT AND CHILD, § 2.

Estoppel of guardian to claim services of ward, see ESTOPPEL, § 90.

Existence of other remedy as affecting habeas corpus to determine right to custody of ward, see HABEAS CORPUS, § 3.

Foreign and ancillary administration, see post, § 168.

Form and requisites of petition to obtain custody of ward, see HABEAS CORPUS, § 53.

Functions and acts covered by bond, see post, § 175.

Liability of clerk of court on official bond for funds of estate in his custody, see CLERKS OF COURTS, § 74.

Payment of trust fund for conveyance to guardian, as creating resulting trust, see TRUSTS, § 84.

Possession of guardian of infant married woman as possession of husband, see HUSBAND AND WIFE, § 10.

Receipts given by guardian as contracts in writing within statutes of limitations, see LIMITATION OF ACTIONS, § 25.

Return to writ of habeas corpus to determine right to custody of ward, see HABEAS CORPUS, § 77.

Right of guardian to appointment as administrator in place of ward, see EXECUTORS AND ADMINISTRATORS, § 17.

Right of guardian to assign dower, see DOWER, § 68.

Right of guardian to share of rental value of quarantine property, see EXECUTORS AND ADMINISTRATORS, § 175.

Right to procure custody of ward by habeas corpus, see HABEAS CORPUS, § 25.

Right to receive legacy payable to ward, see EXECUTORS AND ADMINISTRATORS, § 304.

Scope of inquiry on habeas corpus to determine right to custody of ward, see HABEAS CORPUS, § 90.

### § 29. Custody and control of person.

[a] (Sup. 1846)

A petition which was sworn to, for a writ of habeas corpus, stated that the petitioner was the guardian, etc., of a certain infant; that the infant was the daughter of one A., deceased, and his wife, Abigail, who had, after her said husband's death, married Lorenzo D. Hovey; that the infant was by said Lorenzo and wife illegally restrained of her liberty, and detained from the custody of the petitioner. The petition prayed that the writ be directed to said Lorenzo and wife, commanding them to have the infant before the court, etc. The writ was granted accordingly. *Held*, that the act of 1845, entitled "An act for the relief of Abigail C. Hovey and Lorenzo D. Hovey of Carroll county," supposing it to be a public act (it not having been pleaded) and to be constitutional, of which no opinion was given, could not benefit the defendants in this proceeding; they not having shown that they had given the security required by that act.—*Hovey v. Morris*, 7 Blackf. 559.

[b] (Sup. 1851)

A., the grandfather of certain children under 14 years named in the petition, whose parents were dead, was duly appointed guardian. The children, since their father's death, have continued to live with their stepmother, the appellee, whose character is unexceptionable, and who has taken good care of them. A. and his wife are fit persons to have the care of the children, and well able to support them. The children wish to remain with the appellee. *Held*, that the guardian was entitled to their custody.—*Bonnell v. Berryhill*, 2 Ind. 613.

[c] (Sup. 1872)

In proceedings by a mother to recover the custody of her child from the guardian, evidence was proper to inform the court how the child had been treated by the guardian, and by those in whose custody he had placed her, and how she would probably be treated if the petitioner received the child in her charge.—*Garner v. Gordon*, 41 Ind. 92.

On a petition by a mother against the guardian for the custody of her children, it is error for the court, pending an appeal from a finding in favor of petitioner, to change the custody of the children; all proceedings being stayed on the perfecting of the appeal.—*Id.*

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Where the question as to custody is between the mother of female children and their guardian, the wishes of the parties should not control, but the best interest of the children should be considered.—Id.

[d] (Sup. 1878)

Upon an application by J., the guardian of D., an illegitimate orphan child, for a habeas corpus to obtain her custody from E., an answer by E. that, more than four years previously, and when D. was 4 years old, D.'s mother had transferred the care and custody of D. to E. until D. should be 21 years old; that D.'s father was unknown; that E. had ample means to support and educate D.; that D. had become attached to E. and his wife; and that J. was illiterate and could not read or write,—held not to show that E. was entitled to the custody of D., as against her guardian.—*Johns v. Emmert*, 62 Ind. 533.

[e] (Sup. 1887)

Rev. St. § 2518, relating to the appointment of statutory guardians, provides "Every guardian, so appointed, shall have the custody and tuition of such minor, and the management of such minor's estate, during minority, unless sooner removed or discharged from such trust: provided, that the father of such minor, or, if there be no father, the mother, if suitable persons, respectively, shall have the custody of the person and the control of the education of such minor." Held, that to render this section conclusive, as against the father's right to the custody of his child, it must appear in some way that he was in court in such manner that the court, in appointing the guardian, must have passed upon the question of his fitness to have such custody.—*Brooke v. Logan*, 112 Ind. 183, 13 N. E. 669, 2 Am. St. Rep. 177.

[f] (Sup. 1902)

Burns' Rev. St. 1901, § 2682, providing that, where a minor has no father nor mother living, the guardian is entitled to the minor's custody, is mandatory, and the wishes of the ward as to who shall have custody of her are not controlling.—*Palin v. Voliva*, 63 N. E. 760, 158 Ind. 380.

[g] (Sup. 1905)

The appointment of a legal guardian for a minor child is ineffectual to deprive the father of the child of his right to its custody.—*Gilmore v. Kitson*, 165 Ind. 402, 74 N. E. 1083.

[h] (Sup. 1906)

Under Burns' Ann. St. 1901, § 2682, declaring that every guardian shall have the custody of the minor ward, except that the father or mother, if suitable, shall have the custody of the minor's person, and section 2688, authorizing the removal of a guardian where it is for the best interest of the minor, a guardian of a minor whose parents are dead is entitled to the child's custody as an incident of the office of guardian.—*Cottrell v. Booth*, 76 N. E. 546, 166 Ind. 469.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 100-115.

See, also, 21 Cyc. pp. 62-65; note, 58 L. R. A. 931.

### § 30. Support and education.

[a] (Sup. 1948)

In an action against a guardian upon his individual undertaking to pay the board of his wards, pleas that he had no assets of his wards, and that he was not guardian when the board was furnished are bad on demurrer.—*Clark v. Casler*, 1 Ind. 243, Smith, 150.

[b] (Sup. 1861)

If a ward be physically unable to earn his own support, or cannot do it without encroaching upon the time necessary for acquiring a good English education, the guardian may and should use the principal of his ward's property for the expenses of support and education.—*State ex rel. Druliner v. Clark*, 16 Ind. 97, 102.

[c] (Sup. 1880)

A guardian and his sureties are entitled to the amount, with interest, of a debt lawfully contracted by him as such guardian for the maintenance and education of the ward, and which has been personally released to him by the creditor without his having paid the same.—*Kinsey v. State ex rel. Shirk*, 71 Ind. 32.

[d] (Sup. 1881)

If children possess an estate and their father and guardian none, and both children and father are unable to work, the estate of the children may justly be applied to their education and maintenance.—*Corbaley v. State ex rel. Holmes*, 81 Ind. 62.

Where both a father and children were unable to work, and the children had an estate, though the father and guardian did not apply to the court for an order directing the use of the children's money for their education and maintenance, the father and guardian might, when sued on his bond, show in defense a just and reasonable application of the money of the wards to that purpose.—Id.

Prima facie a father has no right to charge his children for their support and maintenance, and it is for him to show why such prima facie case shall not prevail against him.—Id.

[e] (Sup. 1882)

Where the guardian, in reporting himself entitled to compensation for boarding his ward, concealed the fact that his ward was not only capable of supporting himself, but was in fact rendering him services of great value, he committed a wrong which fully justified the ward in invoking the assistance of the court.—*Marquess v. La Baw*, 82 Ind. 550.

[f] A guardian cannot have credit for the education and maintenance of his ward, unless the latter had no parents, or they were unwilling to provide.—(Sup. 1883) *State ex rel. Dunham v. Roche*, 91 Ind. 406; (1884) Id., 94 Ind. 372.

## [g] (App. 1893)

An infant's relative cannot recover for its support from its guardian, though its father refused to support it, and though the guardian had estate of the ward which he failed to use for its support, unless the father's failure to support it was brought to the notice of the guardian.—*Turner v. Flagg*, 6 Ind. App. 563, 33 N. E. 1104.

## [h] (App. 1893)

Where a guardian takes his ward to live with him as a member of his family, there is no implied obligation on the ward's part to pay for board.—*Doan v. Dow*, 8 Ind. App. 324, 35 N. E. 709.

## [i] (App. 1900)

Where a person furnishes goods, necessities etc., to a ward, at the instance and request of the guardian, a judgment therefor should not be against the ward's estate, but against the guardian personally.—*Hall v. Ferguson*, 57 N. E. 153, 24 Ind. App. 532.

## [j] (App. 1903)

The father of a minor secured the services of a physician for the minor, of which the guardian of the minor had no knowledge, and subsequently the physician sought to settle his claim with the father. The minor had no estate. *Held*, in an action by the physician against the guardian, that there was nothing to take the case from the rule that the father was chargeable with the care and maintenance of the minor.—*Leach v. Williams*, 66 N. E. 172, 30 Ind. App. 413.

## FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 116-135.

See, also, 21 Cyc. pp. 65-71.

## § 31. Services and earnings.

Estoppel of guardian to claim services of ward, see ESTOPPEL, § 90.

## [a] (Sup. 1856)

An infant, without an appointed guardian or an estate of inheritance, living in the family of his mother, a widow, is subject to her control as his natural guardian, and she has a right to his wages.—*Ohio & M. R. Co. v. Tindall*, 13 Ind. 366, 74 Am. Dec. 259.

## [b] (Sup. 1861)

Guardians should keep their wards employed when able to earn their own support, rather than permit them to consume in idleness the principal of their patrimony.—*State ex rel. Druliner v. Clark*, 16 Ind. 97, 102.

## [c] (Sup. 1881)

Where the ward is of limited fortune, and is able to earn his support, it is the guardian's duty to keep him so employed, rather than to allow him to remain in idleness or expend his limited patrimony.—*Brown v. Yaryan*, 74 Ind. 305.

## [d] (Sup. 1882)

A guardian who receives his infant ward into his family cannot appropriate his services and at the same time charge him for board.—*Marquess v. La Baw*, 82 Ind. 550.

A guardian must keep his ward employed when he is of suitable age and capacity in order that he may earn his support, and not exhaust his estate in his maintenance.—*Id.*

## FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 136-141.

See, also, 21 Cyc. pp. 71-73.

## § 32. Appraisal and inventory of estate.

Property covered by bond of guardian, see post, § 174.

Vested rights of guardian, see CONSTITUTIONAL LAW, § 92.

## FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. § 102.

See, also, 21 Cyc. p. 79.

## § 33. Collection of assets.

## [a] (Sup. 1878)

A guardian is liable to his ward for accepting from an administrator or other party a note or other obligation in lieu of money coming to the ward's estate, where the same proves uncollectible.—*Bescher v. State ex rel. Hammann*, 63 Ind. 302.

## [b] (App. 1893)

A guardian has power to release from liability a guarantor of a note taken by himself, but forming a part of his ward's estate.—*Ditmar v. West*, 7 Ind. App. 637, 35 N. E. 47.

## [c] (App. 1907)

Where one is appointed guardian of a minor's estate, who at the time of assuming the trust is personally indebted to the estate, the guardian must pay the debt, separate the amount of it from his own funds, and invest it for the benefit of the ward; and his failure to so invest it is a conversion of that amount of the ward's funds to his own use.—*United States Fidelity & Guaranty Co. v. State ex rel. Smith*, 40 Ind. App. 136, 81 N. E. 226.

## FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 142-161.

See, also, 21 Cyc. pp. 79-81.

## § 35. Possession and use of property.

## [a] (Sup. 1860)

A testator made his children residuary legatees, to whom all his property after the payment of debts and specific legacies, was to pass as legatees, not as heirs, and gave his executor control of the property during their minority. *Held*, that under Rev. St. p. 280, § 137, providing that where the deceased shall die intestate the surplus remaining after the payment of all debts, and in case of a will after

the payment of all debts and legacies, shall be distributed to the legal heirs thereof according to the law of descent in force in this state, does not apply so as to pass the control of the property to the guardian.—*Branch v. Holcraft*, 14 Ind. 237.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 162-167.

See, also, 21 Cyc. pp. 76, 77.

### § 36. Management of estate.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 168-171.

See, also, 21 Cyc. pp. 78, 84, 85.

### § 37. — In general.

[a] (App. 1891)

The degree of care and prudence required of a guardian acting without fraud in the affairs of his trust is not higher than that which an ordinarily prudent man exercises in his own affairs of a like nature.—*Wainright v. Burroughs*, 27 N. E. 591, 1 Ind. App. 393.

[b] (App. 1895)

A guardian must manage the property in his hands to the best interest of his ward, and he should, if possible, make the income pay the expenses, but the law does not require that he shall keep two separate and distinct funds, or separate the income from the principal.—*Rountree v. Pursell*, 39 N. E. 747, 11 Ind. App. 522.

[c] (App. 1908)

Under the express provisions of Burns' Ann. St. 1901, § 2685, subd. 2, it is the duty of a guardian to manage the estate for the best interest of his ward; the discharge of such duty depending largely, if not wholly, on the condition of the estate.—*Alcon v. Koons*, 42 Ind. App. 537, 82 N. E. 92, 84 N. E. 1104.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. § 168.

### § 40. Sale.

Sales under order of court, see post, §§ 77-114.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 172-191.

See, also, 21 Cyc. pp. 82, 83.

### § 41. — In general.

[a] (Sup. 1872)

Where a father has procured himself to be appointed guardian of the persons and estates of his children, a sale of property belonging to such estates, if proved to have been made for the benefit of the father, will be set aside.—*Lane v. Taylor*, 40 Ind. 495.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. § 172.

### § 42. — Real property.

[a] (Sup. 1878)

Where a person, acting as the guardian of one of the joint owners of realty and as the agent of another, has sold such realty, accepting in part payment an obligation held by the purchaser against him individually, the fact that a contract provided that such obligation was to be applied as a payment upon the purchase money due him as principal does not render the payment valid.—*Bevis v. Heflin*, 63 Ind. 120.

As against the ward, the sale of his real estate by the guardian, the note of the purchaser being accepted in part payment, is not made valid by the facts that the residue of the purchase money was paid in cash, and the guardian reported the sale of the ward's real estate as made for cash.—*Id.*

A sale by a guardian of the ward's land, taking in part payment the individual obligation of the purchaser, divests the ward of no rights so long as the property or its proceeds can be traced and identified in the hands of those who have full knowledge of all the existing equities.—*Id.*

[b] (Sup. 1881)

A petition for partition is not bad because it alleges that defendants claim under a guardian's sale made without the order or approval of the court, as such a sale cannot divest the ward's title.—*White v. Clawson*, 79 Ind. 188.

[c] A guardian has no power to give his ward's lands to a railroad company for a right of way.—(Sup. 1884) *Indiana, B. & W. R. Co. v. Brittingham*, 98 Ind. 294; (1885) *Indiana, B. & W. Ry. Co. v. Allen*, 100 Ind. 409.

[d] (Sup. 1884)

Although a guardian has no right to give a deed before his sale has been confirmed, if he does so, and the sale is then confirmed, the deed is good.—*Hannemann v. Mink*, 99 Ind. 279.

The omission to comply with the requirement of 2 Rev. St. 1876, p. 531, that a guardian's deed shall specify the page of the order book containing the order of sale, does not make a deed invalid which in all other respects conforms to the law; the book itself being referred to, etc.—*Id.*

[e] (App. 1891)

The authority of a guardian to sell real estate depends on express authority from the court under whose jurisdiction he acts, granted in strict conformity to the statutes regulating the guardianship upon such matters.—*Morris v. Goodwin*, 27 N. E. 985, 1 Ind. App. 481.

[f] (Sup. 1893)

A guardian, being powerless to convey without an order of the proper court, has no power to do such acts in ratification as are the

equivalent of the contract to convey.—*Funk v. Rentschler*, 33 N. E. 364, 898, 134 Ind. 68.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guard. & W. §§ 173-185, 191.

See, also, 21 Cyc. p. 82.

**§ 44. Lease.**

[a] (Sup. 1848)

Under Rev. St. 1838, p. 193, § 51, authorizing the court to appoint guardians for the protection of estates of minors, and page 194, § 54, authorizing the court, on the application of the guardian, to permit him to sell the real estate for better investment, a guardian has authority to lease real estate of his ward.—*Huff v. Walker*, 1 Ind. 193, Smith, 134.

[b] (Sup. 1867)

A guardian who removes his minor wards from their father's dwelling within the year after his decease cannot maintain an action against the widow to recover any part of the rental value thereof for the year.—*Weaver v. Low*, 29 Ind. 57.

[c] (Sup. 1894)

A guardian is liable for the difference between the reasonable rent of his ward's property and the reasonable value of necessary improvements made by him.—*Taylor v. Calvert*, 138 Ind. 67, 37 N. E. 531.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guard. & W. §§ 192-201.

See, also, 21 Cyc. pp. 85-87; note, 25 Am. Rep. 728.

**§ 47. Contracts.**

Contract of guardian as entire or severable, see CONTRACTS, § 171.

Novation of contract by guardian, see NOVATION, § 5.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guard. & W. §§ 101, 219-231.

See, also, 21 Cyc. pp. 115-117.

**§ 48. — In general.**

[a] (Sup. 1882)

Where a guardian applies or uses money belonging to his wards to discharge liens on his own lands, or in redeeming liens on other lands, his wards are not entitled to be subrogated to the rights of the lienholders.—*French v. Shepler*, 83 Ind. 266, 43 Am. Rep. 67.

[b] (Sup. 1883)

A guardian cannot make any contract for his ward, except for necessities for the ward, that the latter may not repudiate when he arrives at age.—*State ex rel. Dunham v. Roche*, 91 Ind. 406.

[c] (App. 1893)

The estate of the ward is not, in any instance, bound by the terms of an agreement

which may have been made by the guardian. The court is to determine whether the necessities were furnished under such circumstances that the law will imply an obligation on those on whom the duty rests to pay therefor.—*Turner v. Flagg*, 33 N. E. 1104, 6 Ind. App. 563.

[d] (App. 1907)

An administrator of an estate who is also the guardian of a minor heir cannot bind his ward by a settlement as administrator with himself as guardian.—*Kinnick v. Coy*, 40 Ind. App. 139, 81 N. E. 107.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guard. & W. §§ 101, 219-226.

See, also, 21 Cyc. pp. 115-117.

**§ 49. — Services.**

[a] (App. 1891)

Where services were rendered a ward under a contract with the guardian, in an action to recover for them, plaintiff was entitled to a personal judgment against the guardian, and there should, in the judgment, have been no reference to the ward's estate.—*Baker v. Groves*, 27 N. E. 640, 1 Ind. App. 522.

[b] (App. 1909)

The ward's estate is not liable for services of an attorney in procuring the appointment and the bond of a guardian, so that the guardian is not entitled to credit therefor, though contracting for and making payment therefor from such estate.—*In re Kitchen*, 89 N. E. 375.

A guardian cannot claim credit for the entire payment to an attorney for services to the estate, though made according to his contract with the attorney, the contract for payment of half the proceeds of the estate not having been approved by the court, having been unreasonable, and having been made without the guardian knowing, or making effort to learn, the condition of the estate.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guard. & W. § 227.

**§ 50. — Borrowing money.**

[a] (Sup. 1882)

One lending money to a guardian, who is authorized by the court to borrow for the purpose of removing liens from his ward's land, may recover from the ward's estate the amount so lent and expended.—*Ray v. McGinnis*, 81 Ind. 451.

[b] (Sup. 1885)

Where taxes on the lands of a ward are paid at the request of the guardian and upon his promise to repay the same, the guardian is personally liable.—*Elson v. Spraker*, 100 Ind. 374.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guard. & W. §§ 228, 229.

**§ 53. Investments.**

[a] (Sup. 1886)

A guardian is not an insurer of the safety of investments made of his ward's funds, nor is he held to an extraordinary degree of care and diligence, but he is required to exercise ordinary care and diligence.—*Slauter v. Favorite*, 107 Ind. 291, 4 N. E. 880, 57 Am. Rep. 106.

A guardian lending money on mortgage examined the records 10 days before closing the loan, and found no incumbrance on the property. The borrower was a man in active business, well and favorably known in the community, and of excellent financial standing. *Held*, that the guardian was not negligent in accepting the borrower's word that there was no incumbrance prior to the guardian's loan.—*Id.*

[b] (Sup. 1889)

Where a guardian employs trust funds belonging to his ward in the purchase of realty, the trust therein arises at the inception of the title, and must depend on the transaction as it occurred up to that time, and cannot be changed by any subsequent transaction, except as such subsequent transaction may throw light on the original.—*Hughes v. White*, 20 N. E. 157, 117 Ind. 470.

[c] (Sup. 1890)

A guardian is not an insurer of the safety of the investments made by him, nor is he to be held to an extraordinary degree of care, but, in order that he may be exonerated from loss on account of insolvent securities taken in the course of the guardianship, it is his duty to keep the trust estate separate from his own fund, and to act in good faith, and observe that sound discretion and prudence usually exercised by diligent men about their own business. In making loans of the trust funds it is his duty to take security.—*Line v. Lawder*, 23 N. E. 758, 122 Ind. 548.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. &amp; W. §§ 232-241.

See, also, 21 Cyc. pp. 87-92.

**§ 54. Interest on funds of estate.**

[a] (Sup. 1879)

In a suit brought upon a guardian's bond for his failure to pay over the ward's money to his successor, it is error to instruct the jury to allow 10 per cent. interest on the amount due; the evidence having failed to show any written contract for the payment of interest at that rate.—*Baldrige v. State*, 69 Ind. 166.

[b] (Sup. 1880)

Where a guardian under the authority of the court sells his ward's real estate, he is chargeable with the moneys received, with interest at the rate of 6 per cent. per annum, deducting proper credit at the proper date, and, on the balance found due at the date of the

verdict in an action on his bond of principal and interest, he is chargeable with a sum equal to 10 per cent. of the whole amount assessed and found to be due as damages.—*Kinsey v. State ex rel. Shirk*, 71 Ind. 32.

[c] (Sup. 1882)

Where the guardian could have loaned the ward's money in his hands, or used the money himself, which could have been safely invested by the use of reasonable diligence, he should account for a just rate of interest.—*Marquess v. La Baw*, 82 Ind. 550.

[d] (Sup. 1883)

A guardian who converts to his own use his ward's money is chargeable with the highest legal rate of interest which he could have obtained by the use of reasonable diligence.—*Hays v. Walker*, 90 Ind. 105.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. &amp; W. §§ 242-253.

See, also, 21 Cyc. pp. 93-95.

**§ 56. Loans.**

[a] (Sup. 1886)

Ordinary care requires that a guardian should not accept a second mortgage. If, however, he exercises care and diligence in endeavoring to secure a first mortgage, but by false representations is induced to accept a mortgage believing in good faith it is a senior one, he is not liable, although it turns out to be a junior one.—*Slauter v. Favorite*, 107 Ind. 291, 4 N. E. 880, 57 Am. Rep. 106.

[b] (Sup. 1890)

Loans made by a guardian on the credit of individuals or firms, without security, or with doubtful security, are ordinarily at the risk of the guardian.—*Line v. Lawder*, 23 N. E. 758, 122 Ind. 548.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. &amp; W. §§ 255-260.

See, also, 21 Cyc. pp. 90, 91; note, 91 C. C. A. 622.

**§ 58. Expenditures.**

Compensation of guardian, see post, §§ 149, 150.

[a] (Sup. 1852)

The money of the wards being in the hands of their father's administrator, who expended the same, under the direction of the guardian, in the completion of a distillery, it was *held* that the administrator was entitled to a credit in his settlement, so far as his expenditures were made with reasonable care and judgment.—*Powell v. North*, 3 Ind. 392, 56 Am. Dec. 513.

An order of the probate court to a guardian to invest a sufficient sum of money of his wards, without limiting the amount, to complete an unfinished distillery, was *held* to justify a

reasonably prudent expenditure for the purpose.—Id.

[b] (*Sup.* 1867)

Where, after a sale by a guardian of the ward's land, the same land is, upon the petition of the administrator of the estate of the ancestor, sold to pay debts, the guardian is not authorized to protect the title of the purchaser at his sale by buying in the land at the administrator's sale. The payment of money by the guardian for such a purpose is no answer to the suit upon his bond.—*State ex rel. Chesser v. Clark*, 28 Ind. 138.

[c] (*Sup.* 1872)

A father, procuring himself to be appointed guardian of the persons and estates of his children, cannot claim a credit for the improvement of the estates.—*Lane v. Taylor*, 40 Ind. 495.

[d] (*Sup.* 1877)

The guardian of a girl, whose whole estate in his hands amounted to \$170, advanced to her, during the period of about six years and a half, while she was between 11 and 18 years of age, the whole of said amount in sums of \$5 at a time. *Held*, that there was no abuse of discretion on the part of the guardian, though during such period said ward was gratuitously furnished by her relatives with the actual necessities of life in the matters of boarding, clothing, and schooling.—*Karney v. Vale*, 56 Ind. 542.

[e] (*Sup.* 1877)

An infant ward, who has married a man of full age, is bound by a payment made by her guardian to her husband by her direction.—*Haines v. State ex rel. Shope*, 60 Ind. 41.

[f] (*App.* 1908)

It is not only the statutory duty of a guardian to manage the estate for the ward's best interest, but the guardian is specifically required to pay all just debts due from the ward out of the estate in his hands by *Burns' Ann. St.* 1901, § 2685, subd. 5.—*Alcon v. Koons*, 42 Ind. App. 537, 82 N. E. 92, 84 N. E. 1104.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 264-282.

See, also, 21 Cyc. pp. 97-101; note, 49 Am. Dec. 657.

§ 59. Submission to arbitration.

[a] (*Sup.* 1839)

A guardian can submit the cause of his ward to arbitration.—*Kelley v. Adams*, 120 Ind. 340, 22 N. E. 317.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. § 104.

§ 60. Confession of judgment.

Right to plead set-off in action to set aside guardian's report, see SET-OFF AND COUNTERCLAIM, § 13.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. § 106.

§ 61. Estoppel.

[a] (*Sup.* 1879)

Where a guardian has knowledge of an agreement between his minor ward and her mother and a third person that such ward shall serve such third person at a certain price, to be paid to the minor, and allows such agreement to be executed, and the amount paid to the minor without objection, he is estopped to collect the amount as guardian.—*Boulton v. Black*, 68 Ind. 269.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 283-287.

See, also, 21 Cyc. pp. 108, 109.

§ 62. Individual interest in transactions.

[a] (*Sup.* 1823)

Where a guardian invests the money of his ward in land, and takes a deed in his own name, the claim of the ward against the estate of his guardian is a lien on the land, and takes precedence of all others.—*Peck v. Braman*, 1 Blackf. 544.

[b] (*Sup.* 1832)

Where a guardian purchased land for himself on his own credit, taking a conveyance in his own name, and afterwards used his ward's money in paying therefor, no trust in the land resulted or arose in favor of the latter.—*French v. Sheplor*, 83 Ind. 266, 43 Am. Rep. 67.

[c] (*Sup.* 1894)

Where it is the duty of guardian to protect his ward's interest by buying a certificate of purchase and he makes an investment for himself, he should be held as trustee for the ward.—*Taylor v. Calvert*, 37 N. E. 531, 138 Ind. 67.

Whenever a guardian assumes a position in relation to his wards' funds by which he puts his personal interest in conflict with theirs or acquires any interest or title adverse to that of his wards', he will not, whether he intended any fraud or not, be permitted to retain the advantage, but the same will inure to the benefit of his wards, and he will hold what he has acquired in trust for them subject only to his right to be reimbursed for what he invested.—Id.

Where a guardian held as a part of the ward's estate a mortgage, he could not assume, in relation to the land mortgaged, any position in conflict or inconsistent with the ward's interest, and, where he assumed to purchase the certificate which was adverse and superior to the mortgage, the purchase would inure to the ward's benefit, and the guardian would be adjudged to hold the certificate as trustee and that too, whether he bought it with his own money or the ward's money. It was the guardian's duty to make good the mortgage lien if he could, and, if need be, to take steps to ripen it into a title by foreclosure, and, when he bought an adverse and senior lien, he put himself in a place where it was to his interest to

prevent a redemption from the certificate or a foreclosure of the ward's mortgage.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guard. & W. § 288-293.

See, also, 21 Cyc. pp. 101-103.

**§ 63. Fraud.**

[a] (Sup. 1886)

The fact that a guardian as mortgagee took a note payable to himself, without any designation of his official character, may be considered, with other facts stated in the special finding, in determining whether he was guilty of fraud in the transaction.—*Slauter v. Favorite*, 4 N. E. 880, 107 Ind. 291, 57 Am. Rep. 106.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guard. & W. § 107.

**§ 64. Waste, conversion, or embezzlement by guardian.**

[a] (Sup. 1876)

For a guardian to take notes for money belonging to his ward, payable to himself in his own name, is not in law a conversion, though the fact may deserve consideration as tending to show a conversion.—*Richardson v. State ex rel. Crow*, 55 Ind. 381.

[b] (Sup. 1878)

Guardians are answerable for any mismanagement or unauthorized dealings with the trust moneys in their hands, under 2 Rev. St. 1876, p. 592, § 13, and any misapplication of such moneys is a conversion thereof within the meaning of the statute.—*State ex rel. Cavins v. Sanders*, 62 Ind. 562, 30 Am. Rep. 203.

[c] (Sup. 1878)

The act of a guardian in commingling his ward's estate with his own money or otherwise disposing of such estate, and destroying the identity of the ward's money, as a separate and distinct fund, is a conversion of the estate of the ward, for which the guardian is liable either in a separate action or upon his bond.—*Covey v. Neff*, 63 Ind. 391.

[d] (Sup. 1878)

The use by a guardian of the money of his ward in his own business is a conversion of such money to his own use, for which he is liable on his bond.—*Lowry v. State ex rel. Hill*, 64 Ind. 421.

[e] (Sup. 1882)

The failure of a guardian in his report to disclose that he has received money for his ward amounts to a conversion thereof.—*Asher v. State ex rel. Applegate*, 88 Ind. 215.

[f] (Sup. 1889)

A guardian invested his ward's money in a mortgage, and afterwards bought the mortgaged land himself, agreeing to pay the mortgage, which he entered satisfied of record, and then mortgaged the land to a third person. *Held*, that this constituted a conversion of his ward's

money, for which his bondsman was liable.—*Hogshead v. State ex rel. Allen*, 120 Ind. 327, 22 N. E. 330.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guard. & W. §§ 294-299.

See, also, 21 Cyc. p. 103.

**§ 66. Torts.**

[a] (Sup. 1884)

A guardian is not liable for a tort of his ward.—*Garrigus v. Ellis*, 95 Ind. 598.

[b] (Sup. 1884)

Where a guardian, knowing that his ward was chaste, uneducated, feeble-minded, and ignorant of the meaning of sexual intercourse, worked on her passions while she was acting as servant in his family by undue familiarities, and negligently permitted his son to have intercourse with her, whereby she became pregnant, he was liable to her for the injuries thereby resulting.—*Brattain v. Cannady*, 96 Ind. 266.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guard. & W. § 108.

See, also, 21 Cyc. p. 73.

**§ 67. Presentation and payment of claims.**

Rights of action against guardian or ward, see post, § 119.

[a] (Sup. 1874)

An order, made by a court without notice to a guardian, requiring him to pay a debt claimed to be due from him or his ward, as to pay taxes on land of his ward's ancestor sold by the administrator of said ancestor's estate, is void.—*Martin v. Beasley*, 49 Ind. 280.

[b] (App. 1893)

Where a person has a legal and equitable claim against the estate of an infant ward, he may present his claim against the guardian in the probate court having jurisdiction of the estate of the ward and of the person of the guardian, and secure an order of such court for the payment of such amount out of the trust estate as the court may, in its discretion, see fit.—*Turner v. Flagg*, 6 Ind. App. 563, 33 N. E. 1104.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guard. & W. §§ 300-304.

See, also, 21 Cyc. p. 117.

**§ 68. Reimbursement and indemnity to guardian.**

[a] (Sup. 1886)

Where after a guardian, as such, secured a judgment, and the ward, after becoming of age, satisfied it, and the guardian sued to enforce an equitable lien on the trust estate for the satisfaction of expenses incurred in the litigation, whether there was any fraud between the ward and her assignee was immaterial.—*Curran v.*

Abbott, 40 N. E. 1091, 141 Ind. 492, 50 Am. St. Rep. 337.

A trustee has an equitable right to be reimbursed for all reasonable expenses properly incurred in the execution of his trust, and the expenses of a trustee in the execution of his trust are a lien upon the estate, and he will not be compelled to part with the property until the disbursements are paid, and this principle is applicable to a guardian; he being in effect a trustee.—Id.

Where a guardian as such obtained a judgment, and the ward, after reaching majority, satisfied the same, if the guardian had other funds of his ward's in his hands, sufficient to reimburse him for his expenses, the ward and her assignees could compel him to first exhaust such funds.—Id.

Where a guardian, as such, recovers a judgment, his right to be reimbursed and to enforce an equitable lien for his expenses against the trust estate is the same whether he is personally liable for the expenses and attorney's fees or only in a fiduciary capacity.—Id.

#### FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 264-262, 497.

### § 69. Conveyances, contracts, and other transactions between guardian and ward.

#### [a] (Sup. 1852)

A guardian contracted with his ward to sell him a tract of land, at a price fixed, 2 years before he became of age, and the ward went into possession, and hence knew the location, quality, and price of the land, and, with this knowledge, and without any undue influence on the part of his guardian, he accepted, after arriving at majority, a deed for said land, and afterwards retained the possession and use of it for 15 months without objection. *Held*, that the ward could not have the sale set aside and compel the guardian to account for the purchase money.—Sherry v. Sansberry, 3 Ind. 320.

A ward may, on arriving at majority, purchase property from his late guardian, and such a purchase, if fairly made, will stand.—Id.

#### [b] (Sup. 1874)

Where an infant female is married to a man of full age, a payment made by her guardian to her husband with her assent and direction is good as to her.—State ex rel. Wade v. Joest, 46 Ind. 233; State ex rel. Hutson v. Same, Id. 235.

Where a husband and wife are both infants, a payment made by the guardian of the wife to the husband is not good as to the wife.—Id.

#### [c] (App. 1891)

A female ward is bound by a payment made by her guardian to her husband by her

consent and direction.—State ex rel. Haines v. Parrish, 27 N. E. 652, 1 Ind. App. 441.

#### [d] (Sup. 1894)

All arrangements between a guardian and his ward soon after the arrival of the ward of age will be closely scrutinized.—Taylor v. Calvert, 37 N. E. 531, 138 Ind. 67.

#### FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 261, 305-307.

See, also, 21 Cyc. pp. 104-114; note, 21 Am. St. Rep. 94.

### § 70. Ratification of unauthorized acts.

#### [a] (Sup. 1852)

A guardian may invest the money of his ward in real estate under an order of the proper court; but, if he convert it without such order, he may be liable to answer for any loss that may occur, and the ward will have the option, on coming of age, of refusing the realty, conveying it to his guardian, and requiring the purchase money and interest. If he accepts the real estate with a full knowledge of all the facts and without fraud on the part of the guardian, he will be bound by such acceptance.—Sherry v. Sansberry, 3 Ind. 320.

#### [b] (Sup. 1880)

An alleged guardian's sale, though invalid because the seller had ceased to be a guardian, may yet be binding on the supposed ward by long acquiescence (15 years) on her part after coming of age, by her husband's receipt of the price, and by their permitting the purchaser to make valuable improvements.—Morris v. Stewart, 14 Ind. 334.

#### [c] (Sup. 1878)

Recovery by a ward, in an action against the guardian and his sureties to recover the purchase money of the ward's real estate sold by the guardian, is prima facie a ratification of the sale.—Bevis v. Heflin, 63 Ind. 129.

#### [d] (Sup. 1880)

Where a guardian and trustee sold his ward's land with her full knowledge and without objection, paid over to her the purchase money, and made his final settlement, which was approved; and the purchaser and his grantee held peaceable possession for seven years, the ward, whose motion to have her guardian's settlement set aside on the ground that said sale had been made while she was of age had been denied, could not recover the land.—Webster v. Bebinger, 70 Ind. 9.

#### [e] (Sup. 1884)

Where a ward, after majority, without fraud or undue influence, executes to his late guardian a receipt for the value of property obtained by him from the guardian during minority under a voidable contract, this is a ratification, although he was ignorant that he might

disaffirm.—*Clark v. Van Court*, 100 Ind. 113, 50 Am. Rep. 774.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 308–315.

See, also, 21 Cyc. pp. 106, 107.

**§ 72. Successive guardianships.**

[a] (Sup. 1875)

A guardian may follow his ward's money, and recover it from one who obtained it from a former guardian under a contract made by such former guardian in his individual capacity, and not as guardian.—*Fox v. Kerper*, 51 Ind. 148.

[b] (Sup. 1878)

A guardian contracted with his wife to maintain and care for his wards, and promised to compensate her therefor out of the wards' estate. The guardian subsequently absconded without paying his wife. *Held*, that she could collect for such care and maintenance from his successor as guardian.—*Rooker v. Rooker*, 60 Ind. 550.

[c] (Sup. 1886)

A guardian who accepts from his predecessor in the trust a note payable to such predecessor individually is guilty of a breach of duty which renders him liable on his bond.—*State ex rel. McIntosh v. Greensdale*, 106 Ind. 364, 6 N. E. 926, 55 Am. Rep. 753.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 318–321.

See, also, 21 Cyc. pp. 273, 274.

**§ 73. Representatives of deceased guardians.**

[a] (Sup. 1878)

Under an order of court, made on motion of the surety of a deceased guardian, his administrator reported that the estate was chargeable with \$311 belonging to the ward, that the estate was insolvent, and that the deceased guardian had so mingled the ward's estate with his own that it could not be identified. *Held*, that an order, thereupon made, that the administrator pay into court for the benefit of the ward said sum of \$311, was erroneous.—*Covey v. Neff*, 63 Ind. 391.

[b] (Sup. 1882)

Where a guardian died without paying sums due to his wards, it is the duty of the guardian's administrator to pay such sum to the guardian succeeding his intestate, without demand therefor.—*Higgins v. State ex rel. Smith*, 87 Ind. 282.

[c] (Sup. 1886)

In an action by a newly-appointed guardian against the administrator of the former guardian to recover money belonging to the ward, no penalty can be collected unless there have been a demand and refusal to pay.—

*Buchanan v. State ex rel. Roberts*, 106 Ind. 251, 6 N. E. 614.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 322–324; 22 CENT. DIG. Ex. & Ad. § 1646.

See, also, 21 Cyc. p. 119.

**§ 74. Mortgage or lien of ward on property of tutor.**

[a] (Sup. 1866)

Where a guardian gives a mortgage to his successor to secure "the amount ascertained to be owing" from himself to his successor, he cannot go behind the mortgage for the purpose of testing his liability.—*O'Haver v. Shidler*, 20 Ind. 278.

Where a guardian gives a mortgage to his successor to secure "the amount ascertained to be owing," from himself to his successor, and also delivers certain notes taken for loans of the ward's money, the mortgagee is not bound to pursue his remedy on the notes assigned before resorting to the mortgage.—*Id.*

[b] (Sup. 1881)

A special act authorizing the probate court of a certain county to sell certain specified real estate of a ward named in the act, on petition of his guardian, is valid.—*Davidson v. Koehler*, 76 Ind. 398.

Where a special act authorizing the sale of a ward's real estate does not specify that the petition shall be verified, it is not necessary to verify it, although similar petitions under the general rule are required to be verified.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 206–218.

See, also, 21 Cyc. pp. 110–114.

**IV. SALES AND CONVEYANCES UNDER ORDER OF COURT.**

Application by guardian of minor heirs and administratrix of decedent's estate, see EXECUTORS AND ADMINISTRATORS, § 336.

Entry of judgment nunc pro tunc, see JUDGMENT, § 273.

Liability on bond for sale as executor of one holding both as executor and guardian, see EXECUTORS AND ADMINISTRATORS, § 392.

Notice to guardian of minor heirs of sale of ancestor's property and waiver thereof, see EXECUTORS AND ADMINISTRATORS, § 337.

Power to order sale as affected by duration of trust, see WILLS, § 686.

Sales without order of court, see ante, §§ 40–42.

**§ 77. Purposes for which authorized.**

[a] (Sup. 1851)

On an application by guardian for the sale of a portion of his ward's real estate, the reasons alleged were the indebtedness of the heirs and a benefit to their estate by changing the overplus above their indebtedness into a differ-

ent investment. The heirs were in debt for their maintenance and for damages recovered by their mother in her application for dower; but it did not appear that payment ever passed, and it was shown that the heirs have other property, the income of which might pay the debts in a reasonable time, and the sale of which, should it become necessary to sell any, would be more to their advantage than that prayed for. *Held*, that an order of sale was correctly reversed.—*Lindner v. Holmes*, 2 Ind. 629.

[b] (Sup. 1884)

A guardian, acting under the order of a court of competent jurisdiction, has authority to lay out additions to cities and to dedicate lands to the public for streets and alleys.—*City of Indianapolis v. Kingsbury*, 101 Ind. 200, 51 Am. Rep. 749.

[c] (Sup. 1896)

Rev. St. 1894, § 2692 (Rev. St. 1881, § 2528), providing that the proper court may, on application of the guardian, order the ward's real estate to be sold, whenever a better investment of the value thereof can be made, authorizes the court to direct an exchange of the ward's lands for other lands.—*Decker v. Fessler*, 44 N. E. 657, 146 Ind. 16.

[d] (App. 1908)

Whenever necessary to pay debts of a ward or to discharge liens, the court may, on the application of the guardian, order a sale of the ward's real estate, or a portion thereof, as authorized by *Burns' Ann. St. 1901*, § 2692.—*Alcon v. Koons*, 42 Ind. App. 537, 82 N. E. 92, 84 N. E. 1104.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 327-329.

See, also, 21 Cyc. p. 122.

### § 81. Jurisdiction.

Exclusive or concurrent jurisdiction, effect of priority of jurisdiction, see COURTS, § 475.

[a] (Sup. 1840)

Under Rev. Code 1831, p. 173, authorizing a sale of a minor's interest in land on petition of the guardian showing certain facts, the evidence of the facts authorizing the sale need not appear upon the record to support the jurisdiction of the court.—*Doe ex dem. Graeter v. Wise*, 5 Blackf. 402.

[b] (Sup. 1880)

During the existence of the common pleas courts, a common pleas court had jurisdiction to order the sale by a guardian of real estate belonging to his ward and situate within the county.—*McKeever v. Ball*, 71 Ind. 398.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 334-336.

See, also, 21 Cyc. pp. 119-121.

### § 86. Petition or other application.

[a] (Sup. 1840)

Under Rev. Code 1831, p. 173, providing that, upon petition of "any guardian of a minor," etc., for sale of real estate, if certain facts shall appear, the probate court may decree a sale thereof, a joint petition by the respective guardians of several minors, joint owners of land, is sufficient to confer jurisdiction on the court to order a sale of the land.—*Doe ex dem. Graeter v. Wise*, 5 Blackf. 402.

[b] (Sup. 1873)

Where the interest of a ward in real estate under Acts 1843, pp. 529, 530, §§ 234, 239, was described in a petition to sell the same, as a reversionary interest created by a will which was referred to, and it was alleged that it would not accrue until after the decease of the guardian, who, by the will, had a life estate in the land, a mistake in calling the interest a reversionary one, instead of an interest in remainder, was immaterial.—*Worthington v. Dunkin*, 41 Ind. 515.

[c] (Sup. 1880)

Where a court had jurisdiction by statute to authorize guardians to sell real estate of their wards, the fact that it authorized a sale upon an insufficient and defective petition does not constitute a defect of jurisdiction.—*McKeever v. Ball*, 71 Ind. 398.

Under Act May 14, 1852 (2 Gav. & H. Rev. St. p. 20) § 4, providing that the court of common pleas of the proper county shall have original and exclusive jurisdiction to authorize guardians to sell and convey real estate of their wards, a petition to the proper court by a guardian for the sale of real estate of her wards gives the court jurisdiction, notwithstanding it does not contain a statement of the matters which the statute (2 Rev. St. 1876, p. 594, § 15) provides shall be set forth specifically.—*Id.*

[d] (Sup. 1890)

Under Rev. St. 1881, § 2528, which provides that a court may order the land of a minor to be sold on application of his guardian whenever a better investment of its value can be made, an application stating that it would be for the interest of the minor to exchange his land for certain other land is sufficient to give the court jurisdiction to order a sale of the minor's land for cash.—*Nesbit v. Miller*, 125 Ind. 106, 25 N. E. 148.

[e] (App. 1908)

On an application by a guardian for a sale of the ward's real estate to pay debts, the guardian must set forth in detail the facts connected with the estate, as required by *Burns' Ann. St. 1901*, § 2693.—*Alcon v. Koons*, 42 Ind. App. 537, 82 N. E. 92, 84 N. E. 1104.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 340-344.

See, also, 21 Cyc. pp. 125, 126.

**§ 88. Hearing of application in general.**

[a] (Sup. 1854)

In the case of a guardian's application to sell real estate, it was not necessary, under the Revised Statutes of 1843, that the record should show that evidence was offered to support the matter set out in the petition.—Adkins v. Sidener, 5 Ind. 228.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. &amp; W. § 346.

See, also, 21 Cyc. p. 128.

**§ 89. Determination as to necessity for sale, mortgage, or lease.**

[a] (Sup. 1854)

In proceedings by a guardian for the sale of his ward's real estate, it seems that evidence to sustain the averments in the petition is not necessary in order to authorize an order of sale, and, if the court is satisfied with the propriety of selling the real estate, it is sufficient.—Adkins v. Sidener, 5 Ind. 228.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. &amp; W. § 347.

See, also, 21 Cyc. p. 129.

**§ 90. Order or decree.**

Jurisdiction of one state court to modify decree of another state court, see COURTS, § 481.

Record of sale as documentary evidence, see EVIDENCE, § 332.

[a] (Sup. 1854)

It is not sufficient, under the Revised Statutes of 1843, to set aside the order for sale of the real estate of a ward, that the guardian filed his petition, the appraisers were appointed and sworn, the appraisal made and returned, and the order of sale made on the same day.—Adkins v. Sidener, 5 Ind. 228.

[b] (Sup. 1871)

An order for the sale of land of a minor does not operate in presenti, and convert the land into assets in the hands of the guardian, so as to prevent judgment against the minor obtained after the order, but before the sale, from becoming a lien on the land; nor does the title of a purchaser at a guardian's sale relate back to the order of sale, so as to prevent any intervening liens or rights being acquired by a creditor.—Shaffner v. Briggs, 36 Ind. 55, 10 Am. Rep. 1.

[c] (Sup. 1873)

Under Acts 1843, pp. 529, 530, §§ 233, 239, as amended by Acts 1845, p. 17, and Acts 1849, p. 52, the court is authorized to make an order allowing the guardian to sell the land of his ward at private sale for two-thirds of its appraised value; but, if the land be sold for its appraised value, such an order is not absolutely necessary, and would not void the sale in the lands of an innocent purchaser.—Worthington v. Dunkin, 41 Ind. 515.

[d] (Sup. 1886)

An order for the sale of the real estate of a ward, made upon the petition of a guardian,

operates only upon the interest of the ward in the real estate held by him at the time of making the order, and does not operate upon the interest which vests in him, at the death of his mother, by virtue of the statute of descents, as her forced heir.—Erwin v. Garner, 108 Ind. 488, 9 N. E. 417.

[e] (Sup. 1887)

A guardian's sale of his ward's realty cannot be collaterally attacked with success on the ground that the guardian, in procuring the order of the court therefor, did not give the additional bond required by statute, and that the proceeds thereof were never accounted for by him.—Davidson v. Bates, 111 Ind. 391, 12 N. E. 687; Same v. Hutchins, 112 Ind. 322, 13 N. E. 106.

[f] (Sup. 1889)

A guardian obtained an order for the sale of his ward's real estate in order to pay debts incurred on behalf of the ward. Before the sale was made the ward died; and, upon report of the fact being made to the court, the guardian was ordered to proceed and settle the estate without letters of administration, as provided by Rev. St. 1881, § 2523. The guardian, in pursuance of the order before made, gave due notice, and sold the real estate, which sale was duly confirmed by the court. Held, that the sale was not invalidated by the fact that no new order therefor was obtained after the death of the ward.—Wingate v. James, 121 Ind. 69, 22 N. E. 735.

[g] (App. 1891)

An order of court authorizing a guardian to sell his ward's land, providing for the giving of a deed, but fixing no terms for the payment of the purchase price, and which shows an appraisal of the land at \$16,000 and the filing of an additional bond for only \$25,000, is so irregular that title founded upon it is not marketable.—Morris v. Goodwin, 1 Ind. App. 481, 27 N. E. 985.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. &amp; W. §§ 349-355.

See, also, 21 Cyc. pp. 129, 130.

**§ 92. Special bond for sale.**

Liabilities on bonds for sale, see post, § 110.

[a] (Sup. 1880)

A guardian's special bond for the sale of the ward's real estate, executed under 2 Rev. St. 1876, p. 595, § 18, requiring the bond to be conditioned for the faithful payment and accounting for all moneys received from the sale, is not invalidated because conditioned only for the faithful discharge of his duties in view of the Act June 9, 1852 (2 Rev. St. 1876, p. 588), § 5, providing that the guardian's bond shall not be void on account of any informality or defect thereof but shall have the same force and effect as if it had been legally executed, or Code (2 Rev. St. 1876, p. 311), § 790, providing that no bond taken by an officer in the dis-

charge of the duties of his office shall be void for want of form or substance or recital or condition, nor the principals or surety be discharged, but that the principals and surety shall be bound by such bond to the full extent contemplated by the law requiring the same and to the sureties to the amount specified in the bond, even though section 5 be applicable only to guardian's general bonds.—*Stevenson v. State ex rel. Ruddell*, 71 Ind. 52.

The bond of a guardian for the sale of his ward's real estate, conditioned merely "for the faithful discharge of his duties," is valid and binding.—*Id.*

[b] (Sup. 1880)

A ward brought an action against the purchaser to have a sale made by his guardian set aside because no additional bond had been given and because the proceeds of the sale had been lost and unaccounted for. *Held*, that the sale was void.—*McKeever v. Ball*, 71 Ind. 398.

Where a sale of a ward's real estate is made by a commissioner, instead of the guardian, under 2 Rev. St. 1876, p. 597, § 20, no bond is required of such commissioner; and the fact that he gives one does not relieve the guardian from executing the bond required by sections 18, 19 of said act.—*Id.*

[c] (Sup. 1888)

A bond for the sale of a ward's realty was filed by the guardian with one surety, instead of two, as required by Rev. St. § 2532, and the court approved it, and ordered the sale, which was made to a purchaser for value, but with knowledge that there was but one surety, and he in failing circumstances. The guardian converted a portion of the proceeds to his own use, and both he and the surety were insolvent at the time of sale, and so remain. *Held* that, the court having passed on the sufficiency of the bond and ordered the sale, the purchaser was protected.—*Marquis v. Davis*, 113 Ind. 219, 15 N. E. 251.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. GUARD. & W. §§ 358-362.

See, also, 21 Cyc. p. 132.

§ 93. Appraisal of property to be sold.

[a] (Sup. 1881)

A guardian cannot hold money obtained from the sale of his ward's land upon the ground that the sale was made without proper appraisement.—*Corbaley v. State ex rel. Holmes*, 81 Ind. 62.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. GUARD. & W. § 357.

See, also, 21 Cyc. p. 131.

§ 94. Sale.

Accrual of right of action to recover, land sold, see LIMITATION OF ACTIONS, § 72.

Application of general statutes of limitation to action by ward to recover land sold, see LIMITATION OF ACTIONS, § 44.

Color of title, see ADVERSE POSSESSION, § 77.

Estoppel of ward to deny guardian's authority, see ESTOPPEL, § 67.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. GUARD. & W. §§ 363-394.

See, also, 21 Cyc. pp. 133-144.

§ 96. — Notice.

[a] (Sup. 1873)

Under Rev. St. 1843, a guardian, in making sale of his ward's realty, was not required to give notice thereof.—*Maxwell v. Campbell*, 45 Ind. 360.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. GUARD. & W. §§ 363, 364.

See, also, 21 Cyc. p. 133.

§ 97. — Manner and conduct.

[a] (Sup. 1840)

Under Rev. Code 1831, p. 173, providing that, upon the petition of "any guardian of a minor" for sale of real estate showing certain facts, the probate court may decree a sale thereof, where a petition was presented by the respective guardians of several minors, joint owners of a tract of land, setting up the necessary facts, and a sale of the land as an entire tract was decreed, the sale was valid.—*Doe ex dem. Graeter v. Wise*, 5 Blackf. 402.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. GUARD. & W. §§ 365-368.

See, also, 21 Cyc. pp. 134, 135.

§ 99. — Persons who may purchase.

Secondary evidence to show award of custody of infant, see EVIDENCE, § 162.

[a] (Sup. 1868)

Where a sale of land of an infant under order of court procured by the guardian was made by him for the purpose of obtaining to himself the title to the land, the proceedings appearing upon the record being regular and valid, upon false reports of the sale by the guardian, *held*, that a good title passed by a subsequent sale of the land by the guardian to a purchaser for a valuable consideration and without notice of the fraud.—*Gwinn v. Williams*, 30 Ind. 374.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. GUARD. & W. §§ 370, 371.

See, also, 21 Cyc. p. 135.

§ 100. — Requisites and validity in general.

[a] (Sup. 1840)

That the property of minors sold by guardians was appraised at \$400 and sold for

\$100 is no objection to the validity of the sale.—*Doe ex dem. Graeter v. Wise*, 5 Blackf. 402.

[b] (Sup. 1873)

Where the court having jurisdiction over the subject-matter and the ward, who was represented by his guardian, erred in holding an insufficient petition to sell real estate of the ward to be good, it was a mere error, and not a defect of jurisdiction.—*Worthington v. Dunkin*, 41 Ind. 515.

[c] (Sup. 1897)

Rev. St. 1894, § 2697 (Rev. St. 1881, § 2533), provides that an order for sale of real estate by a guardian shall provide for reasonable notice of sale, but that, if the appraised value of the land does not exceed \$1,000, the court may order it sold at private sale without notice. *Held*, that where the court had jurisdiction, and an order for a private sale by a guardian of land appraised at \$3,600 did not provide for notice, and the sale was made without notice, and reported to and confirmed by the court, the sale was not void.—*Eliason v. Bronnenburg*, 147 Ind. 248, 46 N. E. 582.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 372, 373.

See, also, 21 Cyc. p. 136.

### § 103. — Confirmation.

[a] (Sup. 1861)

A ward cannot bring a complaint for a review of the proceedings had by his guardian for the sake of selling his real estate, for these proceedings are ex parte, and the ward was no party thereto, which the statute requires from one who would be complainant in such a case.—*Davidson v. Lindsay*, 16 Ind. 186.

[b] (Sup. 1862)

The proceedings upon a guardian's petition for the sale of real estate of his ward are ex parte in their character, and hence a suit will not lie by the ward to review a judgment therein.—*Williams v. Williams*, 18 Ind. 345.

[c] (Sup. 1873)

Though under Rev. St. 1843 a guardian, in making sale of the ward's realty, was not required to give notice thereof, he should have reported the sale to the court for confirmation before making a conveyance.—*Maxwell v. Campbell*, 45 Ind. 360.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 378-381, 391.

See, also, 21 Cyc. pp. 136-139.

### § 104. — Ratification and curing defects.

[a] (Sup. 1867)

The report of the sale of a ward's real estate was confirmed by the court, and at a subsequent term of court an application was made, on notice and motion, for an entry nunc pro

tunc of a formal order directing the sale of the land. *Held*, that it was not necessary that the affidavits upon which the motion was based should be filed before the motion was made, and that as the record failed to show that the additional bond, which the statute requires before a sale is ordered, was filed, an order of sale would have been irregular, and hence there was nothing in the prior proceedings authorizing the amendment asked.—*Makepeace v. Lukens*, 27 Ind. 435, 92 Am. Dec. 263.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. § 382.

See, also, 21 Cyc. p. 140.

### § 105. — Opening, vacating, or setting aside, and resale thereon.

[a] (Sup. 1880)

In an action to recover real property, a deed of the property by a commissioner appointed by the court to make it, on sale of the ward's property by the guardian on the latter's petition, is sufficient evidence that the sale was approved by the court.—*Edwards v. Powell*, 74 Ind. 294.

[b] (Sup. 1891)

If the wards permit an irregular sale of their land by their guardian to stand, persons holding adverse title to the land cannot attack it, as they are not injured by such irregularity.—*Meikel v. Borders*, 129 Ind. 529, 29 N. E. 29.

[c] (Sup. 1896)

Where a guardian, appointed by a court of superior jurisdiction having authority to appoint guardians and order the sale of real estate of minors, but without jurisdiction to make the particular appointment, sells lands of the ward, under an order of such court, to one who purchases in good faith, the purchaser will be protected in his title, if the guardian applies the proceeds properly.—*Decker v. Fessler*, 146 Ind. 16, 44 N. E. 657.

[d] (Sup. 1897)

Where a complaint charges a fraudulent conspiracy between the guardian and the purchaser at the guardian's sale, to cheat the ward out of her land by means of a pretended sale, it is indispensably necessary that it contain an averment that the purchaser at the guardian's sale never paid the purchase money for the land.—*Eliason v. Bronnenberg*, 46 N. E. 582, 147 Ind. 248.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 383-389.

See, also, 21 Cyc. pp. 141-144.

### § 106. — Operation and effect.

[a] (Sup. 1873)

Where a purchaser of real estate sold by a guardian under a valid order of sale has paid the purchase money and is in possession of the real estate, and the sale has been confirmed, he has an equitable title to the same, and is en-

titled to retain possession as against the wards.  
—*Maxwell v. Campbell*, 45 Ind. 360.

#### FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. § 390.

See, also, 21 Cyc. pp. 139, 140.

### § 107. — Collateral attack.

[a] (Sup. 1873)

Where the probate court entertained and granted a petition of a guardian to sell his ward's real estate, it must be presumed that it was shown to the court that the guardian was duly appointed and qualified.—*Worthington v. Dunkin*, 41 Ind. 515.

[b] (Sup. 1880)

On a collateral attack of a guardian's sale, it will be presumed that a petition for the sale was filed.—*Webster v. Bebinger*, 70 Ind. 9.

[c] (Sup. 1887)

However irregular the proceedings and orders of a probate court of general jurisdiction may be in relation to the sale and conveyance of real estate of wards, the sale cannot be questioned collaterally.—*Walker v. Hill*, 12 N. E. 387, 111 Ind. 223.

[d] (Sup. 1887)

A guardian's sale of his ward's realty cannot be collaterally attacked with success on the ground that the guardian, in procuring the order of the court therefor, did not give the additional bond required by statute, and that the proceeds thereof were never accounted for by him.—*Davidson v. Bates*, 111 Ind. 391, 12 N. E. 687; *Same v. Hutchins*, 112 Ind. 322, 13 N. E. 106.

[e] (Sup. 1891)

Where a guardian presents to the court a petition for an order to sell his wards' land, and the sale is ordered and approved by the court, it is valid as against collateral attack, notwithstanding certain irregularities by which the purchaser got the land for less than its appraised value.—*Meikel v. Borders*, 129 Ind. 529, 29 N. E. 29.

#### FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 392, 393.

See, also, 21 Cyc. p. 144.

### § 108. Rights and liabilities of purchasers.

[a] (Sup. 1863)

A guardian, being mother of her ward and having a dower interest in his real estate, applied for a sale of her ward's real estate, describing it as the entire title, without mention of her own interest. The order was made, and the sale completed accordingly, without any mention of her interest. *Held*, that she was estopped from setting it up against the title and interest which she had caused to be sold and conveyed.—*Wiseman v. Macy*, 20 Ind. 239, 83 Am. Dec. 316.

[b] (Sup. 1872)

If a guardian sell the real estate of his ward by order of the proper court, all the proceedings being formal and regular, and receives his own individual notes in payment, and fails to account to the proper court for the proceeds of the sale, the purchaser may be held accountable for the trust property, or for its proceeds, if sold by him to an innocent purchaser.—*Wallace v. Brown*, 41 Ind. 436.

[c] (Sup. 1873)

On trial of an action to recover land sold by a guardian, on the ground that the proceedings were void, plaintiff offered to prove that no sale was ever made; that the guardian's report of the sale and receipt of the purchase money was untrue; that the transactions set forth in the probate record were the result of an exchange between the guardian and the purchasers, the guardian taking the land received in exchange in his own name; and that no money was ever paid or agreed to be paid by the purchasers from said guardian. *Held*, that the evidence was inadmissible against defendant, who was a purchaser in good faith, and who had a right to rely on the record, unless a knowledge of its falsity was brought home to him.—*Worthington v. Dunkin*, 41 Ind. 515.

The failure of the appraisers to sign their appraisal was a defect which did not avoid a guardian's sale of his ward's land, as against purchasers in good faith, under Rev. St. 1843, p. 458, § 27.—*Id.*

[d] (Sup. 1878)

A purchaser, who knows that a vendor has made the sale of real estate as the guardian of one joint owner and the agent of another, has no right to presume that the payment will be applied on the amount due to the principal, and not on the amount due to the ward.—*Bevis v. Heflin*, 63 Ind. 129.

[e] (Sup. 1896)

Where a guardian who has received his appointment from a court having authority to make such appointment, but without jurisdiction to make the particular appointment, sells lands of his ward under an order of such court, the one who purchases and pays for such land, relying in good faith on such order, is to be protected in the title that he acquires thereby, if the guardian has properly applied the proceeds.—*Decker v. Fessler*, 44 N. E. 657, 146 Ind. 16.

#### FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 369, 395-398; 47 CENT. DIG. Trusts, § 273.

See, also, 21 Cyc. pp. 145-147.

### § 110. Liabilities on bonds for sale.

Estoppel of sureties, see PRINCIPAL AND SURETY, § 46.

## [a] (Sup. 1863)

Suit may be instituted on a special sale bond of a guardian, whenever it is broken, without first resorting to the original bond.—State ex rel. Mount v. Steele, 21 Ind. 207, 83 Am. Dec. 346.

## [b] (Sup. 1876)

An action can be maintained on a special bond given by a guardian for the sale of real estate before the general bond is exhausted or the sureties shown to be worthless.—Shook v. State ex rel. McCampbell, 53 Ind. 403.

An action may be maintained on a special guardian's bond for the sale of real estate without a previous demand for the money due.—Id.

## [c] (Sup. 1878)

Where the assets converted by a guardian are the proceeds of his ward's real estate, the guardian's liability arises on the bond given to secure such proceeds.—Lowry v. State ex rel. Hill, 64 Ind. 421.

## [d] (Sup. 1879)

A guardian's bond for the sale of the real estate of his ward, though not in terms conditioned for "the faithful payment, and accounting for, of all moneys arising from such sale according to law," as required by 2 Rev. St. 1876, pp. 595, 596, § 18, was good, as section 5 of the same statute gave it the same effect as if it had contained the proper condition.—Stevenson v. State ex rel. McDowell, 69 Ind. 257.

## [e] (Sup. 1881)

An action by a ward on the bond of his guardian, given on an application to sell real estate, is a waiver of irregularity in the sale, and the sureties cannot avail themselves of such irregularity to avoid liability on the bond.—Gray v. State ex rel. Mills, 78 Ind. 68, 41 Am. Rep. 545.

## [f] (Sup. 1881)

Where a guardian who has given an additional bond for the proceeds of land sold by him is in default, so that it is impossible to ascertain whether the money unaccounted for consisted of the proceeds of the land or not, the ward may recover, to the extent of the defalcation, from whichever set of bondsmen he may choose.—Yost v. State ex rel. Bouslog, 80 Ind. 350.

## FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 589, 637.

## § 111. Deed to purchaser.

## [a] (Sup. 1867)

A guardian's deed of the real estate of his ward, made under the order of the court on the guardian's petition for a sale of the land, has only the effect of a deed of quitclaim. The guardian cannot bind his ward by any covenants in the deed.—State ex rel. Chesser v. Clark, 28 Ind. 138.

## [b] (Sup. 1873)

Under Act 1847, p. 117, § 2, a guardian's deed on sale of his ward's real estate need contain only succinct statements of the order of the court directing the sale, or the order confirming the same, or the order directing the conveyance.—Worthington v. Dunkin, 41 Ind. 515.

## FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 180, 185.

See, also, 21 Cyc. p. 139.

## § 114. Proceeds.

## [a] (Sup. 1863)

The guardian, and not the judge or clerk of the court, is the proper custodian of the moneys arising from the sale of the ward's real estate.—State ex rel. Mount v. Steele, 21 Ind. 207, 83 Am. Dec. 346.

## [b] (Sup. 1882)

In an action to recover the purchase money of land of a ward, which it was averred had not been paid, but in lieu thereof certain indebtedness of the guardian to the defendant had been received and applied in its payment, an averment that, as agent for another party interested in the land and as the guardian of the ward, the defendant's proposition was accepted, which was not to apply the note of the guardian on the purchase money of the other party's interest, but to apply it on the purchase money of both interests, did not show that defendant paid the money on the ward's interest and therefore the paragraph was insufficient.—Hedin v. Bevis, 82 Ind. 388.

## FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. § 399.

See, also, 21 Cyc. p. 148.

## V. ACTIONS.

Answer of guardian ad litem as evidence against infants, see EQUITY, § 344.

By or against foreign guardians, see post, § 170.

Foreclosure of mortgage, see MORTGAGES, § 411.

Joint claim against administrator of decedent and guardian of minor, see EXECUTORS AND ADMINISTRATORS, § 250.

On guardians' bonds, see post, § 182.

Replevin by guardian, see REPLEVIN, §§ 8, 58.

Right of guardian of infant defendant to be present at trial, see TRIAL, § 38.

Set-off of claim against guardian individually in action by him as guardian, see SET-OFF AND COUNTERCLAIM, § 46.

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### § 117. Rights of action between guardian and ward.

#### [a] (Sup. 1874)

Where a husband and wife are both infants, a payment made to the husband by the guardian of the wife need not be tendered back before suit is brought by the wife to recover the same of the guardian.—*State ex rel. Wade v. Joest*, 46 Ind. 233; *State ex rel. Hutson v. Same*, Id. 235.

#### [b] (Sup. 1876)

In an action against a guardian, his surety, and the assignee of the judgment on the note and mortgage wrongfully taken by the guardian in his own instead of in the name of his ward for a decree against them vesting the title of the judgment in the ward, the fact that the guardian's offer to deliver to the plaintiff the note and mortgage if they would credit the amount of them on the guardian's defalcation was declined, did not have the effect of vesting the ownership of the property in the guardian as his individual property, nor authorize him to convert it to his own use, where the offer was not followed up by bringing the note and mortgage into court.—*Moon v. Martin*, 55 Ind. 218.

#### [c] (Sup. 1883)

The right of a ward who has attained his majority to maintain an action against his guardian for a wrongful conversion of money received during the guardianship is clear. The ward may sue on the bond in the name of the state if he elects, or may proceed against the guardian individually for breach of duty.—*Hays v. Walker*, 90 Ind. 105.

#### [d] (Sup. 1883)

In order to give a ward a right of action against his guardian for moneys received by the guardian, it was not necessary that there should be a settlement of the guardian with the proper court and a formal discharge of the guardian by that court, nor was it necessary that the guardian should disavow his trust.—*Jones v. Jones*, 91 Ind. 378.

#### [e] (Sup. 1886)

Money in the hands of a guardian, belonging to his ward, at the time of his death, may be recovered from his administrator and his bondsmen, where they have failed to pay over the same, by the newly appointed guardian, without demand.—*Buchanan v. State ex rel. Roberts*, 106 Ind. 251, 6 N. E. 614.

#### FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 407-410.

See, also, 21 Cyc. pp. 186-188.

### § 118. Rights of action by guardian or ward or both.

#### [a] (Sup. 1857)

Under 2 Rev. St. p. 27, § 4, providing that executors, administrators, or guardians of luna-

tics may sue, the guardian of a minor, though not named, is clearly within the meaning of the act.—*Shepherd v. Evans*, 9 Ind. 260.

The duty imposed upon guardians to collect all debts of their wards implies the right to sue to enforce such collection.—*Id.*

#### [b] (Sup. 1871)

A guardian may maintain an action against the executors of an estate, who hold property to which his wards are heirs, for a proper sum for the maintenance and education of his wards.—*Miller v. Duy*, 36 Ind. 521.

#### [c] (Sup. 1877)

The guardian of an infant defendant in partition proceedings is not authorized to maintain an action to review such proceedings.—*Bundy v. Hall*, 60 Ind. 177.

#### [d] (Sup. 1878)

Where a guardian sells real estate of the ward, taking in part payment his own individual note or obligation held against him by the purchaser, and fails to pay over the amount thereof in money, the ward may maintain an action against the purchaser for the purchase money or to set aside the sale.—*Bevis v. Heflin*, 63 Ind. 120.

#### [e] (Sup. 1879)

Except when suing on the bond of a former guardian, a guardian may sue in his own name to recover a debt due his infant ward.—*Potts v. State ex rel. Morgan*, 65 Ind. 273.

#### [f] (App. 1891)

Where a guardian converts the funds of his wards and dies, the succeeding guardian may sue the estate of the former guardian, and is not restricted to an action on the former guardian's bond.—*Harshman v. McBride*, 2 Ind. App. 382, 28 N. E. 564.

#### [g] (Sup. 1896)

Under Rev. St. 1894, § 267 (Rev. St. 1881, § 266), providing that a father may sue for the injury of a child, and a guardian for the injury of his ward, but when the action is by a guardian the damages shall inure to the benefit of the ward, a guardian may sue for injuries to his ward, though the father of the ward be living.—*Cleveland, C. & St. L. R. Co. v. Moneyhun*, 146 Ind. 147, 44 N. E. 1106, 34 L. R. A. 141.

#### [h] (Sup. 1898)

A guardian who is required to file the valuation of his ward's real estate, and of the annual rents and profits, and to give bond in four times the annual value of the rents and profits (Rev. St. 1894, § 2076; Rev. St. 1881, § 2515), and has the management of the ward's estate during minority (section 2682, Rev. St. 1894; section 2518, Rev. St. 1881), and has the duty to manage the estate for the best interest of the ward (section 2685, Rev. St. 1894; section 2521, Rev. St. 1881), can maintain suit in her own name to enjoin injury to the ward's real

estate in her possession; right of action in favor of infant not being limited to suit by next friend by section 256, Rev. St. 1894 (section 255, Rev. St. 1881), providing that, "when an infant shall have a right of action, such infant shall be entitled to bring suit thereon," and section 257, Rev. St. 1894 (section 256, Rev. St. 1881), providing that, before any process shall be issued in the name of an infant who is a sole plaintiff, a person shall consent to appear as the next friend of such infant.—*Kinsley v. Kinsley*, 49 N. E. 819, 150 Ind. 67.

[I] (App. 1904)

Under the statutes, a guardian has the right to enforce by suit the collection of debts due his ward.—*Bryson v. Collmer*, 71 N. E. 229, 33 Ind. App. 494.

[J] (Sup. 1907)

A guardian is not a trustee of an express trust within Burns' Ann. St. 1901, § 252, providing that a trustee of an express trust may sue without joining with him the person for whose benefit the action is prosecuted.—*Campbell v. Fichter*, 168 Ind. 645, 81 N. E. 661.

Under Burns' Ann. St. 1901, §§ 265, 267, 1208, 2707, providing for actions by guardians, and section 2684, authorizing the appointment of a guardian ad litem to defend the interests of an infant, and section 2685, prescribing the duties of guardians, when considered in connection with the general provision of the Code as to parties plaintiff, a guardian having no authority over his ward's property, except such as is conferred on him by statute, has no authority to maintain on behalf of his ward a suit to contest a will.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 411–418.  
See, also, 21 Cyc. pp. 188–192.

**§ 119. Rights of action against guardian or ward or both.**

[a] (Sup. 1858)

A suit against a guardian upon a contract touching his ward's estate is personal against him.—*Stevenson v. Bruce*, 10 Ind. 397.

[b] (App. 1893)

When a person has a legal and equitable claim against the estate of wards, whether infants or persons of unsound mind, he may present his claim by proper complaint or petition against such guardian in the probate court having jurisdiction of the estate of the wards and of the person of the guardian, and secure an order of such court for the payment of such amount out of the trust estate, as the court may, on the evidence, under the circumstances, see fit, in the exercise of a sound discretion to allow.—*Turner v. Flagg*, 33 N. E. 1104, 6 Ind. App. 563.

[c] (App. 1908)

Though it is the duty of a guardian to defend actions brought against his ward, and for that purpose he must appear in the case, all ac-

tions seeking to affect the title of the infant real estate must be brought directly against the infant, and process must be served upon him the same as if he were an adult, or the court obtains no jurisdiction.—*Harrison v. Western Const. Co.*, 41 Ind. App. 6, 83 N. 256.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 411–421; 5 CENT. DIG. Assumpsit, § 65.  
See, also, 21 Cyc. pp. 193, 194.

**§ 121. Defenses by guardian or ward.**

[a] (Sup. 1882)

That a female ward has married, and the marriage to a person of full age operates as a legal discharge of the guardianship, is no defense in an action against the guardian on an express contract for the support of the ward, although it is a defense to a common action for necessities furnished.—*Swihart v. Shaffer*, 87 Ind. 20.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. § 423.  
See, also, 21 Cyc. p. 195.

**§ 122. Set-off and counterclaim.**

[a] (Sup. 1873)

Where a guardian of minor children sued on his individual undertaking to pay for their board, in the absence of any agreement which the wards were to be kept at work can only set off against the claim the value of the services actually rendered.—*Lewis v. Edwards*, 44 Ind. 333.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. § 424.  
See, also, 21 Cyc. p. 195.

**§ 123. Jurisdiction.**

Exclusive or concurrent jurisdiction, see COURT, § 472.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 424–427.  
See, also, 21 Cyc. pp. 196, 197.

**§ 124. Venue.**

[a] (Sup. 1873)

A suit against a guardian of minor children on his individual undertaking to pay for their board and care may be brought in the county where he resides, although his appointment of guardian was made, and the children reside, in another county.—*Lewis v. Edwards*, 44 Ind. 333.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. § 425.  
See, also, 21 Cyc. p. 198.

**§ 125. Time to sue and limitations.**

Accrual of right of action by ward against guardian, see LIMITATION OF ACTIONS, §§ 672.

Application of general statutes of limitation to action against guardian for misfeasance or malfeasance, see **LIMITATION OF ACTIONS**, § 33.

Application of general statutes of limitation to action by ward against guardian to enforce constructive trust, see **LIMITATION OF ACTIONS**, § 39.

Concealment of cause of action as affecting limitations, see **LIMITATION OF ACTIONS**, § 104.

Nonresidence of ward as affecting limitations, see **LIMITATION OF ACTIONS**, § 87.

#### FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. Guard. & W. §§ 428, 429.

See, also, 21 Cyc. pp. 198-200.

#### § 126. Parties.

[a] (**Sup.** 1857)

Where a promissory note is made payable to "E, guardian of the estate of R.," upon its face E. is the real party in interest, and may sue in his own name; and the above words may be regarded as surplusage or as descriptive personæ.—*Shepherd v. Evans*, 9 Ind. 200.

[b] (**Sup.** 1857)

The general guardian, in a suit against minor heirs to foreclose a mortgage, need not be made a party. The infants alone are sufficient.—*Alexander v. Frary*, 9 Ind. 481.

[c] (**Sup.** 1881)

In an action by a county treasurer against a guardian to recover back taxes on property of the wards, it was not necessary to make the wards parties, though the property should be assessed in their names.—*Vogel v. Vogler*, 78 Ind. 353.

[d] (**Sup.** 1881)

A ward is not a proper party to a suit against his guardian by the treasurer of the county to recover unpaid taxes due by the ward.—*State ex rel. Ferguson v. Howard*, 80 Ind. 466.

[e] (**Sup.** 1882)

A ward is neither a necessary nor a proper party to an action against the guardian upon a claim due from him as guardian.—*Ray v. McGinnis*, 81 Ind. 451.

[f] (**Sup.** 1884)

A guardian, in behalf of his infant ward, may represent the ward in partition proceedings.—*Miller v. Smith*, 98 Ind. 226.

[g] (**Sup.** 1885)

Under R. S. 1881, §§ 255, 256, 287, when an infant has a cause of action for waste, suit must be brought in his own proper name by next friend, and not in the name of the guardian.—*Wilson v. Galey*, 103 Ind. 257, 2 N. E. 736.

[h] (**Sup.** 1889)

Under Rev. St. 1881, § 1194, which allows guardians to act for their wards in suits for partition, and section 2542, which allows them

to assent to a partition of their wards' lands, a guardian may bring suit in partition in his own name for the benefit of his ward.—*Bowen v. Swander*, 121 Ind. 164, 22 N. E. 725.

[i] (**App.** 1891)

Where a guardian converts the funds of his wards, his successor may maintain a suit therefor in his own name, under Rev. St. § 2521, subd. 5, making it the duty of the guardian to collect all debts due the ward.—*Harshman v. McBride*, 2 Ind. App. 382, 28 N. E. 564.

#### FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. Guard. & W. §§ 430-432, 434-437.

See, also, 21 Cyc. pp. 200-206.

#### § 128. Termination of guardianship pending action.

[a] (**App.** 1907)

An action to recover real estate belonging to a ward, upon the death of the ward, revives in favor of his heirs at law.—*Hurst v. Hawkins*, 39 Ind. App. 467, 79 N. E. 216, 80 N. E. 42.

#### FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. Guard. & W. § 438.

See, also, 21 Cyc. p. 206.

#### § 130. Pleading.

In suit against guardian to recover taxes, see **TAXATION**, § 592.

[a] (**Sup.** 1866)

In an action by a guardian against the maker of a note assigned by his ward, it is not necessary to allege that the infant disaffirmed the assignment before payment by the maker to the assignee.—*Briggs v. McCabe*, 27 Ind. 327, 80 Am. Dec. 503.

[b] (**Sup.** 1869)

A complaint against a guardian to recover for maintaining and providing for his ward, which does not contain any averment of a request or promise made by the defendant, or any allegation that he had failed to provide, within the means in his hands as guardian for the reasonable wants of his ward, is bad on demurrer for want of sufficient facts.—*Gwaltney v. Cannon*, 31 Ind. 227.

[c] (**Sup.** 1874)

A ward cannot maintain an action against her guardian for credits and assets in his hands alleged to belong to the ward, in the absence of any averment that they have been collected by the guardian or of negligence on his part, or some other allegation that would render the guardian legally responsible therefor.—*Sanders v. State ex rel. Bucher*, 49 Ind. 228.

[d] (**Sup.** 1877)

In an action to recover for work and labor performed for the defendant, the answer alleged that such services had been performed while the defendant was the guardian of the plaintiff; that the defendant had fully settled his

trust, received the receipt of his ward in full, and been discharged from his trust by the proper court on filing his final report; and that said report had been approved more than three years prior to the commencement of the action. *Held* that, for want of a direct averment that the matter in controversy had been included in such settlement, the answer is insufficient.—*Voiles v. Beard*, 58 Ind. 510.

[e] (Sup. 1881)

A complaint by a guardian is not defective because it does not show plaintiff's appointment.—*Favorite v. Slaughter*, 79 Ind. 562.

[f] (Sup. 1885)

A complaint by a relator as an heir of the decedent on the bond of a guardian for failure to pay over money to which the relator was entitled is not defective because it does not aver that the person referred to therein as the heir was the relator, where it fairly appeared that the relator and the person mentioned in the complaint were, in fact, one and the same person.—*Naugle v. State ex rel. Burton*, 101 Ind. 284.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 440-446.

See, also, 21 Cyc. pp. 200-211.

§ 131. Evidence.

Admissions as evidence, see EVIDENCE, §§ 222, 224.

Competency of witnesses to testify as to transactions with decedent, see WITNESSES, § 149. Resignation of guardian as affecting his competency as a witness in a suit against him, see WITNESSES, § 112.

Stipulations and agreed statements for purpose of trial, see TRIAL, § 35.

[a] (Sup. 1854)

Courts will presume strongly in favor of the ward, and against the guardian, if he has been delinquent or guilty of neglect.—*Jennings v. Kee*, 5 Ind. 257.

[b] (Sup. 1874)

In a suit against a guardian, by a party claiming to be an heir of a deceased ward, for money alleged to have belonged to the ward, where the guardian answered that he received the money by the terms of a will (made a part of the answer) bequeathing it, in case of the death of the ward to persons other than the plaintiff, the will, purporting to have been executed in another state, and the certificate of probate thereon, certified by the clerk of the court of common pleas of the county in which said suit was brought to have been filed in open court, and to be on file in his office, and to be a true copy of the will and of the certificate of probate thereon as made in said state, was admitted in evidence without objection. *Held*, that this showed that the money was held by the guardian under the terms of the will.—*State ex rel. Splain v. Joyce*, 48 Ind. 310.

[c] (Sup. 1883)

In all cases of delinquency and neglect courts will presume in favor of a ward against the guardian as strongly as the fact will warrant.—*State ex rel. Dunham v. Roach*, 91 Ind. 406.

[d] (Sup. 1885)

In an action by a guardian for an amount found due his ward on a settlement made with defendant at a certain date, and as to which an issue has been made, proof of such settlement and the matters which entered into it are admissible.—*Binford v. Miner*, 101 Ind. 1.

[e] (Sup. 1885)

That a sum of money in a guardian's hands was paid over to the ward is not established by the guardian's final report showing such sum, with a prayer for his discharge, and an order of the court approving his report and discharging him.—*Naugle v. State ex rel. Burton*, 101 Ind. 284.

[f] (Sup. 1886)

Where a guardian contracts or deals directly with his ward, he must show fair dealing on his part, as in other cases of fiduciary relationship; but no such burden is upon him in a suit to set aside his final settlement report for negligence or misconduct.—*Wainwright v. Smith*, 106 Ind. 239, 6 N. E. 333.

[g] (Sup. 1886)

As a general rule, the guardian should require the wife of a mortgagor to whom he loaned his ward's funds to join in executing a mortgage, and, if she does not, the burden of showing that the husband's interest in the land furnished ample security is upon the guardian.—*Slaughter v. Favorite*, 107 Ind. 291, 4 N. E. 83, 57 Am. Rep. 106.

[h] (App. 1891)

In an action against a guardian for the value of land belonging to his wards, alleged to have been sold for taxes because of his negligence in failing to pay the same, a special verdict found that the fair value of the land was \$350; that the lien thereon was \$250; that the defendant did not apply for any order to satisfy his wards' interest in the land, but that he endeavored unsuccessfully to obtain a purchase for it at more than the tax lien; and that there was no fraud or collusion between defendant and the purchaser at the tax sale. One of the owners gave defendant \$18, to be used in paying the taxes, if he could get enough to make up the balance, but he returned it. He at the time had enough money to pay them, and it does not appear that he could have raised enough.—*Held*, that judgment was improperly entered for plaintiffs.—*Wainwright v. Burroughs*, 1 Ind. App. 393, 27 N. E. 591.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 440-451.

See, also, 21 Cyc. pp. 212-216.

**§ 132. Trial.**

Construction and operation of findings of court, see TRIAL, § 404.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guard. & W. § 452.

See, also, 21 Cyc. p. 217.

**§ 133. Judgment.**

Conclusiveness, as against ward, of judgment against guardian, see JUDGMENT, § 692.

**[a] (Sup. 1848)**

In an action against a guardian as such, the judgment, if any against him is rendered, should be against him personally, and not to be made of the goods and estate of the wards in his hands.—Clark v. Casler, 1 Ind. 243, Smith, 150.

Judgment in an action against a guardian upon his individual undertaking to pay for supplies furnished to his ward should be against him personally.—Id.

**[b] (Sup. 1860)**

In a suit against a guardian by his ward for failure to report as required by law, the statute does not authorize a judgment for 10 per cent. on the amount of trust funds in his hands.—Ely v. Hawkins, 15 Ind. 230.

**[c] (Sup. 1862)**

In a widow's suit for partition of her husband's lands, service was made on the testamentary guardian of one of his minor children, who were the defendants. *Held*, that a rendition of judgment for want of an answer by this guardian, without proof, was error; that the guardian could have been compelled to answer, or otherwise could have been removed.—Richards v. Richards, 17 Ind. 636.

**[d] (Sup. 1876)**

Where a guardian wrongfully procures a judgment in his own name on a chose in action belonging to his ward, and the penalty of the guardian's bond has been exhausted, leaving an unsecured balance due the ward, after the guardian's insolvency, the ward may have a decree against such guardian, his surety, and the assignee of such judgment, who took the assignment with knowledge of the facts, vesting in such ward the title to the judgment.—Moon v. Martin, 55 Ind. 218.

**[e] (Sup. 1886)**

Unless there has been a demand and a refusal to pay, no penalty as for conversion can be recovered in an action by a ward, against the administrator of his guardian to recover money belonging to the ward in the hands of his guardian at the time of the latter's death.—Buchanan v. State ex rel. Roberts, 106 Ind. 251, 6 N. E. 614.

**[f] (Sup. 1895)**

Where a guardian sues for libel, and obtains a judgment, and pending an appeal the ward, having attained her majority, settles the

suit, and executes a satisfaction of the judgment, such satisfaction, to the amount expended by the guardian and the liabilities incurred by him in the suit, will be set aside if he has no funds belonging to the ward to pay the same.—Curran v. Abbott, 141 Ind. 492, 40 N. E. 1091, 50 Am. St. Rep. 337.

**[g] (App. 1900)**

A judgment that "plaintiff recover of and from defendant F., guardian of H., the sum of \$152, together with his costs and charges, \* \* \* with relief from valuation laws," shows on its face that it is a personal judgment against F.—Hall v. Ferguson, 57 N. E. 153, 24 Ind. App. 532.

**[h] (App. 1907)**

While it is not necessary to make the ward a party with his guardian, a judgment affecting the ward's title to real estate is properly rendered in favor of the ward.—Hurst v. Hawkins, 39 Ind. App. 467, 79 N. E. 216, 80 N. E. 42.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guard. & W. §§ 453-456.

See, also, 21 Cyc. pp. 217, 218.

**§ 134. Execution and enforcement of judgment.****[a] (Sup. 1881)**

Where a guardian shows that he has no funds belonging to his ward's estate, it is error to order him to pay a judgment rendered against him for clothing furnished the ward; and the fact that such guardian is the surety on the bond of his predecessor, who is insolvent and against whom he holds a judgment for funds of the estate converted by him, affords no reason for granting such order.—Stumph v. Gœpper, 76 Ind. 323.

**[b] (Sup. 1895)**

Where the guardian of a minor recovers a judgment for libel against the proprietor of a newspaper, and, after the minor attains her majority, she settles with the proprietor, and executes a release of the judgment, an ex parte order forbidding the issuing of an execution on the judgment is not binding on the guardian.—Curran v. Abbott, 141 Ind. 492, 40 N. E. 1091, 50 Am. St. Rep. 337.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guard. & W. § 457.

See, also, 21 Cyc. p. 218.

**§ 135. Appeal and error.**

Appellate jurisdiction as between particular courts, see COURTS, § 220 (11).

**[a] (Sup. 1861)**

Where a jury has declared that expenditures for the support of a ward from the principal of the ward's estate are proper, the supreme court will not disturb such finding, where it would not set aside a verdict in other

cases.—State *ex rel. Druliner v. Clark*, 16 Ind. 97, 102.

[b] (*Sup.* 1877)

An action to review a proceeding for partition of lands cannot be maintained by the guardian of an infant defendant.—*Bundy v. Hall*, 60 Ind. 177.

[c] (*Sup.* 1884)

A guardian may appeal in behalf of his ward from a decision in partition proceedings.—*Miller v. Smith*, 98 Ind. 226.

[d] (*App.* 1907)

Service of notice of appeal on a guardian in his official capacity is not service upon such guardian in his personal capacity.—*Hurst v. Hawkins*, 39 Ind. App. 467, 79 N. E. 216, 80 N. E. 42.

#### FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. *Guard. & W.* §§ 458, 459; 38 CENT. DIG. *Partit.* § 305.

See, also, 21 Cyc. p. 220.

### VI. ACCOUNTING AND SETTLEMENT.

Accounting and default necessary to liability of sureties on bond, see *post*, § 179.

By guardian or committee of insane person, see *INSANE PERSONS*, § 42.

Failure to account as contempt, see *CONTEMPT*, § 10.

Right to trial by jury on exceptions to guardian's report, see *JURY*, § 19.

Sales of property of infants under statute or order of court, see *INFANTS*, §§ 35-41.

Subrogation of ward to rights of creditor of guardian on payment of debt from property of ward, see *SUBROGATION*, § 25.

#### § 137. Duty to account in general.

[a] (*Sup.* 1881)

A statutory requirement that a guardian shall render a biennial account under a penalty of 10 per cent. damages is reasonable, and should be strictly enforced against the guardian.—*Eiceman v. State ex rel. Leonard*, 75 Ind. 46.

[b] (*App.* 1891)

Where it was alleged that the guardian had received rent from the ward's realty, and had occupied it, without rendering any account therefor, it was a sufficient answer that the guardian was then the husband of the ward, that they had lived together on such property during the alleged occupancy, and that the only money received as rent therefor was used by them, with the wife's consent, for domestic purposes.—State *ex rel. Haines v. Parrish*, 1 Ind. App. 441, 27 N. E. 652.

The right of an infant ward to money held in trust for her by her husband, as guardian, is not affected by their subsequent divorce.—*Id.*

[c] (*Sup.* 1896)

By the express provisions of Rev. St. 1881, § 2521, when a ward arrives at majority, the

guardian must fully account and pay over to the estate remaining in his hands.—*Curran Abbott*, 40 N. E. 1091, 141 Ind. 492, 50 Am. St. Rep. 337.

[d] (*App.* 1905)

A guardian is bound to make full disclosure to the court of his transactions, and the law requires of him the exercise of the utmost good faith.—State *ex rel. Millice v. Peterse*, 36 Ind. App. 269, 75 N. E. 602.

[e] (*App.* 1907)

Guardianship is ended by the death of the ward, and it then becomes the duty of the guardian to account for and pay over to the proper person all of the estate of the ward remaining in his hands, unless the ward's personal estate does not exceed \$500, in which case the guardian may settle the estate himself.—*Hurst v. Hawkins*, 39 Ind. App. 467, 79 N. E. 216, 80 N. E. 42.

[f] (*App.* 1908)

Under the express provisions of Burns' Ann. St. 1901, § 2685, subd. 3, if a guardian fails to render an account of his trust every two years, he is liable to a penalty of 10 per cent. of the entire estate, and to a forfeiture of allowance for services.—*Alcon v. Koons*, 4 Ind. App. 537, 82 N. E. 92, 84 N. E. 1104.

The purpose of Burns' Ann. St. 1901, § 2685, subd. 3, requiring guardians to account every two years, was to obtain in permanent and reliable form from time to time statements of the condition of estates for the information of the court and the protection of the ward.—*Id.*

#### FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. *Guard. & W.* §§ 462, 464, 469, 473, 475.

See, also, 21 Cyc. pp. 150-152.

#### § 138. Who entitled to require accounting.

[a] (*Sup.* 1828)

Though, in general, a ward must be of age before he can require his guardian to account, yet in chancery, he may during minority compel an accounting for cause.—*Peck v. Braman*, 2 Blackf. 141.

#### FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. *Guard. & W.* § 465.

See, also, 21 Cyc. p. 153.

#### § 139. Who liable.

[a] (*Sup.* 1828)

Though as a general rule a ward cannot compel an accounting by his guardian until after he becomes of age, yet, where the guardianship terminates by the death of the guardian before the ward reaches his majority, he may in chancery compel an accounting by the personal representatives of the guardian.—*Peck v. Braman*, 1 Blackf. 544.

**[b] (Sup. 1837)**

An infant has the right to compel any person who enters upon his lands and receives the proceeds thereof to account for the same in a court of chancery as his guardian.—*Grimes v. Wilson*, 4 Blackf. 331.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guard. & W. §§ 466-468.

See, also, 21 Cyc. p. 152; note, 8 Am. St. Rep. 684.

**§ 142. Release from liability.**

Parol evidence to vary receipt to guardian, see EVIDENCE, § 408.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guard. & W. § 463.

**§ 144. Jurisdiction of courts.**

**[a] (Sup. 1828)**

The guardianship of minors and the adjustment of their accounts is within the jurisdiction of a court of equity.—*Peck v. Braman*, 2 Blackf. 141.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guard. & W. §§ 477-481, 488.

See, also, 21 Cyc. pp. 155-158.

**§ 145. Proceedings for accounting.**

**[a] (Sup. 1874)**

On a failure of a guardian to comply with an order issued without notice to him, and requiring him to pay a debt claimed to be due from him and his ward, a citation to him to appear instantan and render an account of his proceedings in the guardianship is illegal.—*Martin v. Beasley*, 49 Ind. 280.

**[b] (App. 1908)**

A guardian filing a final report and seeking to be discharged is regarded as the plaintiff in the accounting proceeding.—*Alcon v. Koons*, 42 Ind. App. 537, 82 N. E. 92, 84 N. E. 1104.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guard. & W. §§ 482-487, 527, 528.

**§ 146. Actions for accounting.**

Admissions as evidence, see EVIDENCE, § 222.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guard. & W. §§ 489-495.

See, also, 21 Cyc. pp. 155-169.

**§ 147. Charges.**

Executor and guardian charging himself as guardian and crediting as executor, see EXECUTORS AND ADMINISTRATORS, § 481.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guard. & W. § 496.

See, also, 21 Cyc. p. 172.

**§ 149. Compensation.**

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guard. & W. §§ 498-507.

See, also, 21 Cyc. pp. 173-176.

**§ 150. — In general.**

**[a] (Sup. 1858)**

A guardian's claim for services need not show that he has not used the ward's money in his private business.—*Nettleton, Ex parte*, 10 Ind. 352.

**[b] (App. 1891)**

Under Rev. St. 1881, § 2521, which provides that a guardian shall receive no compensation for his services if he fails to render an account of his receipts and expenditures at least once in two years, a guardian who has failed to render such account for nearly three years after his appointment can recover nothing for his services, although owing to the fact that he was the husband of the ward, he might have been under no obligation to render such account.—*State ex rel. Haines v. Parrish*, 1 Ind. App. 441, 27 N. E. 652.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guard. & W. §§ 498-500, 502, 504-507.

See, also, 21 Cyc. pp. 173-176.

**§ 153. Form and requisites of account.**

**[a] (Sup. 1882)**

A guardian of two or more minors should file separate accounts for each ward.—*Wood v. Black*, 84 Ind. 279.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Guard. & W. § 508.

See, also, 21 Cyc. pp. 154, 155.

**§ 155. Objections and exceptions.**

Review of exceptions to report as dependent on bill of exceptions, see APPEAL AND ERROR, § 544.

**[a] (Sup. 1880)**

An exception to a guardian's report allowing a stepfather for boarding and clothing the ward is bad on demurrer, where it avers that a person named is the ward's stepfather without also averring that he was the stepfather when he furnished the board and clothing.—*Glidewell v. Snyder*, 72 Ind. 528.

An exception to a guardian's report charged that 6 per cent. interest only had been accounted for, and that 10 per cent. should be charged. There was no averment that the guardian received, or by proper diligence could have obtained, more than the sum with which he had charged himself, nor that he had used the trust funds in his own business, nor that there was any other fact tending to show that he should be held to account for more than the lawful rate of interest. *Held*, that the exception presented a question of law, and not of fact, and was not the subject of demurrer.—*Id.*

[b] (App. 1900)

Where the plaintiff objected to the final report of a guardian because a judgment in his favor against such guardian for goods furnished the ward had not been paid, and the plaintiff's receipts showed that he had received all that he alleged was due him in his complaint, except 11 cents, an order overruling his exceptions was sustained by the evidence.—Hall v. Ferguson, 57 N. E. 153, 24 Ind. App. 532.

Where the plaintiff in a prior suit in the superior court against a guardian and his bondsmen, for goods furnished the ward at the request of the guardian, finally agreed to a judgment against the guardian, and afterwards filed exceptions to his final report because the judgment had not been paid, such exceptions were properly overruled, since the judgment was a personal one against the guardian.—Id.

[c] (App. 1902)

An administrator of a person under guardianship at the time of his death may file exceptions to the guardian's final report if the ward's assets are not properly accounted for by the guardian.—Peterson v. Erwin, 62 N. E. 719, 28 Ind. App. 330.

[d] (App. 1909)

The finding, on hearing of exceptions to the final report and account of a guardian calling in question two items of credit only, that the services covered by those items were of the reasonable value of a certain amount is sufficient for a judgment; all other items in the account standing, as such finding is to be read in connection with the account.—In re Kitchen, 89 N. E. 375.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 470, 510.

See, also, 21 Cyc. p. 162.

### § 157. Evidence.

[a] (Sup. 1891)

In a suit on a guardian's bond, the burden is on the relators to show a breach of its conditions; but, on questions arising on exceptions to the guardian's report or in any other way in the matter of the guardianship itself, the burden is on the guardian.—State ex rel. Wiseman v. Wheeler, 26 N. E. 552, 1008, 127 Ind. 451.

[b] (App. 1908)

When a guardian files a report to which exceptions are taken, the burden is on him to establish facts entitling him to a discharge.—Alcon v. Koons, 42 Ind. App. 537, 82 N. E. 92, 84 N. E. 1104.

[c] (App. 1909)

On the hearing of exceptions to the final report and account of a guardian, calling in question items of credit, he has the burden of proof, so that unless the facts established show affirmatively that he is entitled to more than

the court allows him, he cannot complain.—In re Kitchen, 89 N. E. 375.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 511–513.

See, also, 21 Cyc. pp. 163, 164.

### § 158. Hearing or reference.

[a] (App. 1908)

On a trial of exceptions to a guardian's report, it is proper practice, on request, for the court to specially find the facts, and to state conclusions of law thereon.—Alcon v. Koons, 42 Ind. App. 537, 82 N. E. 92, 84 N. E. 1104.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 514, 515, 521.

See, also, 21 Cyc. pp. 164, 166.

### § 159. Order or decree.

[a] (Sup. 1852)

An order given to a guardian by the probate court pursuant to Rev. St. p. 610, § 96, in relation to the management, investment, and disposition of the estate and effects in his hands, cannot be impeached collaterally, except for fraud.—Sherry v. Sansberry, 3 Ind. 320.

[b] (Sup. 1877)

A guardian who, pursuant to an order of the court, and without exception thereto, on making a report of his ward's estate intended to be final, makes a new report charging himself with an amount greater than that charged in the original, is precluded from subsequently objecting to the order.—Stumph v. Guardian ship of Pfeiffer, 58 Ind. 472.

[c] (Sup. 1886)

The approval of the final report of a guardian is an adjudication of all matters involved in the proper accounting by the guardian of the money with which he is chargeable, but is not an adjudication of the subject of his negligence in the management of the estate, unless that subject is embraced in the report.—Wainwright v. Smith, 106 Ind. 239, 6 N. E. 333.

[d] (Sup. 1886)

If the ultimate judgment upon the final report of a guardian is right, there can be no reversal, although one of the conclusions of law may be erroneous.—Slaughter v. Favorite, 107 Ind. 291, 4 N. E. 880, 57 Am. Rep. 106.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 516–520.

See, also, 21 Cyc. p. 165.

### § 160. Opening or vacating.

Action to open or set aside, see post, § 165.

[a] (Sup. 1881)

In a guardian's account, it appeared that he had turned over to his successor a note of an insolvent secured only by a junior mortgage. Held, that there was sufficient prima facie

evidence to set aside the account.—*Favorite v. Slaughter*, 79 Ind. 562.

[b] (Sup. 1886)

If a guardian in his final report conceals from the court that the maker of a note held by him is insolvent, or makes any false statement, the report will be set aside, and the settlement based on it annulled.—*Slaughter v. Favorite*, 107 Ind. 291, 4 N. E. 880, 37 Am. Rep. 106.

[c] (Sup. 1891)

The approval of the final settlement and discharge of the administrator of a deceased infant precludes the bringing of an action against the infant's guardian who has accounted to the administrator and been discharged, either on his bond, or to set aside his report.—*Horton v. Hastings*, 128 Ind. 103, 27 N. E. 338.

[d] (Sup. 1891)

Under Rev. St. 1881, § 2403, which provides that final settlements of estates that affect a party adversely may be set aside, and section 398, which provides that the court shall disregard any error which does not affect the substantial rights of the adverse party, and no judgment can be reversed by reason of such errors, a final report and settlement of a guardian will not be set aside on the ground that the guardian failed to make an inventory of plaintiff's property in proper form, and to file reports at the time they should have been filed, where he honestly discharged his duties, accounted for all moneys and property in his hands belonging to his ward, and with his final report filed receipts in full signed by the ward after becoming of age.—*La Follette v. Higgins*, 129 Ind. 412, 28 N. E. 768.

[e] (App. 1893)

Where a guardian, in his report, charges the ward with board, and fails to inform the court that he has taken the ward to live with him as a member of the family, and that there is no agreement to pay for board, such concealment is ground for suit by the ward to set the guardian's settlement aside.—*Doan v. Dow*, 8 Ind. App. 324, 35 N. E. 709.

The fact that a guardian loaned his ward's money at 10 per cent., and accounted for 6 per cent. only, and failed to account for moneys received for the ward, is ground for setting aside his final settlement.—*Id.*

[f] (App. 1894)

Upon the final report of a guardian all previous reports are subject to review and correction.—*Duckworth v. Kirby*, 10 Ind. App. 139, 37 N. E. 729.

[g] (App. 1905)

A complaint by a ward against her ex-guardian and his bondsmen, filed within three years after settlement of the guardian's final account, alleged that the guardian had in his hands \$660.38 when he filed his report in 1892; that at that time he claimed that plaintiff's mother had overdrawn her account with him as

her agent in the sum of \$200, which sum he appropriated to his own use from the money in his hands belonging to plaintiff, and received a credit therefor in his 1892 report; that his final settlement was made on the basis of \$460.-38 due to plaintiff on May 19, 1892, instead of \$660.38, and that he had never accounted for the difference. *Held* that, under Burns' Ann. St. 1901, § 2685, cl. 4, requiring every guardian at the expiration of his trust fully to account for and pay over to the proper person all of the estate of his ward remaining in his hands, the complaint stated facts justifying the vacation of the final settlement.—*State ex rel. Millice v. Petersen*, 75 N. E. 602, 36 Ind. App. 269.

A direct attack on a guardian's final account for fraud or mistake of fact may be made either on the final settlement of the guardian or within three years after such settlement has been acted on.—*Id.*

The trust created by guardianship is in fieri until final settlement is made and the guardian discharged, and his reports are under the control of and may be set aside, corrected, or modified by the court to which he reports.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 522, 529, 530.

See, also, 21 Cyc. pp. 181-185.

§ 161. Review.

[a] (Sup. 1879)

An appeal lies only from such settlement of a guardian as fully discharges him from all the duties of his trust.—*Angevine v. Ward*, 66 Ind. 460.

[b] (Sup. 1883)

Until a guardian has finally settled and been discharged, an appeal will not lie from an order of the court concerning the settlement of the guardianship.—*Pfeiffer v. Crane*, 89 Ind. 485.

[c] (App. 1902)

Exceptions to the final report of a guardian bring up for review all his previous reports.—*Peterson v. Erwin*, 62 N. E. 719, 28 Ind. App. 330.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 523-526.

See, also, 21 Cyc. pp. 166, 167.

§ 163. Operation and effect.

Conclusiveness of adjudication as against sureties on bond, see post, § 180.

Effect on liability of sureties on bond, see post, § 176.

[a] (Sup. 1849)

The account of a guardian settled with the probate court after his removal, though ex

parte, is to be considered as prima facie correct.—*State ex rel. Shannon v. Strange*, 1 Ind. 538, Smith, 367.

[b] (Sup. 1874)

The final settlement of a guardian made in the proper court, unless revoked, reopened, or appealed from, is conclusive upon the parties. It cannot be attacked collaterally, in a suit by the ward on the guardian's bond, for the allowance to a third person of an unjust and fraudulent claim in such settlement.—*Holland v. State ex rel. Fenton*, 48 Ind. 391.

[c] (Sup. 1878)

The reports of a guardian may be collaterally attacked.—*Cogswell v. State ex rel. Albert*, 65 Ind. 1.

[d] (Sup. 1880)

A guardian's report, which has been approved by the court, is deemed prima facie correct; it being presumed that the several items were examined and approved by the court.—*Glidewell v. Snyder*, 72 Ind. 528.

[e] (Sup. 1881)

Where a decedent made his final settlement as a guardian and reported it to the proper court, and it was approved, and he was finally discharged by the court, a claim embraced therein was finally adjudicated in that proceeding, and a collateral suit cannot be maintained to recover the same thing.—*Candy v. Hanmore*, 76 Ind. 125.

Ex parte orders and partial reports in relation to the duties of guardians, though only prima facie correct and subject to revision at any time before final settlement, cannot be collaterally attacked.—Id.

[f] (Sup. 1884)

Unapproved guardian accounts conclude no one.—*State ex rel. Dunham v. Roche*, 94 Ind. 372.

[g] (Sup. 1885)

The discharge of a guardian, without requiring him first to pay over what his report showed was in his hands, does not amount to an adjudication that he had paid it over.—*Naugle v. State ex rel. Burton*, 101 Ind. 284.

[h] (Sup. 1887)

The approval of a guardian's final report and settlement by the circuit court is such an adjudication of all matters as were, or should have been, brought into the account and report, as precludes all collateral inquiry into its correctness by parties interested so long as the judgment remains in force.—*Castetter v. State ex rel. Bradburn*, 112 Ind. 445, 14 N. E. 388.

[i] (Sup. 1894)

The final report of an outgoing guardian, resigning his trust during the period of guardianship, and the approval of such report, followed by his discharge by the court, does not constitute a "final settlement."—*State ex rel. Coleman v. Peckham*, 136 Ind. 198, 36 N. E. 28.

[j] (Sup. 1894)

The final report and discharge of a guardian is not a bar to an action against him by wards to enforce a constructive trust as to property purchased by him, where he was not required to, and did not, report concerning that transaction.—*Taylor v. Calvert*, 138 Ind. 67, 37 N. E. 100.

[k] (Sup. 1897)

A partial settlement of a guardian was approved by the court cannot be attacked collaterally, but is binding as to all matters properly embraced therein and adjudicated until aside, corrected or modified by some direct proceeding brought for the purpose.—*State ex Little v. Parsons*, 47 N. E. 17, 147 Ind. 62 Am. St. Rep. 430.

[l] (App. 1902)

Where a guardian, while his ward was still under age, petitioned that all the money belonging to the ward's estate be turned over to him for the purpose of boarding, clothing, and schooling the ward, and the court, without having the ward before it, and without notice to him, and without any prayer for discharge in the petition, entered an order accepting the guardian's report and discharging him, the ward was not bound thereby, and might, upon attaining his majority, demand a settlement notwithstanding such order of discharge.—*State ex rel. Webb v. Stockwell*, 63 N. E. 321, 28 Ind. App. 530.

[m] (Sup. 1904)

The settlement of the accounts and discharge of a guardian do not create an estoppel against the surety on his bond, so as to preclude him from enforcing a claim under an indemnifying mortgage given by the guardian, when the surety in fact became liable for and paid a sum as such.—*Howe v. White*, 60 N. E. 162 Ind. 74.

[n] (App. 1905)

An order settling a guardian's final account and discharging him, while impervious to collateral attack as to all matters included in the report, does not constitute an adjudication as to any matter not included in the final settlement.—*State ex rel. Millice v. Petersen*, N. E. 602, 36 Ind. App. 269.

[o] (App. 1908)

Where a guardian makes a full disclosure of his ward's estate to the court and has executed the court's order with reference thereto, the guardian is not liable.—*Alcon v. Koe*, 42 Ind. App. 537, 82 N. E. 92, 84 N. E. 111.

FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. Guard. & W. §§ 474, 540-544.

See, also, 21 Cyc. pp. 178, 179.

§ 164. Private accounting and settlement.

[a] (Sup. 1847)

An orphan female ward, 9 years old, domiciled in Ohio, where the age of majority was

was brought into this state, where such age was 21, by B., who was here appointed her guardian. At the age of 18 the ward chose this state as her permanent home, having resided here continuously since her removal from Ohio. B., after his ward became domiciled here and before she was 21, was instrumental in the sale of her real estate for her in Ohio, the proceeds of which he received and brought into this state. *Held*, that he was chargeable as guardian for said proceeds, and that his payment of them to his ward before she was 21 would not excuse him from accounting here for the same to the proper authority.—*Hiestand v. Kuns*, 8 Blackf. 345, 46 Am. Dec. 481.

[b] (Sup. 1877)

An infant married to a man of full age is bound by a settlement made by him with her guardian by her consent and direction.—*Haines v. State ex rel. Shope*, 60 Ind. 41.

[c] (Sup. 1890)

A guardian who makes an informal settlement, and obtains a release from his ward, assumes the burden of making it clearly appear that he fully and fairly disclosed the condition of the ward's estate at the time of the settlement, and that he paid over the amount found due, either in money or in such securities as had been taken in pursuance of the order of the court or in the exercise of such diligence and prudence as men display in the conduct of their own affairs. The burden rests upon the guardian to show affirmatively that he exercised the required degree of care in taking the securities which he turned over to his ward, or that they were good beyond peradventure and that they will be collectible when they fall due.—*Line v. Lawder*, 23 N. E. 758, 122 Ind. 548.

A settlement between a guardian and his ward, made out of court, and without turning over to the ward the money, property, or securities which actually constituted the trust estate, is not such a settlement as will stand in a court of equity when seasonably assailed.—*Id.*

Where adequate care is observed by a guardian and the condition of the estate, and the character of the investments of the trust funds are truthfully reported to the court, a guardian may relieve himself and his sureties by turning over the estate to his ward who has attained his majority in the condition in which it actually exists at the time a settlement is made. Where a settlement is thus made, and it afterwards turns out that securities so taken and turned over were worthless, in order to justify cancellation of the settlement, it must appear that there was negligence and bad faith on the part of the guardian.—*Id.*

In a proceeding to set aside the final settlement report of a guardian, when it appears that the guardian obtained a receipt in full and release from his ward by a representation that certain securities which he turned over were solvent and constituted the balance of her estate, when in fact the securities were worth-

less notes, which had been taken by the guardian in his own personal transactions, the receipt and release will not be a bar to opening up the final settlement.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 471, 545-555.

See, also, 21 Cyc. pp. 169-172.

### § 165. Actions to open or set aside settlement.

Accrual of right of action, see LIMITATION OF ACTIONS, § 82.

Joinder of causes, see ACTION, §§ 45, 46.

[a] (Sup. 1874)

The settlement of a guardian cannot be set aside or opened up except by a direct proceeding.—*Barnes v. Bartlett*, 47 Ind. 98.

[b] (Sup. 1881)

The three-year limitation prescribed by 2 Rev. St. p. 537, § 116, in actions to set aside the final settlement of an executor or an administrator, applies to actions to set aside the final settlement of a guardian.—*Briscoe v. Johnson*, 73 Ind. 573.

[c] (Sup. 1886)

A complaint to set aside the final settlement report of guardian, averring, among other things, that money out of the ward's estate was improperly paid by him upon an order of court obtained by misrepresenting the facts, is sufficient.—*Wainwright v. Smith*, 106 Ind. 239, 6 N. E. 333.

[d] (Sup. 1889)

A complaint by wards to set aside a settlement by a guardian, charging him with conspiring with another to defraud plaintiffs, alleging that the guardian falsely represented to the court, for the purpose of defrauding plaintiffs, that they had no homes, and, unless their funds were used to pay the rent of a house occupied by their father, as tenant for said guardian's confederate, they would be without a home, and dependent on charity, upon which the court ordered the rent paid out of the trust fund, states a good cause of action.—*Wainwright v. Smith*, 117 Ind. 414, 20 N. E. 297.

Such a complaint is supported by findings that defendant drew the application referred to, knowing it to be false, and that said guardian swore to it, and presented it to the court, and obtained the order, acting upon which he paid the amount of the rent out of plaintiffs' estate, though the fact of the conspiracy between the parties is not expressly found.—*Id.*

[e] (Sup. 1890)

In a proceeding to set aside a final settlement of a guardian, it appeared that the guardian obtained a receipt in full and release from his ward by representing that certain securities which he turned over were solvent and constituted the balance of her estate, when in

fact they were worthless notes which had been taken by him in his own personal transactions. *Held*, that in such case, as law and good conscience required the guardian to withhold the receipt and release, and not obtain his discharge as guardian until the money due his ward had been paid over, he would not be heard to say that he did not agree to do so.—*Line v. Lawder*, 122 Ind. 548, 23 N. E. 758.

Where a guardian obtains a receipt in full and release on representing that certain securities, which he turned over, were solvent and constituted the balance of her estate, when in fact they were worthless notes which had been taken by him in his own personal transactions, it is not necessary that the notes should be tendered back before application to set aside the settlement is made, but it is sufficient if the ward offers to return them at the hearing.—*Id.*

[f] (Sup. 1891)

In the absence of a special statute providing for setting aside the final reports of guardians, such actions must be brought within the time limited by Rev. St. 1881, § 2403, relating to the settlement of decedents' estates, and providing that final settlements may be set aside within three years, and that persons under disability may sue three years after removal of their disability.—*Horton v. Hastings*, 128 Ind. 103, 27 N. E. 338.

[g] (App. 1893)

Though a ward must take notice of the final report of his guardian, he is not limited to remedy by appeal for the guardian's failure to account for moneys received, but may, if in proper time, sue to set the final settlement aside.—*Doan v. Dow*, 8 Ind. App. 324, 35 N. E. 709.

[h] (Sup. 1894)

The sureties on a guardian's bond may be made parties in an action by the ward against the guardian to set aside an approval of his account rendered at the time of his resignation.—*State ex rel. Coleman v. Peckham*, 136 Ind. 198, 36 N. E. 28.

[i] (Sup. 1897)

A guardian's final settlement made by him with the ward and approved by the court after the ward becomes twenty-one years old or, if a female, after she marries a man of that age, cannot be set aside, modified, or corrected after the expiration of three years from the date of its approval, nor can it be set aside in an action brought within the three years except for fraud or mistake.—*State ex rel. Little v. Parsons*, 47 N. E. 17, 147 Ind. 579, 62 Am. St. Rep. 430.

The final report of a guardian resigning during the period of guardianship is not, though approved by the court, a final settlement, within the limitation of actions to set aside final settlements to three years after the ward is relieved of disability.—*Id.*

[j] (Sup. 1905)

A claim filed by a ward against her mer guardian's estate, for money had and received, is not in the nature of a suit to set aside the guardian's final settlement, nor upon the guardianship bond.—*Roberts v. Smith*, 165 Ind. 414, 74 N. E. 804.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 537.

See, also, 21 Cyc. pp. 181-185.

## VII. FOREIGN AND ANCILLARY GUARDIANSHIP.

### § 166. Foreign appointment.

[a] (Sup. 1886)

In habeas corpus for the custody of a minor, it appeared that the petitioner was appointed guardian in Missouri, where he resided at the commencement of the proceedings, where the property of the ward was situated, that the ward, 17 years old, though provided with a good home and educational advantages by his guardian, ran away to his sister in Indiana, who was only 22 years of age, and otherwise unfit to have the custody of her brother. The Missouri statute provides that a guardian shall have the control of his ward's person, and charge of his support. *Held*, that petitioner entitled to the custody and control of the ward.—*Grimes v. Butsch*, 41 N. E. 328, 142 Ind.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 559, 560, 567.

See, also, 21 Cyc. pp. 61, 263.

### § 168. Custody and disposition of property.

[a] (Sup. 1859)

Though the power of a guardian is limited to the state in which he receives his appointment, yet he is competent to receive the property or custody of the ward when placed in his hands by such court to be taken to the state where both belong, but such guardian, to entitle him to receive the property or the custody of the ward, must make proof of his guardianship.—*Warren v. Hofer*, 13 Ind. 167.

[b] (Sup. 1868)

Rev. St. 1843, c. 35, § 107, authorizing the court having jurisdiction to make such order respecting the delivery and payment of property and moneys to the nonresident guardian of nonresident wards as to the court may seem just and right, was but declaratory of what the law was in that respect before its enactment.—*Earl v. Dresser*, 30 Ind. 11, 95 Am. Dec. 66.

The question of the exercise of the power to make an order respecting the delivery and payment of money to nonresident guardians of nonresident wards is addressed to the sound judicial discretion of the court, to be determined

upon principles of comity, equity, and justice; and where it appears for the best interest of the ward, and it does not appear that any principle of public policy will be violated, or the legal rights of any of our citizens injured or impaired, the court should grant the order.—Id.

Letters of guardianship granted by the courts of one state do not operate to give the guardian a strict right to control assets of the ward situated within another state.—Id.

It is proper to direct a guardian appointed for a nonresident to pay to the father of the ward, who was appointed guardian of such ward's person and estate in a foreign state, funds belonging to such ward, where it appears that no rights of any of the citizens of this state would be injured by the transmission of the fund to the foreign guardian.—Id.

[c] (Sup. 1877)

Under Rev. St. 1876, p. 593, the circuit court has power to make an order requiring a domestic guardian who has funds in his hands belonging to nonresident wards to pay over such funds to a foreign guardian, when in the exercise of a sound discretion such an order appears to be for the best interests of the wards.—*Marts v. Brown*, 56 Ind. 386.

In an action by a foreign guardian of nonresident wards, to require the resident guardian to pay over funds of the wards held by him, an answer charging the unfitness of the persons with whom the wards are residing to have charge of them is insufficient.—Id.

A foreign guardian of nonresident wards may sustain a petition to the circuit court having jurisdiction of a resident guardian holding funds of such wards for an order directing the latter to pay over his funds to the petitioner.—Id.

#### FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 561-566.

See, also, 21 Cyc. pp. 265-268; note, 95 Am. Dec. 666.

#### § 170. Actions by foreign guardians.

[a] (Sup. 1876)

Where a foreign guardian sues to recover personal property of his ward situate in Indiana, the fact that the complaint does not show that the guardian has complied with the provisions of Act May 3, 1869 (2 Rev. St. 1876, p. 593), in regard to the filing of an authenticated copy of his appointment, cannot render the complaint bad on demurrer assigning as cause the want of sufficient facts.—*Shook v. State ex rel. McCampbell*, 53 Ind. 403.

#### FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 570-573.

See, also, 21 Cyc. p. 269.

#### VIII. LIABILITIES ON GUARDIANSHIP BONDS.

Action to set aside fraudulent conveyance by surety, see FRAUDULENT CONVEYANCES, § 259.

Appropriations of payments on liabilities on separate bonds, see PAYMENT, § 44.

Conveyances by sureties in fraud of creditors, see FRAUDULENT CONVEYANCES, § 54.

Necessity and sufficiency of bond, see ante, §§ 15, 24.

Right of guardian against whom judgment has been recovered in action on bond to claim benefit of exemption laws, see EXEMPTIONS, §§ 63, 72.

Right of obligee to attack fraudulent conveyance by surety, see FRAUDULENT CONVEYANCES, § 218.

Right of sureties on bond of guardian to claim benefit of exemption laws, see EXEMPTIONS, § 75.

#### § 173. Nature and extent in general.

[a] (Sup. 1862)

Where a wife is appointed a guardian, her husband should be taken as her sole bondsman only when his pecuniary resources are ample.—*Ex parte Maxwell*, 19 Ind. 88.

[b] (Sup. 1864)

Where the original bond given by a guardian was in a sum too small, and he gives an additional bond voluntarily, such second bond is as binding upon him as though given in compliance with an order of the court.—*Potter v. State ex rel. Thompson*, 23 Ind. 550.

[c] (Sup. 1866)

The principal obligor is not the agent of the clerk or court in procuring the execution of the bond. It is the business of the guardian to present the bond to the clerk or court for approval.—*Blackwell v. State ex rel. Simpson*, 26 Ind. 204.

[d] (Sup. 1874)

The estate of a surety upon a guardian's bond is liable for a default of the guardian which occurred subsequent to the death of the surety.—*Voris v. State ex rel. Davis*, 47 Ind. 345.

[e] (Sup. 1878)

The surety of a guardian is immediately liable on the guardian's misapplication of the ward's money; and the guardian's subsequent solvency, when he signs a new bond with a new surety, is immaterial.—*State ex rel. Cavins v. Sanders*, 62 Ind. 502, 30 Am. Rep. 203.

[f] (Sup. 1881)

A bond given by a guardian appointed as such for the "unknown heirs" of a deceased person, being a nullity, is not valid as a common law bond.—*State ex rel. Ross v. McLaughlin*, 77 Ind. 335.

Where a guardian was appointed for the "unknown heirs" of a deceased person, and it

appeared that the only heir of such decedent was a grandchild born to a married daughter of the decedent after the death of the latter, the obligors on the guardian's bond are not estopped, in an action by such grandchild on such bond, to assert that the appointment was void.—Id.

[g] (Sup. 1881)

Where a guardian's bond is valid on its face, the sureties thereon cannot escape liability by disputing the truth of its recitals.—Gray v. State ex rel. Mills, 78 Ind. 68, 41 Am. Rep. 545.

[h] Where the penalty in a guardian's bond is left blank, the defect is cured by Rev. St. § 2516, providing that a guardian's bond shall not be void on account of any informality, illegality, or defect, either formal or substantial, but shall have the same effect as if legally executed.—(Sup. 1885) State ex rel. Rowe v. Britton, 102 Ind. 214, 1 N. E. 617; (1888) Britton v. State ex rel. Rowe, 115 Ind. 55, 17 N. E. 251.

The failure to approve a guardian's bond does not invalidate it.—Id.

[i] (Sup. 1889)

It is no objection to a complaint in an action on a guardian's bond that it is therein alleged that the guardian was appointed by the court, while an exhibit shows that his bond was approved by the clerk, as, in spite of the irregularity, if any, the bond is valid by Rev. St. § 2516, providing that such a bond shall not be void for any informality, illegality, or defect therein, or by reason of any such informality, etc., in the appointment of the guardian.—Peelle v. State ex rel. Hipes, 118 Ind. 512, 21 N. E. 288.

The fact that there was no personality belonging to the ward's estate, and that his land was worth \$1,200, and the rental value was \$65, at the time of the guardian's appointment, and that the clerk by mistake fixed the penalty of the bond at \$2,400, is no ground for reforming the bond, as the mistake, if any, was one of law.—Id.

Even if the mistake were one that could be corrected, the surety cannot, after his principal has, on the faith of the bond, received money of the ward, procure the reduction of the penalty of the bond, and thereby cause loss to the ward, but is bound by his long acquiescence.—Id.

#### FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 576-588.

See, also, 21 Cyc. pp. 221-223.

#### § 174. Property covered.

[a] (Sup. 1854)

The bond given by a guardian in assuming the duties of his trust was by Rev. St. 1838, only designed to secure the faithful appropriation and investment of the personal estate of the ward, including the rents of the real es-

tate.—Warwick v. State ex rel. Gladden, 5 Ind. 350.

Sureties on the original bond of a guardian under the Revised Statutes of 1838, were not responsible for the application of the purchase money received by the guardian on a sale of the real estate of his ward under an order of the probate court. In case of such a sale, an additional bond was necessary.—Id.

The sureties on the bond of a guardian who has received personal estate belonging to his ward are responsible for a faithful application of it, although it came into his hands from an estate on which no administration had been had.—Id.

[b] (Sup. 1864)

The money received by a guardian from a sale of real estate belonging to his ward cannot be recovered in a suit on a bond given under Rev. St. 1843, p. 608, § 82, but only on the bond given by the guardian upon an order by the court for the sale of such real estate.—Potter v. State ex rel. Thompson, 23 Ind. 607.

[c] (Sup. 1867)

Upon the death of the principal in a guardianship bond, the trust is thereby terminated, and the sureties become liable for the amount of money in the guardian's hands, belonging to the ward, at the time of his death.—State ex rel. McCoy v. Thorn, 28 Ind. 306.

[d] (Sup. 1874)

The statute not having made it one of the duties of the county clerk to receive money due a ward from a guardian upon the settlement of the guardianship, though deposited with the clerk by order of the court, the guardian and the surety on his bond are liable to the ward if the clerk converts to his own use money so deposited.—State ex rel. Roberts v. Fleming, 46 Ind. 206.

[e] (Sup. 1874)

If real estate of wards is sold on the application of the guardian, he and his sureties are not liable on his original bond for the proceeds of such sale. If it is sold on the application of some person other than the guardian, and the proceeds paid over to such guardian, he and his sureties are liable on his original bond for such proceeds.—Colburn v. State ex rel. Arnold, 47 Ind. 310.

[f] (Sup. 1876)

The bond of a guardian, conditioned for the faithful discharge of his duties as guardian of the property of a person named as the minor heir of a certain decedent, covers moneys of the ward's estate received by the guardian from other sources, as well as from the estate of said decedent.—Hunt v. State ex rel. Martin, 53 Ind. 321.

[g] (Sup. 1879)

The assets in the hands of a guardian on whose bond suit was brought for a failure to pay over assets belonging to the ward con-

sisted of certain notes which had been given to him by the surety of a former guardian on settlement with him; and one of the notes had not become due, and the others had been collected. *Held*, that the amount of such unmatured note could be included in the damages.—*Hipes v. State ex rel. Shirk*, 69 Ind. 403.

[h] (Sup. 1881)

Where a guardian converts his ward's money prior to giving a bond, and subsequently he replaces it, his sureties are liable if he fails to account for the money so replaced.—*Parker v. Medsker*, 80 Ind. 155.

[i] (Sup. 1882)

Where a guardian had given an additional bond in case of sale of real estate, and a surety on both bonds had been discharged, and a new bond ordered. *held*, that the new bond covered his entire liability for all moneys or property in his hands at the time of execution.—*Moody v. State ex rel. Burton*, 84 Ind. 433.

[j] (Sup. 1885)

Where a guardian has once been discharged with money in his hands not paid over, and subsequently is reappointed, and accounts only for money received since reappointment, the sureties on his first bond are liable.—*Naugle v. State ex rel. Burton*, 101 Ind. 284.

[k] (Sup. 1889)

Where a guardian's account on its face shows him indebted to his wards, but he has really charged himself therein with a sum, paid him by mistake by the administrator of the estate of the wards' father, greater than the amount of the indebtedness, action cannot be maintained on the guardian's bond as for money in his hands due the wards.—*State ex rel. Howe v. Bond*, 121 Ind. 187, 22 N. E. 998.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 590-599.

See, also, 21 Cyc. pp. 226-230.

§ 175. Functions and acts covered.

[a] (Sup. 1844)

When the surety becomes dissatisfied, and applies to be discharged from further responsibility, and a further bond, with additional surety, is thereupon given for the performance of the condition of the former bond, the surety in the new bond is liable for the previous, as well as the subsequent, defalcations of the guardian.—*Armstrong v. State ex rel. Morrow*, 7 Blackf. 81.

[b] (Sup. 1878)

A surety on the additional bond executed by a guardian, under 2 Rev. St. 1876, p. 539, § 122, unless the same is merely subsidiary to the original bond, is primarily bound for a breach thereof, either separately in a suit thereon against himself alone, or jointly with the surety on the original bond, in a suit on

both bonds against all the sureties.—*Allen v. State ex rel. Stevens*, 61 Ind. 268, 28 Am. Rep. 673.

[c] (Sup. 1878)

The sale, barter, or assignment by a guardian of the property of his ward, including choses in action, for his own use, is a conversion for which the guardian is liable on his bond.—*Lowry v. State ex rel. Hill*, 64 Ind. 421.

[d] (Sup. 1883)

No recovery can be had against the sureties on a guardian's second bond for a conversion of the ward's money by the guardian, in the absence of any showing that such conversion occurred after the execution of the second bond.—*Williams v. State ex rel. Roberts*, 89 Ind. 570.

[e] (Sup. 1889)

A guardian invested his ward's money in a mortgage, and afterwards bought the mortgaged land himself, agreeing to pay the mortgage, which he entered satisfied of record, and then mortgaged the land to a third person. *Held*, that this constituted a conversion of his ward's money, for which his bondsman was liable.—*Hogshead v. State ex rel. Allen*, 120 Ind. 327, 22 N. E. 330.

[f] (Sup. 1904)

Sureties on a guardian's bond are not liable for defalcations of the guardian occurring before the execution of the bonds signed by them.—*Howe v. White*, 69 N. E. 684, 162 Ind. 74.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. §§ 600-606.

See, also, 21 Cyc. pp. 224, 231.

§ 176. Settlement and discharge of principal.

[a] (Sup. 1878)

In an action by a ward on a guardian's bond, where the guardian pleaded a final settlement, and the reply was a general denial, a verdict for the ward was not contrary to law, where there was evidence that a receipt in full of all demands given to the guardian was to enable him to settle with the court, on his agreement that, if it was not right, he would make it right.—*Beedle v. State ex rel. Small*, 62 Ind. 26.

FOR CASES FROM OTHER STATES,

See 21 Cyc. p. 237.

§ 177. Discharge of sureties.

[a] (Sup. 1862)

It is perhaps the right of a surety on a guardian's bond without showing any reason to ask the court to discharge him from the bond, and the duty of the court on such application to require the execution of another bond and grant other proper relief.—*Kendrick v. Wilkinson*, 18 Ind. 206.

2 Rev. St. p. 328, § 26, provides that sureties on a guardian's bond may be discharged from future liability under the same rules and regulations prescribed for the discharge of sureties of executors and administrators, and that all enactments on that subject shall apply to guardians and guardians' bonds and sureties. *Held* to apply to additional bonds given on the sale of real estate.—*Id.*

[b] (*Sup.* 1863)

The additional bond given by a guardian in an application to sell the real estate of his ward, under section 18, p. 571, 2 Gav. & H. St., is not discharged by the fact that, on reporting the sale of the real estate, he produced the proceeds of the sale in court, and then withdrew them by order of the court.—*State ex rel. Mount v. Steele*, 21 Ind. 207, 83 Am. Dec. 346.

Such a bond is not merely subsidiary to the original bond given by the guardian, but is an independent undertaking, and can only be discharged by the actual payment of the moneys arising from the sale of the real estate, according to law, to the person entitled to receive the same.—*Id.*

[c] (*Sup.* 1873)

Where a guardian procures an extension of the time for payment of money due to his ward by a mere agreement to pay a rate of interest which the guardian is bound by law to pay, the guardian's surety is liable on his bond to the ward.—*Douglass v. State ex rel. Chaney*, 44 Ind. 67.

[d] (*Sup.* 1875)

A guardian, in purchasing land for herself, used in payment a note given her as guardian on the sale of her ward's land; and the ward, upon coming of age, ratified and confirmed in writing the purchase as an investment of his estate, and released all right of action against certain named sureties on the bond of his guardian, but expressly excepted others. *Held* that, by such ratification and release, a surety so excepted therefrom was also released.—*Tyner v. Hamilton*, 51 Ind. 259.

[e] (*Sup.* 1878)

Upon breach of a guardian's bond, the liability of the surety is not affected by a subsequent release from suretyship by order of the court upon his own application and the execution of a new bond with a new surety. In an action on the old bond, an answer setting up a former recovery by the plaintiff in an action on the new bond is insufficient.—*State ex rel. Page v. Page*, 63 Ind. 209.

[f] (*Sup.* 1879)

A bond was given by a guardian who had applied for leave to sell the real estate of his ward; and, in a suit thereon, the defense was set up that the surety at least was discharged, because, after the bond was executed, the court changed the terms of the order for the sale. *Held* no defense, because the terms of the sale,

as fixed by the first order of the court, constituted no part of the contract evidenced by the bond, and the court might, in its discretion, alter the terms of the sale without impairing the obligation of the bond.—*Stevenson v. State ex rel. McDowell*, 69 Ind. 257.

[g] (*Sup.* 1881)

A surety on a guardian's bond obtained his release, and the guardian, resigning his trust, obtained letters of guardianship in another county, gave his bond, and made a report, charging himself with a certain sum as belonging to his ward. *Held*, that the surety was not released from liability for the guardian's defalcation prior to these proceedings.—*Yost v. State ex rel. Bouslog*, 80 Ind. 350.

[h] (*Sup.* 1892)

In an action on a guardian's bond to recover an indebtedness against the ward's estate, the answer states a valid defense, where it alleges that plaintiff accepted, in extinguishment of the debt, the individual note of the guardian.—*Price v. Barnes*, 7 Ind. App. 1, 31 N. E. 809, 34 N. E. 408.

[i] (*App.* 1898)

The only way a surety can be released from liability on a guardian's bond is to comply with the letter of the statute and make his application thereunder for release.—*Rush v. State ex rel. Bixler*, 49 N. E. 839, 19 Ind. App. 523.

A subsequent bond filed by a guardian, additional and cumulative in its legal character, did not release the surety on the first bond, and the fact that the court used the words "new bond" in its order showing the filing and approval of the second bond can make no difference.—*Id.*

A guardian's original bond is not discharged by the filing of a second bond, required by laws of the United States before he could receive pension money for the wards.—*Id.*

FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. Guard. & W. §§ 607-619.

See, also, 21 Cyc. pp. 233-238.

§ 178. Breach or fulfillment of condition.

[a] (*Sup.* 1878)

A guardian's failure to loan money derived from the sale of his ward's real estate, when he had the opportunity of doing so on good security, the conversion of such money by him, and his failure to pay and account for the same, *held* to constitute a breach of his bond, which recited that he had been ordered to sell said real estate, and was conditioned that he should faithfully discharge the duties of his trust according to law.—*Cogswell v. State ex rel. Albert*, 65 Ind. 1.

[b] (*Sup.* 1882)

If a guardian accepts the surrender of his own note in payment of the price of his ward's

land, this constitutes a breach of the bond.—*Hedin v. Bevis*, 82 Ind. 388.

[c] (Sup. 1882)

It is a sufficient allegation of breach of a guardian's bond that the guardian had been removed, and had not accounted to any of the wards for money received.—*Moody v. State ex rel. Burton*, 84 Ind. 433.

[d] (Sup. 1886)

Where a guardian fails to file an inventory, as required by Rev. St. 1881, § 2521, there was a technical breach of the conditions of his bond, such as will authorize nominal damages only in the absence of a showing of actual damages.—*Buchanan v. State ex rel. Roberts*, 6 N. E. 614, 106 Ind. 251.

[e] (App. 1907)

A partner, as guardian of a minor, used the funds of the ward in the partnership business. The partner sold his interest in the business to his copartner, who assumed to pay the money due from the partner to the ward as a part of the purchase price. Thereafter the copartner was appointed guardian of the ward and charged himself with the amount due from the partner as former guardian to the estate of the ward. The copartner, as guardian, never actually separated the money thus due the ward from his own funds, but continued to keep and use the same in his private business. *Held*, that the copartner as guardian converted the funds of his ward, rendering his surety on his bond liable therefor.—*United States Fidelity & Guaranty Co. v. State ex rel. Smith*, 40 Ind. App. 136, 81 N. E. 226.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. § 620.

**§ 179. Necessity of accounting and default by principal.**

[a] (Sup. 1848)

Proceedings must first be had between the ward and his guardian, requiring the latter to account, before the ward can sustain an action against the guardian and the sureties on his bond.—*Hunt v. White*, 1 Ind. 105.

**§ 180. Conclusiveness of adjudication against principal.**

[a] (Sup. 1878)

A surety on a guardian's bond is not estopped in an action on the bond to go behind the reports made by the guardian, and to show the real condition from time to time of the assets in the guardian's hands.—*Lowry v. State ex rel. Hill*, 64 Ind. 421.

[b] (Sup. 1881)

In an action on a guardian's bond, his settlement and discharge cannot be attacked, as they are res adjudicata.—*State ex rel. Favorite v. Slaughter*, 80 Ind. 597.

[c] (Sup. 1894)

A guardian, after having loaned his ward's money, without an order of the court, to a partnership, and taken their note therefor, without security, resigned during the period of guardianship, and his account, in which the note was included, was approved by the court. He concealed from the court the fact that the partnership was insolvent, and stated that it would be adverse to the ward's interest to change the investment made by him. *Held*, that the approval of the account and acceptance of the resignation was not a bar to an action by the ward on the guardian's bond, as the matters complained of are not those disclosed in the report, and adjudicated by the court, but rather those concealed from the court.—*State ex rel. Coleman v. Peckham*, 136 Ind. 198, 36 N. E. 28.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. § 621.

See, also, 21 Cyc. pp. 238, 239.

**§ 181. Summary remedies.**

[a] (Sup. 1881)

Where a guardian had no money belonging to his ward's estate with which to pay a claim, the fact that he was sole bondsman of the former guardian did not justify the court in ordering him to pay the amount of such claim into court, for, though it may have been a sufficient reason why he should no longer act as guardian of his ward, it would not justify the court in coercing the payment of the judgment in such a summary manner.—*Stumph v. Goepfer*, 76 Ind. 323.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Guard. & W. § 622.

See, also, 21 Cyc. p. 240.

**§ 182. Actions.**

Accrual of right of action, see LIMITATION OF ACTIONS, §§ 47, 72.

Aider of pleading by verdict or judgment, see PLEADING, § 433.

Capacity of emancipated ward to sue on guardian's bond, see INFANTS, § 70.

Conclusiveness of judgment, see JUDGMENT, § 678.

Demurrer to pleading good in part, see PLEADING, § 204.

Documentary evidence, see EVIDENCE, § 370.

Exclusive or concurrent jurisdiction, see COURTS, § 472.

Exemplary damages as against surety, see DAMAGES, § 92.

Filing written instruments with pleadings, see PLEADING, § 310.

Joinder of causes, see ACTION, §§ 45, 46, 48, 50.

Retroactive operation of statute of limitation, see LIMITATION OF ACTIONS, § 6.

Right to trial by jury, see JURY, § 14.

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Scope of cross-examination of plaintiff's witness, see WITNESSES, § 269.

Self-serving declarations, see EVIDENCE, § 271.

Splitting causes of action, see ACTION, § 53.

Variance between pleading and instrument annexed, filed, or referred to, see PLEADING, § 312.

[a] (Sup. 1846)

A declaration in debt on a guardian's bond alleged that the defendant had failed to pay over certain money to his ward after he had arrived at full age. *Held*, that a plea that the defendant had lent the money, etc., should show that the loan was authorized by an order of the probate court.—*Cottingham v. State ex rel. Hare*, 7 Blackf. 405.

If the declaration in debt on a guardian's bond assign specific breaches, a plea that the defendant had faithfully discharged the duties of his guardianship is bad; so also is a plea, in such case, that the defendant was not guilty of the alleged breaches.—*Id.*

[aa] An action lies on a guardian's bond by his ward without first ascertaining the amount due on the guardianship accounts.—(Sup. 1849) *State ex rel. Shannon v. Strange*, 1 Ind. 538, Smith, 367, overruling *Hunt v. White* (1848) 1 Ind. 105; (1856) *State ex rel. Benton v. Railsback*, 7 Ind. 634.

[b] (Sup. 1849)

A declaration on a guardian's bond must contain an assignment of breaches of it.—*State ex rel. Shannon v. Strange*, 1 Ind. 538, Smith, 367.

A settlement made by a guardian with the probate court, after his removal, is *prima facie* correct, and may be given in evidence in a suit on the guardian's bond.—*Id.*

[bb] (Sup. 1855)

Where a guardian has left the state and gone to parts unknown, the ward is excused from demanding an accounting of him before suing on his bond for conversion of the trust property.—*Hufford v. State ex rel. White*, 6 Ind. 365.

[c] (Sup. 1860)

An action will not lie upon the bond of a guardian, to recover money for which he failed to account on his final settlement with the proper court, after three years from such final accounting and settlement of his trust; the ward being of full age, and under no disabilities.—*State ex rel. Daggs v. Hughes*, 15 Ind. 104.

[cc] (Sup. 1860)

Until the removal of a guardian from his trust, the statute does not authorize a suit by his infant wards on his bond for the recovery of money in his hands.—*Ely v. Hawkins*, 15 Ind. 230.

[d] (Sup. 1861)

Where a guardian has used the interest and part of the principal of his ward's person-

al estate for her support, without direction of the proper court, if any credit is allowable therefor, the account can be taken, and such credit allowed in a suit on his guardian's bond.—*State ex rel. Druliner v. Clark*, 16 Ind. 97, 102.

[dd] (Sup. 1864)

The thirteenth section of the act touching the relation of guardian and ward makes 2 Gav. & H. 531, § 163, applicable to suits on bonds of guardians, and under it, in such suits, 10 per cent. damages should be added to the amount found to be retained by the guardian.—*Potter v. State ex rel. Thompson*, 23 Ind. 607.

[e] (Sup. 1866)

An action upon a guardian's bond is properly brought on the relation of the successor of the defaulting guardian.—*Blackwell v. State ex rel. Simpson*, 26 Ind. 204.

[ee] (Sup. 1867)

Upon the death of the principal in a guardianship bond, the trust is hereby terminated, and the sureties become liable for the amount of money in the guardian's hands, belonging to the ward, at the time of his death; and it is not necessary that the ward should first resort to a suit against the legal representatives of the guardian.—*State ex rel. McCoy v. Thorn*, 28 Ind. 306.

[f] (Sup. 1873)

Where, in a complaint upon a guardian's bond, the only allegation as to the estate that came to the hands of the guardian is that there came to his hands on a certain day three several promissory notes, of a certain value at that date, without showing that they were due, or when they would become due, is bad, though it is alleged in general terms, as a branch of the bond, that the guardian converted said assets to his own use and benefit.—*Kidwell v. State ex rel. Boyden*, 45 Ind. 27.

[ff] (Sup. 1873)

In a suit upon a guardian's bond, an answer by the sureties that the guardian was poor and indigent, and was compelled to use the money sued for in support of the relator, and that he wrongfully refused to claim any allowance for the support of the relator, and asking that the amount so expended may be set off against the claim of the relator, is bad, as not showing the necessity for such a use of the funds.—*Myers v. State ex rel. Appleton*, 45 Ind. 160.

[g] (Sup. 1874)

In assessing damages in a suit on a guardian's bond, the amount of principal and interest realized by the guardian should be ascertained. If the money has not been loaned or invested, the court should add such sum as could have been realized by loaning the same. Interest should be computed on the aggregate amount at the rate of 6 per cent. per annum, and to the sum thus ascertained 10 per cent. should be added. In addition to the above, the

court or jury should, in a proper case, exercise a sound legal discretion in assessing exemplary damages; and, if such damages be allowed, the amount should be added to the aggregate amount before the 10 per cent. is added.—*Colburn v. State ex rel. Arnold*, 47 Ind. 310.

In a suit on the relation of one ward, upon a guardian's bond, where there are two or more wards, each entitled to an equal share, if the relator has received a part of his share from a former guardian the amount so received should be taken into account and the shares equalized.—*Id.*

2 Gav. & H. St. p. 568, provides that a suit on a guardian's bond shall be governed by the law regulating suits on the bonds of executors and administrators, and section 163, p. 531, provides that the measure of damages in suits on the bonds of executors and administrators shall include such exemplary damages as the court or jury trying the case may be willing to give. *Held* to invest the court or jury with a sound legal discretion in assessing exemplary damages in a suit on a guardian's bond.—*Id.*

[gg] (Sup. 1874)

The complaint on a guardian's bond alleged that money came into the hands of the guardian, amounting to a sum specified, and that "said sums, at the resignation of said guardian hereinafter alleged, still remains due and wholly unpaid." *Held*, that the complaint was amendable in the trial court by the insertion of the words "remained and" after the word "alleged," and it should be regarded on appeal as so amended.—*Voris v. State ex rel. Davis*, 47 Ind. 345.

An action may be maintained on a guardian's bond against the principal and the heirs of a deceased surety without previous demand.—*Id.*

[h] (Sup. 1876)

In an action on a guardian's bond, an answer by a sole surety alleging that the bond was obtained from him by the principal obligor by fraud, covin, and misrepresentation, by his stating that it should not be delivered to the clerk or to the judge, until it was executed by one or two other good, solvent persons as sureties, was insufficient.—*Hunt v. State ex rel. Martin*, 53 Ind. 321.

In an action on a guardian's bond, conditioned for the faithful discharge of his duties as guardian of the person and property of one therein named and designated as the minor heir of a certain decedent, the recovery cannot be limited to the value of the estate mentioned in the statement made on application for the appointment of the guardian, but may extend to the value of the entire estate of the ward then held or afterward acquired, not exceeding the amount of the penalty of the bond, except proceeds of the sale of the ward's real estate by order of court.—*Id.*

[hh] (Sup. 1876)

In an action by a foreign guardian of a minor on the bond of a former domestic guardian of such minor, conditioned for the faithful accounting for all moneys arising from the sale of certain lands of the ward ordered by the proper court, the complaint was not rendered insufficient by failure to allege the approval of the bond by the court or the appraisal required by statute of the property to be sold. Rev. St. 1876, § 19.—*Shook v. State ex rel. McCampbell*, 53 Ind. 403.

In an action on a special guardian's bond for the sale of real estate, the complaint alleged that the guardian, with his sureties, executed the bond, and that the court ordered the sale of the property. *Held*, that it will be presumed that the bond was approved.—*Id.*

In an action on a special guardian's bond for the sale of real estate, it will be presumed, from an allegation in the complaint, that the court ordered the sale, that the property was appraised and all other necessary preliminary steps taken.—*Id.*

In an action on a special guardian's bond for the sale of real estate, the allegation that the guardian converted the money to his own use shows a breach of the bond, and it is unnecessary to allege in what manner it was converted to his use.—*Id.*

In an action on the bond of a foreign guardian, given to secure the proceeds of a sale of the ward's property, a failure to allege in the complaint that the guardian had complied with the provisions of 2 Rev. St. 1876, p. 593, in regard to filing an authenticated copy of his appointment, does not render the complaint bad on a demurrer assigning for cause only the want of sufficient facts.—*Id.*

[i] (Sup. 1876)

A complaint on a guardian's bond to recover proceeds of property of the ward sold by the guardian, need not aver that the guardian's report of sale has been approved by the court, nor that the money has been demanded.—*Hudson v. State ex rel. Barnes*, 54 Ind. 378; *Id.* 602.

[ii] (Sup. 1876)

Upon the resignation of a guardian without paying over the money belonging to his ward's estate, a suit may be maintained therefor, on his bond, against the guardian and his sureties without having made any demand on him for the payment of the money.—*Hudson v. State ex rel. Barnes*, 54 Ind. 378.

[j] (Sup. 1876)

The measure of the damages that may be recovered in an action upon a guardian's bond for conversion of the ward's property to his own use in addition to the value of the property converted is prescribed, not by section 163 (2 Rev. St. 1876, p. 551) of the Act of June 17, 1852, "providing for the settlement of decedents' estates," etc., but by clause 3 of section

9 (2 Rev. St. 1876, p. 589) of the act of June 9, 1852, "touching the relation of guardian and ward," and is "ten per cent. in damages on the whole amount of estate, both real and personal, in his hands belonging to such ward."—*Richardson v. State ex rel. Crow*, 55 Ind. 381.

Section 13 of the act touching the relation of guardian and ward (2 Rev. St. 1876, p. 592) does not contemplate that section 163 of the act providing for the settlement of decedents' estates (2 Rev. St. 1876, p. 551) shall govern, as providing a measure of damages, in suits upon a guardian's bond.—*Id.*

[jj] (Sup. 1877)

In an action by a ward, on arriving at maturity, on his guardian's bond, to recover for money of the ward withheld by the guardian, mere multiplicity of allegations of fact in the complaint, concerning the gist of the action, does not constitute duplicity.—*Hay v. State ex rel. McClanrahan*, 58 Ind. 337.

[k] (Sup. 1878)

In an action on a guardian's bond, a guardian's final report is not admissible in evidence on behalf of the defendants until approved by the proper court.—*Beedle v. State ex rel. Small*, 62 Ind. 26.

[kk] A ward who has arrived at age may sue his guardian on his bond for failure to pay over the ward's money without first obtaining his removal.—(Sup. 1878) *Bescher v. State ex rel. Hammann*, 63 Ind. 302; (1880) *Stroup v. State ex rel. Fitch*, 70 Ind. 495.

[l] (Sup. 1878)

Under a joint and several bond by the guardian for several wards, the rights of the latter are several, and not joint; and suit may be brought on the bond on the relation of any of the wards without joining the others.—*Bescher v. State ex rel. Hammann*, 63 Ind. 302.

It is not necessary that the estate should be settled before an action may be brought by the ward on the bond of the guardian for a breach of its conditions.—*Id.*

The nonjoinder of a surety, in an action on a guardian's bond to recover the proceeds of a sale by the guardian of the ward's real estate, does not affect the defendant's liability on the bond.—*Id.*

[ll] (Sup. 1878)

In an action on a guardian's bond, the guardian's successor is the proper relator.—*Cogswell v. State ex rel. Albert*, 65 Ind. 1.

[m] (Sup. 1879)

In a suit on a guardian's bond, a complaint alleging the guardian's appointment, the execution of the bond, the payment into the hands of the guardian of certain moneys belonging to the wards, and alleging that the guardian converted a certain sum to his own use for which he had not accounted stated a cause of action.—*Potts v. State ex rel. Morgan*, 65 Ind. 273.

A guardian appointed to succeed a defaulting guardian may sue on the defaulting guardian's bond as relator.—*Id.*

[mm] (Sup. 1879)

A complaint against the sureties on a guardian's bond alleged that the guardian died with certain funds belonging to his ward in his hands, and without having accounted to the circuit court, etc. The court of common pleas had had, until two years after said guardian's death, exclusive jurisdiction over him and his wards, when it was abolished, and records transferred to the circuit court. That the complaint was sufficient.—*Davis v. State ex rel. Long*, 68 Ind. 104.

In an action against the sureties on a guardian's bond, it is no defense that a settlement and distribution had been made, but that the papers and vouchers had been lost, without any allegation that said settlement had been approved by the proper court.—*Id.*

[n] (Sup. 1879)

2 Rev. St. 1876, p. 590, § 9, cl. 3, provides that, on failure of a guardian to render proper accounts at least once in every two years, he shall be liable to his ward on his bond for 10 per cent. in damages on the whole amount of the estate, both real and personal, in his hands belonging to such ward. Section 13 provides that any bond given by any guardian may be put in suit by any person entitled to the estate, and such suit shall be governed by the law regulating suits on the bonds of executors and administrators. Section 163 of the act providing for the settlement of the estates of decedents (2 Rev. St. 1876, p. 551) provides that the measure of damages in all suits on the bonds of executors and administrators shall be the value of the property converted and 10 per centum on the whole amount assessed. In an action on the bond of a guardian, section 9 of the act relating to guardian's bonds was supplemented by section 163 of the act relating to executors and administrators, and that 10 per cent. damages was properly assessed against the defendants for failure of the guardian to pay to his successor the balance found due the ward on final settlement.—*Barry v. State ex rel. Nicholson*, 69 Ind. 381, overruling *Richardson v. State ex rel. Crow*, 55 Ind. 381.

In an action upon a guardian's bond to render a plea of payment, the defendants have the burden of proof.—*Id.*

Action was brought by a guardian on the bond of B., a former guardian, for his failure to pay over to his successor, the plaintiff, the money of his ward. The evidence showed that on February 6, 1878, B. had presented to the proper court his account current as guardian, and that the same was properly verified, and a balance against B.; that B. was then insolvent, and in the preceding month had been adjudged a bankrupt, and that he had no money with which to pay his attorneys a re-

able fee for preparing said account current; that, on the presentation of said account, the court charged B. with the said balance, with interest thereon at the rate of 10 per cent. per annum, and forthwith removed him from his trust as such guardian, and then and there required him to pay over to plaintiff the said balance and interest. The suit was brought in less than two weeks after B.'s removal, and the trial took place within a month thereafter. *Held*, that in the absence of any evidence whatever tending in the slightest degree to show payment, in whole or in part, of the money in controversy, the jury were fully justified in finding that B. had failed, neglected, and refused to pay over to plaintiff the balance in his hands, or any part thereof.—Id.

[nn] (Sup. 1880)

In an action on a guardian's bond, the ward is not bound to prove that the bond has not been exhausted, even if he makes the averment in his complaint.—*Stroup v. State ex rel. Fitch*, 70 Ind. 495.

[o] (Sup. 1880)

In a suit by a ward and her husband on a guardian's bond for the sale of real estate, the answer alleged that the guardian, who was the ward's father, had made certain payments for her support and education, for which, and for the value of his services as such guardian, a set-off was claimed, and also that he had no means or estate out of which he could support and educate the ward. Plaintiffs replied, claiming a set-off on their part on account of services rendered by the ward at the guardian's request. *Held*, that the set-off claimed by defendants could not be defeated by that claimed by plaintiffs, as, for that claim, defendants were not, nor was either of them, liable to the female plaintiff in any event, under the bond in suit, until after, if at all, the general bond of the guardian had been fully exhausted.—*Kinsey v. State ex rel. Shirk*, 71 Ind. 32.

[oo] (Sup. 1880)

A judgment in an action on a guardian's bond for the sale of real estate rendered against the principals and sureties to be collected without relief from valuation or appraisal laws of the state is authorized by the act of December 21, 1858 (Acts 1858, p. 39; 2 Rev. St. 1876, p. 188, note 5), entitled "An act to regulate the collection of judgment and the sale of property on execution against any sheriff, constable, executor, or other party, officer, administrator, guardian or other person or corporation receiving or holding moneys in a fiduciary capacity or the securities of any or either of them.—*Stevenson v. State ex rel. Ruddell*, 71 Ind. 52.

In a suit on a guardian's bond for the sale of his ward's real estate, the surety answered by way of set-off, merely alleging the expenditure by the guardian, who was the ward's father, of certain sums of money for the support

of the ward, for which the guardian had failed and refused to claim credit. *Held*, on demurrer, that the answer was insufficient.—Id.

[p] (Sup. 1880)

In suit against A. and B. on a joint guardian's bond for the sale of real estate, the complaint showed that they were separate guardians of separate heirs owning certain real estate as tenants in common; that A. and B. joined in a petition and obtained an order for the sale of the real estate of their respective wards; that A. had made a sale, received the purchase money, and failed to account for it or pay it over, and had been removed; and that the recital of the bond that they were joint guardians was a mistake. *Held*, on demurrer by B. that the complaint was insufficient as to him.—*Hurlburt v. State ex rel. Ault*, 71 Ind. 154.

[pp] (Sup. 1881)

A complaint on a guardian's bond alleged that it was given as an additional bond for the sale of real estate. The bond itself recited merely that "if the above bound, \* \* \* who is guardian of the persons and property of \* \* \* minor heirs of \* \* \*, then the above obligation is to be void," etc. *Held*, that the complaint showed sufficiently that it was given as an additional bond, and was good for that purpose, under Code, § 790, which provides that bonds shall not be void for want of form or substance, recital or condition, and that, in all actions on a defective bond, plaintiff may suggest the defect in his complaint, and recover as if the bond were perfect.—*Fee v. State ex rel. Pleasant*, 74 Ind. 66.

A complaint alleging that a guardian "executed his bond" does not, although taken in connection with a copy of the bond filed therewith, and showing that persons of the same names as the sureties signed the same, sufficiently show that the sureties executed the bond.—Id.

[q] (Sup. 1881)

A guardian sued on his bond for his failure to make a biennial report, as imperatively required by statute, cannot defend by setting up as matters in abatement that his only default was the one sued for, by which his ward was not prejudiced; that the ward owed him for board, and commenced the action so soon after her marriage to her co-plaintiff that the guardian could not safely turn over the estate to her; and that no demand has ever been made therefor.—*Eiceman v. State ex rel. Leonard*, 75 Ind. 46.

[qq] (Sup. 1881)

The sureties upon a guardian's bond executed to obtain an order to sell real estate of his ward, after he has sold the real estate and received the money, are estopped to deny that their principal had in fact been appointed guardian of such ward.—*Gray v. State ex rel. Mills*, 78 Ind. 68, 41 Am. Rep. 545.

[qqq] (Sup. 1881)

Where, in an action on the bond of an ex-guardian to recover a ward's estate, the complaint alleged that defendant had converted his ward's entire property into money, and that the same had since his appointment remained in his hands and had been used by him in his own private business ever since he obtained possession thereof, such allegation was not inconsistent with the subsequent clause, which, after detailing several reports made by the guardian, alleged that the amount "now in the guardian's hands" due the relator as guardian was the sum of \$1,700, and that since his removal defendant had refused and still refuses to account or pay over the same or any part thereof, since defendant may have converted the money to his own use, used it in his private business and yet have replaced it, and, if he did so after the execution of the bond sued on, he became liable on his bond to account for it, though at a previous time there may have been no such liability.—*Parker v. Medsker*, 80 Ind. 155.

[r] (Sup. 1881)

In an action on a guardian's bond, the burden was on the sureties to establish that the guardian properly and fully accounted for all moneys received by him during the continuance of the surety's obligation and before the giving of a new bond with other sureties, so that, where the evidence of accounting failed to show on which bond the guardian was in default, the condition of each bond was broken to the extent of defalcation, and the plaintiff was entitled to recover the whole sum against either set of bondsmen she should choose to sue.—*Yost v. State ex rel. Bouslog*, 80 Ind. 350.

[rr] (Sup. 1881)

In an action against the administrator of one who had been surety on a bond given by a guardian, to which the principal in the bond was made a party, the fact that no process was served on the principal did not deprive the court of jurisdiction.—*Corbaley v. State ex rel. Holmes*, 81 Ind. 62.

In an action on a bond executed by a guardian against the administrator of the surety, the principal was a proper party to the action.—*Id.*

In a suit on a guardian's bond, the surety may show by way of defense that the guardian, who was also the father of the wards, was so situated pecuniarily as to be justified in expending upon the support and education of the wards a part of the fund, and that the guardian himself refuses to make claim against the wards for such expenditures.—*Id.*

[rrr] (Sup. 1881)

In an action on a guardian's bond for taking notes of insolvent persons, without security, for the rent of his ward's real estate, the guardian's reports to the court were competent evidence for the purpose of identifying such notes as the notes formerly in the guardian's

possession, though such evidence was not otherwise admissible.—*French v. State ex rel. Mould*, 81 Ind. 151.

[s] (Sup. 1882)

Where a guardian removed from the bond and suit is brought on his bond, the measure of damages upon recovery is the value of property converted or the amount of money unlawfully retained with interest, such as exemplary damages as the court may be willing to give, and 10 per cent. on the amount so ascertained.—2 Rev. St. 1876, p. 592, § 13.—*English v. State ex rel. Fields*, 81 Ind. 455.

[ss] (Sup. 1882)

In an action on a guardian's bond, the sureties thereon are estopped, by the recitals of the bond executed by them of the appointment of the guardian, to controvert the fact, though recited, that he was such guardian at the time the bond was executed.—*State ex rel. Moore v. Mills*, 82 Ind. 126.

[sss] (Sup. 1882)

In an action on a guardian's bond, a complaint alleging that certain moneys came into defendant's hands for relatrix and other wards, and that he had not accounted for such funds, was sufficient without allegations that funds remained in his hands which were unexpended, or that he had not accounted to a successor to the husband of relatrix.—*Moody v. State ex rel. Burton*, 84 Ind. 433.

In a suit for breach of a guardian's bond, the complaint need not show that plaintiff is one of the wards, is of age.—*Id.*

[t] (Sup. 1882)

In an action upon the bond of a deceased guardian, the sureties may plead by way of defense an indebtedness of the estate of the relator to the estate of their principal.—*State ex rel. Benckert v. Wylie*, 86 Ind. 396.

[tt] (Sup. 1882)

In an action on a guardian's bond, a guardian having been dead three years, an allegation that the guardian never paid certain sums received by him to the wards, and that the administrators of the guardian have not paid the moneys, or any portion thereof, to the wards, or to any one for them, sufficiently alleges a breach of the bond.—*Higgins v. State ex rel. Smith*, 87 Ind. 282.

Where a guardian has been dead three years, suit may be maintained on his bond against his successor for failure to pay over moneys without a previous demand therefor.—*Id.*

[ttt] (Sup. 1882)

Where an infant wife and her husband join as co-relators in a suit on her guardian's bond, they cannot recover without proof that her husband was of full age when the suit was brought.—*Burkam v. State ex rel. Miller*, 88 Ind. 200.

Under Rev. St. 1876, p. 36, § 8, providing that, when a married woman is a p

her husband must be joined with her, and *Id.* p. 313, § 794, providing that a husband and wife may join in all causes of action arising out of any contract in favor of either of them, a husband and wife may join as relators in a suit on her guardian's bond.—*Id.*

[u] (Sup. 1882)

Where, in a proceeding against a guardian's estate, it is adjudged that he was indebted to the estate of his ward, it will be presumed, in an action on his bond, that in such proceeding it was shown that the guardian was personally liable to his ward for the amount of the judgment.—*Asher v. State ex rel. Applegate*, 88 Ind. 215.

[uu] (Sup. 1884)

Under a general denial to a suit on a guardian's bond for conversion of the ward's money and failure to pay, payment in whole or part may be shown.—*State ex rel. Dunham v. Roche*, 94 Ind. 372.

Where, in an action on a guardian's bond, the complaint averred that the guardian as such had received money belonging to the ward and had converted the same to his own use and that he did not pay the same to the ward, and the defendants answered by way of general denial, defendants had the right to meet plaintiff's evidence by proof that such sums of money or parts thereof had been accounted for and paid to the proper person.—*Id.*

[uuu] (Sup. 1885)

The failure to prescribe the penalty in a guardian's bond leaves the surety's liability to be ascertained by determining the duty of the guardian and the loss resulting from failure to perform it.—*State ex rel. Rowe v. Britton*, 102 Ind. 214, 1 N. E. 617.

Where, in a suit on a guardian's bond, a paragraph of the complaint proceeded on the theory that there was a mistake in the bond, but did not show either that the mistake was one of fact or that there was a mistake in committing the contract to writing, it was insufficient.—*Id.*

[v] (Sup. 1887)

To a complaint by the state, on the relation of a ward, against the administrator of the estate of the deceased surety on her guardian's bond, for failure of the guardian to account for certain moneys, defendant answered that his decedent, as such surety, had, with the knowledge of relatrix, she being of age, filed in the circuit court his final report and settlement of such guardianship, which was approved and confirmed by the court, and the surety discharged. *Held*, although the same facts might have been proved under the general denial, the error in sustaining the demurrer thereto was not harmless.—*Castetter v. State ex rel. Bradburn*, 112 Ind. 445, 14 N. E. 388.

[vv] (Sup. 1888)

Under Rev. St. § 2527, providing that a guardian's bond may be sued on by any person

entitled to the estate, and that such suit shall be governed by the law regulating suits on bonds of executors and administrators, and section 2458, providing that any creditor of the estate may sue an executor or administrator on his bond, a creditor of the ward's estate is a proper relator in an action on a guardian's bond.—*State v. Fitch*, 113 Ind. 478, 16 N. E. 396.

In an action on a guardian's bond by a creditor of the ward's estate, where plaintiff fails to aver that he cannot collect his claim from the ward's estate, he can recover only nominal damages, and judgment for defendant on demurrer to the complaint will not be disturbed.—*Id.*

A creditor of a ward's estate may bring an action on the guardian's bond without averring that his claim has been allowed by the court, the guardian having reported it as valid.—*Id.*

[vvv] (Sup. 1888)

Under Rev. St. § 1221, which provides that the principal and surety in an official bond shall be bound to the full extent contemplated by the law requiring the same, and the sureties to the amount specified in the bond; and sections 2459 and 2527, providing that the measure of damages in an action on a guardian's bond is the injury to the ward, with exemplary damages, at discretion, and 10 per cent.,—the surety's liability on such a bond does not exceed the sum therein specified.—*Meadows v. State ex rel. Alderman*, 114 Ind. 537, 17 N. E. 121.

[w] (Sup. 1888)

In an action on a guardian's bond, where defendant admits his signature, and the evidence shows that it was approved and filed by the clerk more than 12 years before, it is properly admitted in evidence, although defendant on oath alleges that he never delivered it.—*Britton v. State ex rel. Rowe*, 115 Ind. 55, 17 N. E. 254.

[ww] (Sup. 1889)

A paragraph of an answer to a complaint, in an action on a guardian's bond, alleging that the guardian had paid all moneys received by him, either to relator after he attained his majority, or to others for his board and education, is bad, as it does not thereby appear what sums were actually paid to relator, or that the guardian had the right to pay out his ward's funds for his board and education.—*Peelle v. State ex rel. Hipes*, 118 Ind. 512, 21 N. E. 288.

Though the guardian sued with the surety is not served with process, the bond being joint and several, it is not error to admit evidence of the guardian's default against the surety, as the surety could have been sued alone.—*Id.*

In an action on a guardian's bond, the testimony of the guardian that he received the money, which was pension funds, will justify a judgment for the amount stated by him, though the pension allowed would not equal that sum; it not appearing that he did not receive arrearages.—*Id.*

Where a guardian receives only a comparatively small amount of money, and in small sums, which could not therefore be invested, the recovery against the surety should be the amount received, with simple interest, and the statutory penalty of 10 per cent.—*Id.*

[www] (Sup. 1890)

Plaintiff, as administrator, paid into court money belonging to the estate. He reported no creditors found; that an attorney for certain heirs received said sum and paid it over to the guardian of the heirs, taking from him a bond conditioned that, in case of suit by any creditors of the estate, said guardian would repay the amount thus received. Suit was instituted and all former proceedings set aside, and the attorney was directed to deliver all money and collaterals to the administrator for the benefit of the creditor. A bond given by the guardian was turned over. Demand was made for the amount for which the bond was given, which amount was unpaid and was necessary to the discharge of the indebtedness of the estate. *Held*, that an action on the bond was not prematurely brought where it was prosecuted after the suit had been begun against the attorney, and after the proceeds of the estate in his hands, including such bond, were ordered to be turned over to the administrator, and after the money paid the guardian had been demanded and refused.—*Chandler v. Morrison*, 23 N. E. 160, 123 Ind. 254.

[x] (Sup. 1891)

In an action on a guardian's bond, proof that the guardian has paid out the entire trust fund according to orders of a court of competent jurisdiction is a complete defense, since such orders, though made ex parte and subject to the control of the court making them, are not subject to collateral attack.—*State ex rel. Wiseman v. Wheeler*, 127 Ind. 451, 26 N. E. 552, 1008.

In an action on a guardian's bond to recover for money alleged to be due from him, defendant may show, under the general denial, that he disbursed, under orders of the court, all the money that came to his hands; and testimony of one who assisted him, as to a settlement with the person to whom the court had directed him to pay over the balance in his hands, is admissible to show such payment.—*Id.*

Where a complaint in an action on a guardian's bond charged the conversion by the guardian of a portion of a trust fund and the unauthorized disbursement by him of a portion of such fund, and the guardian's defense was that, while he had disbursed all of the moneys which came to his hands as such guardian, such disbursement was authorized having been made to the mother of his wards in obedience to the court's order, it was proper for a witness to state that he assisted in making a settlement between the guardian and the mother of the wards at the time when the guardian was ordered to pay to the mother the balance remaining in his hands, and that he previously prepared

the petition, and had procured the order of court directing the guardian to pay the balance to the mother, and thereupon the guardian and the mother met in his office to determine the amount of the balance, and that he made the necessary computations for them in the settlement, as such testimony tended to establish the fact of the payment of the money to the mother as the court had directed and was clearly competent.—*Id.*

[xx] (App. 1891)

In an action upon the bond of a guardian, it was alleged that he had received \$600 of the ward's money, but that he had filed no inventory or report of receipts and disbursements, as required by Rev. St. 1881, § 2521; that he had converted it to his own use; and that he had failed to account for such money, though the guardianship was ended by the marriage of the ward with a person over 21 years old. The answer averred that the guardian was the husband of the ward at the making of the bond, which was given solely to enable him to draw a pension due the ward, and that the guardian had paid for various domestic purposes \$531.85 for the use of himself and wife, with her consent; and demanded judgment for costs. *Held* that, since such paragraphs did not account for the whole \$600, and purported to be a complete bar to recovery, it was error to overrule a demurrer to them.—*State ex rel. Haines v. Parfish*, 1 Ind. App. 441, 27 N. E. 652.

[xxx] (Sup. 1892)

A guardian filed a bond with satisfactory sureties at the time of his appointment, and afterwards, on receiving additional money belonging to his wards, was required to file another bond. There was nothing to indicate an intention to make the second bond subsidiary to the first, but it appeared to be given as primary security. *Held*, that it was not necessary to exhaust the remedies against the obligors in the first bond before bringing suit on the second, all being equally liable.—*State ex rel. Joseph v. Mitchell*, 132 Ind. 461, 32 N. E. 86.

[y] (App. 1892)

In an action on a guardian's bond to recover an indebtedness due from the ward's estate, under a plea of payment, it appeared that the guardian gave plaintiff his individual note, and took plaintiff's receipt for the amount of the indebtedness. The guardian testified that "I told my sister [plaintiff] that if she would give me a receipt, so that I could use it in making my report as guardian, I would pay her as soon as I was able." *Held*, that the evidence failed to show that the note was taken by plaintiff in full payment of the debt.—*Price v. Barnes*, 7 Ind. App. 1, 31 N. E. 809, 34 N. E. 408.

[yy] (App. 1894)

Since Rev. St. 1894, § 2685 (Rev. St. 1881, § 2521), makes it the guardian's duty, at the expiration of his trust, to pay over all of the estate of his ward in his hands, a com-

plaint on the bond showing that defendant was duly removed three years before, and that he has wholly failed, neglected, and refused to account for, pay over, and deliver to his successor the property in his hands, is sufficient to support a judgment for the 10 per cent. penalty (Rev. St. 1894, § 2614; Rev. St. 1881, § 2459), without further averment of demand and refusal to account.—*Bernhamer v. Steeg*, 10 Ind. App. 119, 37 N. E. 420.

[jyy] (Sup. 1896)

In an action on a guardian's bond, the defense that certain moneys were received and converted by the guardian before his appointment and qualification is admissible in favor of the sureties, under a general denial.—*Harness v. State ex rel. Turley*, 42 N. E. 813, 143 Ind. 420.

A complaint in a suit on a guardian's bond, alleging that he, as guardian, received certain sums, which he converted to his own use, sufficiently alleges that he received such sums after his appointment and qualification as guardian.—*Id.*

[z] (Sup. 1900)

Under Rev. St. 1881, § 2403 (*Horner's Rev. St. 1897, § 2403*; *Burns' Rev. St. 1894, § 2558*), providing that a final settlement of an estate may be vacated within three years for fraud or mistake in the settlement or in the prior proceedings, and Rev. St. 1881, § 2527 (*Horner's Rev. St. 1897, § 2527*; *Burns' Rev. St. 1894, § 2691*), providing that suits on guardians' bonds shall be governed by the law regulating suits on the bonds of executors and administrators, an action by a ward to recover on his guardian's bond for failure to account for moneys received by him, such failure being due to fraud or mistake, is barred after three years from the final settlement.—*State ex rel. Little v. Parsons*, 57 N. E. 711, 155 Ind. 67.

[zz] (App. 1900)

Where, in an action in the superior court against defendant guardian and his bondsmen to recover for goods furnished a ward on the credit of the defendant, the fact that the defendant was referred to in the complaint as "guardian" will be regarded as "descriptive personæ," since it was evident that the plaintiff sought a personal judgment against the defendant.—*Hall v. Ferguson*, 57 N. E. 153, 24 Ind. App. 532.

[zzz] (App. 1902)

Where the complaint in an action by a ward against his former guardian and his sureties attacked a former order discharging the guardian as fraudulent, and charged him with conversion, the sureties could not set off a claim for services rendered by the guardian for which he had received no compensation, since, if the guardian was guilty of conversion, he was not

entitled to compensation, while, if the order of discharge proved to be valid, there would be no occasion for set-off.—*State ex rel. Webb v. Stockwell*, 63 N. E. 321, 28 Ind. App. 530.

An answer alleging that the guardian had fully accounted to the proper court for all moneys coming into his hands, and had been discharged by such court, was no answer to the fraud and conversion charged in the complaint.—*Id.*

In an action by a ward after reaching majority, against his former guardian and his sureties, an answer of the sureties that their principal had fully and properly accounted for and paid out all money received by him as guardian was insufficient, in that it failed to allege the payment of the money to the ward, or that it was accounted for to the proper court; the averment that it was "properly" accounted for being a mere conclusion.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. *Guard. & W.* §§ 423, 623-636, 638-663.

See, also, 21 Cyc. pp. 240-262.

## GUARDS.

See—

Grading dangerous excavations at railroad crossings. *RAILROADS*, § 303.

Guarding turntables to prevent injury to children. *NEGLIGENCE*, § 23.

Liability of city for negligence of independent contractor failing to guard excavation. *MUNICIPAL CORPORATIONS*, § 751.

## GUESTS.

See—

Imputation of negligence of host to. *NEGLIGENCE*, § 93.

*INNKEEPERS*.

## GUILTY.

See—

Plea of guilty in criminal prosecution. *CRIMINAL LAW*, §§ 272-274.

Of not guilty in criminal prosecution. *CRIMINAL LAW*, §§ 299-301.

Sentence on plea of guilty. *CRIMINAL LAW*, § 980.

Verdict in criminal prosecution. *CRIMINAL LAW*, §§ 872-893.

## GUNPOWDER.

See *EXPLOSIVES*.

## GUNS.

See *WEAPONS*.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

# HABEAS CORPUS.

## *Scope-Note.*

[INCLUDES writs of habeas corpus commanding the production of a person detained by another, with the cause of such detention, for determination thereof; nature and scope of the remedy in general; grounds of such writs; to and against whom and for what restraint they are allowed; jurisdiction to grant and proceedings to obtain the writ; issuance, requisites, and validity of writs; service thereof, return thereto, and proceedings thereon; writs of certiorari in aid of writs of habeas corpus, and other incidental relief; judgments or orders and enforcement thereof; review of proceedings; costs in habeas corpus proceedings; disobedience to such writs; and suspension of the remedy.]

[EXCLUDES writs of habeas corpus for production of prisoners to testify as witnesses (see *Witnesses*), and for special purposes other than deliverance from restraint (see specific heads).]

## *Analysis.*

### **I. Nature and Grounds of Remedy.**

- § 1. Nature and scope in general.
- § 3. Existence of other remedy in general.
- § 4. Existence of remedy by appeal or writ of error.
- § 18. Proceedings reviewable.
- § 22. — Final judgment, sentence, and commitment.
- § 24. Grounds for relief.
- § 25. — In general.
- § 27. — Want of jurisdiction.
- § 29. — Invalidity of proceedings.
- § 30. — Errors and irregularities.
- § 31. — Former jeopardy.
- § 32. — Invalidity of statute or ordinance.
- § 33. — Admission to or reduction of bail.
- § 38. Persons entitled to relief.

### **II. Jurisdiction, Proceedings, and Relief.**

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- § 84. Demurrer or exception to return or to answer.
- § 85. Evidence.
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**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

## II. Jurisdiction, Proceedings, and Relief—Continued.

- § 96. — Errors and irregularities.
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## III. Suspension of Remedy.

- § 121. Power to suspend in general.
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### I. NATURE AND GROUNDS OF REMEDY.

Grant of writ by executive officer as exercise of judicial power, see CONSTITUTIONAL LAW, § 80.

#### § 1. Nature and scope in general.

Habeas corpus as civil action within statute authorizing change of venue, see post, § 48.

[a] (Sup. 1883)

An application for a writ of habeas corpus is not a civil action.—McGlennan v. Margowski, 90 Ind. 150.

#### FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Hab. Corp. §§ 1, 3.

See, also, 21 Cyc. pp. 282-284, 289.

#### § 3. Existence of other remedy in general.

[a] (Sup. 1856)

Where the verdict of the jury in a criminal prosecution is a nullity, the remedy of the prisoner is to move in the trial court for his discharge, and he is not entitled to a writ of habeas corpus.—Wright v. State, 7 Ind. 324.

[b] (Sup. 1909)

One attempting to withhold the custody of a ward from his guardian appointed under section 3065, Burns' Ann. St. 1908, is not confined to the remedy allowed by section 3071, providing that the court by whom or whose clerk a guardian has been appointed may at any time remove the guardian for habitual drunkenness, neglect of duty, incompetency, etc., but upon return to a writ of habeas corpus by the guardian to get possession of the ward may set up the guardian's unfitness, to defeat the guardian's right to the ward's custody.—Shoaf v. Livengood, 172 Ind. 707, 88 N. E. 508.

#### FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Hab. Corp. § 3.

See, also, 21 Cyc. p. 287.

#### § 4. Existence of remedy by appeal or writ of error.

[a] (Sup. 1893)

The proceeding taken by a justice of the peace after acquiring jurisdiction over the person of one charged with the violation of the criminal law can be inquired into only by way of appeal to a higher court, and not by writ of habeas corpus.—Smith v. Clausmeier, 35 N. E. 904, 136 Ind. 105, 43 Am. St. Rep. 311.

[b] (Sup. 1904)

A writ of habeas corpus cannot be used as a substitute for a writ of certiorari, error, or an appeal.—Gillespie v. Rump, 72 N. E. 138, 163 Ind. 457.

[c] (Sup. 1905)

The writ of habeas corpus cannot be made a substitute for an appeal or writ of error.—Welty v. Ward, 73 N. E. 889, 164 Ind. 457.

[d] (Sup. 1905)

Errors, if any, committed by the court in contempt proceedings, can be reviewed and corrected only on appeal, and not by habeas corpus to procure the release of the contemner.—Perry v. Pernet, 74 N. E. 609, 165 Ind. 67.

[e] (Sup. 1908)

Habeas corpus does not lie for the release of a prisoner unless the conviction is void, as the writ cannot serve the office of an appeal.—Tullis v. Shaw, 169 Ind. 662, 83 N. E. 376.

#### FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Hab. Corp. § 4.

See, also, 21 Cyc. p. 285.

**§ 18. Proceedings reviewable.**

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. HAB. CORP. §§ 17-20.

See, also, 21 Cyc. pp. 291-295; note, 22

Am. St. Rep. 417, 422.

**§ 22. — Final judgment, sentence, and commitment.**

Determination of particular questions on hearing, see post, § 105.

**[a] (Sup. 1867)**

Where a petition alleges that petitioner is imprisoned for an alleged contempt in disobeying an order of the court of common pleas, but denies that said imprisonment is by virtue of any writ or order of said court authorizing the same, petitioner is entitled to a writ of habeas corpus.—*Ex parte Lawler*, 28 Ind. 241.

**[b] (Sup. 1879)**

A petition for habeas corpus against the sheriff alleged that a jury had found the petitioners guilty of murder in the second degree, and fixed their punishment at imprisonment in the state prison for two years (the statutory punishment being imprisonment for life), and that the court had denied their motion to be discharged, but had granted them a venire de novo, and that, for want of a recognizance to appear next term, they were in the sheriff's custody. *Held*, that the writ would not lie.—*Wentworth v. Alexander*, 66 Ind. 39.

**[c] (Sup. 1883)**

The writ will not issue where the applicant is restrained of his liberty, under a commitment after trial and final judgment of conviction.—*Smith v. Hess*, 91 Ind. 424.

**[d] (Sup. 1884)**

The action of a justice of the peace in a proceeding to obtain surety of the peace requiring defendant to enter into the statutory recognizance, or in default thereof to go to jail, is not a "final judgment of a court of competent jurisdiction," the legality of which cannot be inquired into under Rev. St. 1881, § 1119.—*Smelzer v. Lockhart*, 97 Ind. 315.

**[e] (Sup. 1885)**

Where a court has jurisdiction of the person and subject-matter, its judgment, though erroneous, cannot, under Rev. St. 1881, § 1119, be collaterally assailed on habeas corpus, as where, on a plea of guilty in a capital case, the court has fixed the punishment without the intervention of a jury.—*Lowery v. Howard*, 103 Ind. 440, 3 N. E. 124.

**[f] (Sup. 1886)**

Under Rev. St. 1881, § 1119, forbidding a discharge where the defendant is held on a final judgment of a court of competent jurisdiction, a judgment of a court of general jurisdiction cannot be collaterally attacked by habeas corpus proceedings unless the record shows affirmatively that the court had no jurisdiction.—*Holderman v. Thompson*, 105 Ind. 112, 5 N. E. 175.

**[g] (Sup. 1887)**

Where an order of a court of competent jurisdiction has been made, denying the application of a prisoner for a discharge on the ground that he had been confined for two or more continuous terms without a trial, such order and judgment cannot be collaterally attacked by habeas corpus proceedings, and it will be presumed that the court heard evidence bringing the matter within the statutory exceptions justifying the refusal of the application for discharge.—*McGuire v. Wallace*, 109 Ind. 284, 10 N. E. 111.

**[h] (Sup. 1900)**

A judgment of conviction rendered by a court having jurisdiction of the subject-matter and of the person is final, and a writ of habeas corpus cannot be used to inquire into its legality.—*Webber v. Harding*, 58 N. E. 533, 155 Ind. 408.

**[i] (Sup. 1902)**

Under Burns' Rev. St. 1901, § 1133, providing that on habeas corpus no court shall inquire into the legality of any judgment or process whereby the party is in custody, issued on any final judgment of a court of competent jurisdiction, where an affidavit containing a colorable criminal charge against the petitioner was filed before a justice of the peace, and, after a preliminary hearing had been waived, judgment was entered requiring him to enter into a recognizance to appear at the circuit court, and in default of bail he was committed to the county jail, the court, on habeas corpus, cannot inquire into the sufficiency of the affidavit, or discharge him from custody.—*Cruthers v. Bray*, 65 N. E. 517, 159 Ind. 685.

**[j] (Sup. 1905)**

Habeas corpus to procure the discharge of one committed for contempt of court is a collateral attack upon the judgment of commitment, and cannot succeed unless that judgment is absolutely void.—*Perry v. Pernet*, 74 N. E. 609, 165 Ind. 67.

**[k] (Sup. 1906)**

A judgment which is not void is not subject to collateral attack by writ of habeas corpus.—*Ryan v. Rhodes*, 167 Ind. 121, 76 N. E. 249, 78 N. E. 330.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. HAB. CORP. §§ 19½, 20; 10 CENT. DIG. CONTEMPT, § 217.

See, also, 21 Cyc. pp. 294, 295; notes, 45 L. R. A. 136, 1 L. R. A. (N. S.) 1142; notes, 55 Am. St. Rep. 267, 87 Am. St. Rep. 167.

**§ 24. Grounds for relief.**

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. HAB. CORP. §§ 21-31.

See, also, 21 Cyc. pp. 295-307.

**§ 25. — In general.****[a] (Sup. 1871)**

Where, by the return to a writ of habeas corpus for a child, it appeared that the petitioner had left the child in the custody of the respondents, a demand for the custody was necessary before legal proceedings could be instituted, and they could be instituted then only if the respondent, having the power to do so, had refused to restore the child.—*Speer v. Davis*, 38 Ind. 271.

**[b] (Sup. 1878)**

The guardian of an illegitimate orphan child is entitled to the custody thereof, and may, by a writ of habeas corpus, procure the custody of the child, even as against one to whom the mother, in her lifetime, intrusted the child to remain until its majority.—*Johns v. Emmert*, 62 Ind. 533.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Hab. Corp. §§ 21, 28, 30. 47; 21 CENT. DIG. Execution, § 1262.

See, also, 21 Cyc. pp. 295, 296, 301-307.

**§ 27. — Want of jurisdiction.****[a] (Sup. 1854)**

Where the court or officer was without jurisdiction or power to render judgment or issue process for the imprisonment of a party, the imprisonment was illegal, and the courts will relieve by habeas corpus.—*Miller v. Snyder*, 6 Ind. 1.

On habeas corpus the question of the jurisdiction of the court by whose judgment the petitioner is imprisoned is a proper subject of inquiry, both at common law and by statute.—*Id.*

**[b] (Sup. 1908)**

Where an affidavit presented to the juvenile court, charging defendant with encouraging a girl under 15 to commit an act of delinquency, to wit, that defendant held illicit sexual intercourse with her, was claimed to charge a felony because of the allegation following the videlicet, the juvenile court had jurisdiction to determine whether the charge was repugnant to the allegation preceding the videlicet, and if so, whether it nullified such charge of misdemeanor, or whether the charge of felony should itself be rejected as surplusage or a repugnant allegation, leaving the charge of misdemeanor to stand alone, and hence the court having decided that the evidence charged a misdemeanor, and that it had authority to try the case on the merits, the judgment was not without jurisdiction so as to entitle defendant to a discharge on habeas corpus.—*Tullis v. Shaw*, 169 Ind. 662, 83 N. E. 376.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Hab. Corp. § 22.

See, also, 21 Cyc. p. 296.

**§ 29. — Invalidity of proceedings.****[a] (Sup. 1865)**

A writ of habeas corpus to obtain the custody of a child should not be set aside and quashed, because the judge before whom it was returnable failed to attend at the prescribed time and place, and because the defendant has removed to another county.—*State ex rel. Sharpe v. Banks*, 25 Ind. 495.

**[b] (Sup. 1886)**

Although the verdict of a jury, under Rev. St. 1881, § 1560, authorizing a ca. sa., may be so defective that it is error for the court to render judgment thereon awarding execution against the person, yet if the court has jurisdiction of the person and subject-matter the judgment is not a nullity, and cannot be collaterally attacked on habeas corpus.—*Willis v. Bayles*, 105 Ind. 363, 5 N. E. 8.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Hab. Corp. § 24.

**§ 30. — Errors and irregularities.****[a] (Sup. 1886)**

Where one who is held in custody under the judgment of a court institutes habeas corpus proceedings, he must show that the judgment is not erroneous merely, but absolutely void.—*Willis v. Bayles*, 105 Ind. 363, 5 N. E. 8.

It is settled law that the writ of habeas corpus cannot be used as a writ for the correction of mere errors in the judgment under and by force of which the petitioner for the writ is restrained of his liberty.—*Id.*

**[b] (Sup. 1891)**

Where the affidavit on which the prosecution before a justice of the peace is based did not charge a public offense, the judgment of conviction, though erroneous, was not void, the justice having jurisdiction of the subject-matter and the person of the defendant, and the judgment rendered by him cannot be attacked collaterally by habeas corpus.—*McLaughlin v. Etchison*, 27 N. E. 152, 127 Ind. 474, 22 Am. St. Rep. 658.

**[c] (Sup. 1892)**

The judgment of a justice of the peace as committing magistrate of persons charged with felony refusing to grant a change of venue is not void, but merely voidable on direct attack, and the error cannot be raised in habeas corpus proceedings to obtain the accused's release from the custody of the sheriff whence accused was committed by the justice.—*Turner v. Conkey*, 31 N. E. 777, 132 Ind. 248, 17 L. R. A. 509, 32 Am. St. Rep. 251.

Where a justice of the peace has jurisdiction to commit persons charged with felony to the custody of the sheriff for a preliminary hearing, one accused of felony who is committed to the custody of the sheriff is not entitled to release on habeas corpus merely for error of

the justice in refusing to grant a motion for change of venue.—Id.

Where a justice of the peace having as committing magistrate original jurisdiction of a criminal case erroneously denies a motion by defendant therein for a change of venue, the jurisdiction of the justice is not affected thereby, and the defendant, being committed in default of bail, is not entitled to a discharge from custody on a writ of habeas corpus.—Id.

A judgment of a justice of the peace having jurisdiction as a committing magistrate in cases of persons charged with felony is not open to collateral attack for error in the proceedings by petition for habeas corpus to obtain the release of a person charged with felony and committed by the magistrate to the custody of the sheriff.—Id.

[d] (Sup. 1894)

Mere errors or irregularities, which only render the proceeding voidable, are not grounds for relief on writ of habeas corpus.—Board of Children's Guardians of Marion County v. Shutter, 139 Ind. 268, 34 N. E. 665, 31 L. R. A. 740.

[e] (Sup. 1900)

Where a justice of the peace before whom defendant was tried and convicted had jurisdiction of the subject-matter of the action and of defendant's person, no formal error or irregularity in the proceedings of the justice would authorize defendant's discharge on habeas corpus.—Pritchett v. Cox, 56 N. E. 20, 154 Ind. 108.

[f] (Sup. 1900)

Where one had been tried and convicted in the superior court, he will not be released by habeas corpus because he was not arraigned and did not plead in such court, since, as such errors do not go to the jurisdiction of the court, its judgment is not subject to collateral attack therefor.—Winslow v. Green, 58 N. E. 259, 155 Ind. 368.

[g] (Sup. 1901)

Where a committing magistrate, with jurisdiction of the person of defendant and the subject-matter, improperly denied defendant's motion for change of venue, such error did not entitle defendant to discharge on habeas corpus after conviction, as the error did not deprive the magistrate of jurisdiction.—Peters v. Koepke, 59 N. E. 33, 156 Ind. 35.

[h] (Sup. 1901)

Where one has been tried and convicted in the lower court, he will not be released by habeas corpus because his demand for a jury trial was refused, and the trial had before the judge, since such action, if erroneous, did not deprive the court of jurisdiction.—Williams v. Hert, 60 N. E. 1067, 157 Ind. 211, 87 Am. St. Rep. 203.

[i] (Sup. 1904)

Even if it was error for the court to charge a jury in a criminal case and impanel a second jury, such act did not ipso facto deprive the court of its jurisdiction, and render its subsequent proceedings void.—Gillespie v. Rump, 72 N. E. 138, 163 Ind. 457.

[j] (Sup. 1905)

Even if an order committing a person to an indefinite time for contempt in failing to comply with an order requiring the payment of money was erroneous for failure to fix a definite time, this error would not render the judgment void, and subject to collateral attack by habeas corpus.—Perry v. Pernet, 74 N. E. 609, 165 Ind. 67.

[k] (Sup. 1906)

A judgment of a court of competent jurisdiction, committing a married female infant to the industrial school for girls under Burns' Act, St. 1901, § 8273, though possibly erroneous on the ground that the statute only applies to unmarried females, is not for that reason void, and hence is not subject to collateral attack by habeas corpus proceedings.—Ryan v. Rhoads, 76 N. E. 249, 78 N. E. 330, 167 Ind. 121.

The fact that the husband of a female infant was not a party to proceedings whereby she was committed to the industrial school for girls under Burns' Act, St. 1901, § 8273, does not enable the husband to maintain habeas corpus on the ground that the judgment was erroneous.—Id.

A proceeding by habeas corpus cannot be used to correct errors in a case in which commitment was made.—Id.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Hab. Corp. § 25.

See, also, 21 Cyc. p. 298.

§ 31. — Former jeopardy.

[a] (Sup. 1904)

Former jeopardy or proceedings in the nature of an acquittal are matters for which a subsequent trial, under Burns' Act, St. 1901, § 1832, and not ground for a petition for discharge on habeas corpus.—Gillespie v. Rump, 72 N. E. 138, 163 Ind. 457.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Hab. Corp. § 27.

See, also, 21 Cyc. p. 305.

§ 32. — Invalidity of statute or ordinance.

[a] (Sup. 1901)

Rev. St. 1881, § 1119 (Horner's Rev. St. 1897, § 1119; Burns' Rev. St. 1894, § 1119) provides that no court shall inquire into the validity of any judgment or process whereby a party is in custody, or discharge him, when the term of commitment has not expired, and any process issued, on any final judgment of a court of competent jurisdiction. Acts 18

p. 65 et seq., §§ 113, 115, 116 (Burns' Rev. St. 1894, §§ 4017, 4019, 4020), provide that the police court of the city of Evansville is a court of record, having exclusive original jurisdiction of all violations of ordinances of the city, whose judgments and proceedings have the same force as those of the criminal and circuit courts. *Held* error to refuse to quash a writ of habeas corpus for release, on the ground of the unconstitutionality of an ordinance and the statute authorizing it, of one convicted before such police court of a violation of such ordinance.—*Koepeke v. Hill*, 60 N. E. 1039, 157 Ind. 172, 87 Am. St. Rep. 161.

#### FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Hab. Corp. § 20.

See, also, 21 Cyc. p. 302.

### § 33. — Admission to or reduction of bail.

#### [a] (Sup. 1852)

A person indicted for murder is entitled to habeas corpus for the purpose of showing facts satisfying the court that he is entitled to a discharge on bail.—*Lumm v. State*, 3 Ind. 283.

#### [b] (Sup. 1860)

Code, § 111, permitting an arrested debtor to sue out a writ of habeas corpus where he has been committed for "want of special bail," does not apply where he is arrested under a writ returnable forthwith to a justice of the peace, under 2 Rev. St. 1852, p. 454, § 24, but has made no appearance before the justice, as section 41, p. 458, provides that no special bail can be given before appearance before the justice and continuance of the cause.—*Dwire v. Saunders*, 15 Ind. 306.

Under 2 Rev. St. 1852, p. 454, § 26, providing that, where a party is under arrest on a *capias ad respondendum*, he is entitled to a trial within 24 hours after being brought before the justice, and cannot give special bail unless the trial be continued. Until the expiration of said 24 hours, or a continuance of the cause, Code, § 111, awarding the writ of habeas corpus to persons under arrest for want of especial bail, has no application.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Hab. Corp. §§ 18, 31;

5 CENT. DIG. Bail, § 5.

See, also, 21 Cyc. p. 306.

### § 38. Persons entitled to relief.

#### [a] (Sup. 1884)

The plaintiff, a corporation authorized to take charge of destitute children and provide them homes, transferred to defendant by written contract the care and custody of a child, and afterwards, under its statutory authority, deeming the home unsuitable, made demand for the return of the child, which defendant refused. *Held*, that plaintiff was entitled to

habeas corpus.—*Milligan v. State ex rel. Children's Home of Cincinnati, Ohio*, 97 Ind. 355.

#### FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Hab. Corp. § 8.

See, also, 21 Cyc. p. 288.

## II. JURISDICTION, PROCEEDINGS, AND RELIEF.

Change of venue, see VENUE, § 36.

Right to trial by jury, see JURY, § 19.

### § 40. Jurisdiction in general.

#### FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Hab. Corp. §§ 34-45.

See, also, 21 Cyc. pp. 307-311.

### § 47. — Authority of judges and judicial officers.

#### [a] (Sup. 1854)

A judge of the court of common pleas may, under 2 Rev. St. 1852, p. 195, § 725, grant the writ of habeas corpus to a prisoner detained in the state prison under sentence for a felony.—*Miller v. Snyder*, 6 Ind. 1.

#### [b] (Sup. 1864)

The act of January 3, 1852 (2 Gav. & II. Rev. St. 304), giving jurisdiction to the clerk of the circuit courts to issue writs of habeas corpus, and to hear and determine them, is by the subsequent legislation on the subject of habeas corpus repealed, and such clerks have now no such power.—*Gregg v. Wynn*, 22 Ind. 373.

#### FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Hab. Corp. §§ 36, 37.

### § 48. Jurisdiction of parties.

#### [a] (Sup. 1871)

A writ of habeas corpus must issue from a court of the county where the person applying for the writ is restrained of his liberty, except when the judge of said court is unable or incompetent to hear and determine the application.—*Ex parte Wiley*, 36 Ind. 528.

#### [b] (Sup. 1905)

Habeas corpus proceedings for the custody of a child resulted in the award of such custody to petitioner, and respondent appealed, and moved for the remission of the child to his custody pending the appeal. Subsequently the motion was withdrawn, and an agreement, leaving the custody of the child to petitioner pending the appeal, and providing that petitioner should keep the child within the jurisdiction of the circuit court during that time, was filed and made an order of court. *Held*, that the act of petitioner in taking the child into another county of the state did not remove it from the jurisdiction of the court in violation of the court's order and the agreement, but the circuit court's jurisdiction, for the purpose of enforcing or modifying its order, would extend to any place in the state at which petitioner might locate.

—*Willis v. Willis*, 75 N. E. 655, 165 Ind. 332.  
2 L. R. A. (N. S.) 244.

FOR CASES FROM OTHER STATES,  
SEE 25 CENT. DIG. HAB. CORP. § 46.

### § 51. Parties.

Persons entitled to relief, see ante, § 38.

#### [a] (Sup. 1856)

The officer who made the arrest is a proper party to a writ of habeas corpus to test the legality of the commitment.—*Nichols v. Cornelius*, 7 Ind. 611.

FOR CASES FROM OTHER STATES,  
SEE 25 CENT. DIG. HAB. CORP. §§ 9, 49.  
See, also, 21 Cyc. p. 311.

### § 52. Petition.

FOR CASES FROM OTHER STATES,  
SEE 25 CENT. DIG. HAB. CORP. §§ 50-54;  
10 CENT. DIG. CONTEMPT, § 218.  
See, also, 21 Cyc. pp. 312-314.

### § 53. — Form and requisites in general.

#### [a] (Sup. 1845)

A petition stating that the petitioner is guardian of a certain infant, the daughter of one A., deceased, and B., his wife, who had, after the death of A., married one C., and that the infant was by said C. and B. illegally restrained of her liberty and detained from the custody of the petitioner, was *held* to be sufficient to authorize the issuing of a writ of habeas corpus.—*Hovey v. Morris*, 7 Blackf. 559.

#### [b] (Sup. 1864)

Where a guardian desires, by the aid of a writ of habeas corpus, to obtain the custody of his ward, he must make his letters of guardianship a part of his petition for the writ.—*Gregg v. Wynn*, 22 Ind. 373.

#### [c] (Sup. 1867)

A petition alleging that the petitioner was imprisoned and held in custody by the sheriff in the county jail for an alleged contempt in disobeying an order of the court directing him to pay certain moneys, and that said imprisonment was not by virtue of any writ or order of the court authorizing the same, is sufficient to entitle the petitioner to a writ of habeas corpus.—*Ex parte Lawler*, 28 Ind. 241.

#### [d] (Sup. 1867)

Upon habeas corpus by a mother to recover the custody of her infant child, if her right to such custody has been before declared by a decree in an action for divorce, a copy of the decree need not be filed with the petition.—*Sears v. Dessar*, 28 Ind. 472.

#### [e] (Sup. 1883)

A petition for a writ of habeas corpus, which shows that the petitioner is deprived of the custody of the person of his motherless daughter, aged 11 years, by the acts of defend-

ant, is sufficient prima facie to authorize the writ, though it contain much surplusage and irrelevant matter.—*McGlennan v. Marg*, 90 Ind. 150.

#### [f] (Sup. 1886)

Where the complaint in habeas corpus proceedings complies substantially with the statutory requirements, a prima facie case is in favor of the petitioner, and the complaint is abundantly sufficient to withstand a motion to quash the writ.—*Willis v. Bayles*, 5 N. E. 105 Ind. 363.

FOR CASES FROM OTHER STATES,  
SEE 25 CENT. DIG. HAB. CORP. §§ 50, 51.  
See, also, 21 Cyc. p. 312.

### § 54. — Particular averments.

#### [a] (Sup. 1867)

Where a petition alleges that petitioner was imprisoned for an alleged contempt in disobeying an order of the court of common pleas, and denies that said imprisonment is by virtue of any writ or order of said court authorizing the same, petitioner is entitled to a writ of habeas corpus.—*Ex parte Lawler*, 28 Ind. 241.

#### [b] (Sup. 1878)

Under 2 Rev. St. 1876, p. 290, § 17, requiring the complaint in habeas corpus to specify the cause of the restraint according to the best knowledge and belief of the applicant, a complaint alleging that the pretended cause and reason of the restraint according to the best knowledge and belief of the applicant was the recovery of a judgment against the applicant "for the sum of \$10 and costs" for violation of a city ordinance sufficiently entitles the existence of a judgment that the applicant work out such judgment in labor and expence in accordance with 1 Rev. St. 1876, p. 274, under which the commitment would have been legal.—*Flora v. Sachs*, 64 Ind. 155.

#### [c] (Sup. 1907)

Where an application for a writ of habeas corpus to obtain the custody of a minor was based on a decree in divorce in Kentucky, but the application contained no averment showing that the Kentucky court rendering the decree was a court of general jurisdiction, that it had jurisdiction over the subject-matter and parties and no certified copy of such decree was filed or made a part of the application, it was fatally defective.—*Hardin v. Hardin*, 168 Ind. 352, 81 N. E. 60.

FOR CASES FROM OTHER STATES,  
SEE 25 CENT. DIG. HAB. CORP. § 51.  
CENT. DIG. CONTEMPT, § 218.

### § 72. Quashing or vacating writ.

#### [a] (Sup. 1886)

In habeas corpus proceedings the sufficiency of the complaint whereon the writ was issued may be tested by a motion to quash the writ.—*Willis v. Bayles*, 105 Ind. 363, 5 N. E. 8.

## [b] (Sup. 1891)

The writ of habeas corpus cannot be used for the correction of errors (Rev. St. 1881, § 1119); and where it appears that the petitioner is in custody pursuant to an erroneous judgment the writ will be quashed, if it also appears that the court rendering it had jurisdiction of his person and the subject-matter.—*McLaughlin v. Etchison*, 127 Ind. 474, 27 N. E. 152, 22 Am. St. Rep. 658.

## [c] (Sup. 1897)

A motion to quash a writ of habeas corpus tests the sufficiency of the application for the writ.—*Schleuter v. Canatsy*, 47 N. E. 825, 148 Ind. 384.

In determining whether the court erred in overruling appellant's motion to quash the writ of habeas corpus, the allegations of the application are admitted to be true, the same as in case of a demurrer to a pleading.—*Id.*

## [d] (Sup. 1900)

A writ of habeas corpus is a collateral remedy, and in an assault on the judgment of a court of competent jurisdiction thereby, it must be presumed, in the absence of any showing to the contrary, in support of a motion to quash the writ, that the court had full jurisdiction of the subject-matter, and that all the proceedings were according to law, and such presumption extends to the appointment of a special judge.—*Crawford v. Lawrence*, 56 N. E. 673, 154 Ind. 288.

## [e] (Sup. 1905)

Respondent to a petition for a writ of habeas corpus admits the truth of the allegations of the writ by moving to quash the same.—*Willis v. Willis*, 75 N. E. 653, 165 Ind. 325.

## [f] (Sup. 1907)

A motion to quash a writ of habeas corpus tests the sufficiency of the complaint or application.—*Hardin v. Hardin*, 168 Ind. 352, 81 N. E. 60.

## FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. Hab. Corp. § 64.

See, also, 21 Cyc. p. 317.

## § 73. Return.

## FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Hab. Corp. §§ 65-73.

See, also, 21 Cyc. pp. 317-320.

## § 75. — Requisites and sufficiency in general.

## [a] (Sup. 1867)

A return to a writ of habeas corpus by a mother to obtain the custody of her infant child, which discloses the fact that before the issuing of the writ the custody of the child had been transferred to another, but fails to state the reason for such change, is bad.—*Sears v. Dessar*, 28 Ind. 472.

## [b] (Sup. 1887)

The return to a writ of habeas corpus, brought by a father to regain the custody of his child from a statutory guardian, alleged the unfitness of the relator to have such custody, and the care, training, and education of the child. *Held* sufficient against general exceptions.—*Brooke v. Logan*, 112 Ind. 183, 13 N. E. 669, 2 Am. St. Rep. 177.

## [c] (Sup. 1895)

When the return of a sheriff upon a writ of habeas corpus shows upon its face that the prisoner is held upon the mittimus of a justice of the peace, but does not show that the justice had jurisdiction, an exception to the return for the justice's want of jurisdiction should be sustained.—*Clayborn v. Tompkins*, 141 Ind. 19, 40 N. E. 121.

## [d] (Sup. 1902)

On a habeas corpus proceeding to obtain possession of an infant, the sufficiency of the return to the writ is not material, as regards the court's power to make such a disposition of the child as appears most conducive to its welfare.—*Bullock v. Robertson*, 65 N. E. 5, 160 Ind. 521.

## FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Hab. Corp. § 66.

See, also, 21 Cyc. pp. 317-319.

## § 76. — Cause or authority for restraint or detention.

## [a] (Sup. 1855)

A return to a writ of habeas corpus alleging a judgment of the circuit court as a justification for the restraint is sufficient under the rule that legal proceedings in courts of general jurisdiction are presumed to be valid.—*Lucas v. Hawkins*, 1 N. E. 358, 102 Ind. 64.

## FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Hab. Corp. § 67.

## § 77. — Copies of process or proceedings authorizing imprisonment.

## [a] (Sup. 1857)

A return to a writ of habeas corpus, setting up a will as the written authority for the restraint, but containing no copy of the will, is insufficient.—*Shaw v. Smith*, 8 Ind. 485.

A person, alleging that he had been appointed guardian of an infant, sued out a writ of habeas corpus to obtain the body of the infant, illegally restrained of his liberty by another person. The return denied all the allegations in the writ, and averred that the mother of the infant, the father having first died, had, by will, appointed him guardian. *Held*, that the return was insufficient in omitting to append a copy of the will, which will should be presented at the hearing.—*Id.*

## FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Hab. Corp. §§ 52, 67, 68.

**§ 79. — Conclusiveness and effect.**

[a] (Sup. 1901)

Burns' Rev. St. 1894, § 4017, provides that all judgments, decrees, orders, and proceedings of the Evansville police court shall have the same force and effect as those of the criminal and circuit courts. *Held*, that where the return to a writ of habeas corpus showed that relator was convicted in that court, and annexed copies of the affidavit, proceedings, and judgment, showing that the court had jurisdiction of subject-matter and of the person of relator, such record could not be shown to be erroneous on the habeas corpus proceedings.—Peters v. Koepke, 59 N. E. 33, 156 Ind. 35.

FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. Hab. Corp. § 70.

See, also, 21 Cyc. p. 319.

**§ 83. Answer to return and issues thereon.**

Demurrer to answer, see post, § 84.

[a] (Sup. 1860)

Proceedings were entered by habeas corpus to obtain a discharge from custody under a *capias* ad respondendum. *Held*, that plaintiff in the *capias* proceedings could not be required to appear and prove the matters alleged for the *capias*.—Dwire v. Saunders, 15 Ind. 306.

[b] (Sup. 1907)

In habeas corpus proceedings to secure the release of one sought to be extradited, that the prosecution of the offense is barred by the two-year statute of limitations of the demanding state must be alleged and proved to be available, though the warrant made a part of the return to the writ shows that the indictment was not presented within a period of two years from the commission of the offense.—Kemper v. Metzger, 169 Ind. 112, 81 N. E. 663.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Hab. Corp. § 75.

See, also, 21 Cyc. p. 321.

**§ 84. Demurrer or exception to return or to answer.**

[a] (Sup. 1865)

A demurrer is not the proper method of testing the sufficiency of a return to a writ of habeas corpus.—Cunningham v. Thomas, 25 Ind. 171.

[b] (Sup. 1883)

Under Rev. St. 1881, § 1117, a return or answer to a writ of habeas corpus is not the subject of demurrer, but its sufficiency may be tested by exceptions.—McGlennan v. Margowski, 90 Ind. 150.

[c] (Sup. 1884)

An objection to the sufficiency of the return should be taken by exceptions, and not by demurrer.—Sturgeon v. Gray, 96 Ind. 166.

[d] (Sup. 1884)

Proceedings for habeas corpus not being a civil action, the sufficiency of the petition can only be questioned by a motion to quash the writ, and not by demurrer.—Milligan v. State ex rel. Children's Home of Cincinnati, Ohio, 97 Ind. 355.

[e] (Sup. 1886)

In habeas corpus proceedings, the sufficiency of the return can only be reached by an exception.—Clayborn v. Thompson, 40 N. E. 121, 141 Ind. 19.

[f] (Sup. 1907)

The sufficiency of a return to a writ of habeas corpus must be raised by exception, and not by demurrer.—Kemper v. Metzger, 169 Ind. 112, 81 N. E. 663.

An exception to an officer's return in a habeas corpus case by a fugitive challenges the regularity of the extradition proceedings only, and, if such proceedings are sought to be impeached, it must be by answer.—Id.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Hab. Corp. § 76.

**§ 85. Evidence.**

[a] (Sup. 1884)

An indictment for murder implies *prima facie* that the party indicted has no right to bail, and the burden is upon the petitioner to show that proof of his guilt is not evident.—Ex parte Kendall, 100 Ind. 599.

[b] (Sup. 1885)

Where a habeas corpus petition admitted that petitioner killed deceased, for which killing he was restrained, but alleged that in so doing he acted in self-defense, and that the proof of his guilt of murder in killing deceased was neither evident nor the presumption thereof strong, the burden of proving the truth of such allegations was on him.—Ex parte Richards, 1 N. E. 639, 102 Ind. 260.

[c] (Sup. 1893)

On habeas corpus, where it appeared that the petitioner was in custody under a judgment of a justice of the peace, it was proper to refuse to permit petitioner to testify that the charge against him before the justice was not one for grand larceny, as such testimony would have been but a legal conclusion.—Davis v. Bible, 33 N. E. 910, 134 Ind. 108.

On habeas corpus by one committed by a justice of the peace on preliminary examination, the burden rests on petitioner to show want of probable cause to justify commitment.—Id.

[d] (Sup. 1895)

Where the record of a court does not show the facts necessary to give it jurisdiction to restrain a prisoner, the presumption that such facts did not exist must be rebutted and established by extrinsic evidence.—Clayborn v. Thompson, 40 N. E. 121, 141 Ind. 19.

## [e] (Sup. 1901)

In habeas corpus by a father to secure the custody of his minor daughter from her grandfather, who was also her guardian, petitioner should not be permitted to attack the character of the daughter of the woman in whose care the guardian intended to place such minor, since the character of such daughter was in no manner involved in the case.—*Berkshire v. Caley*, 60 N. E. 696, 157 Ind. 1.

## [f] (Sup. 1907)

Where petitioner for a writ of habeas corpus to secure his release from arrest fails to plead over or deny the prima facie case made against him by the return to the writ after his exception thereto has been overruled, a judgment of return is properly rendered against him.—*Kemper v. Metzger*, 169 Ind. 112, 81 N. E. 663.

The presumption is that one authenticating an indictment, made a part of requisition papers, as Governor of the demanding state, was so acting at the time.—*Id.*

## FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. HAB. CORP. §§ 77, 78.

See, also, 21 Cyc. p. 322; note, 22 L. R. A. 678.

## § 86. Dismissal on return.

## FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. HAB. CORP. § 79.

See, also, 21 Cyc. p. 323.

## § 88. — Imprisonment under valid process or judgment.

## [a] (Sup. 1901)

Burns' Rev. St. 1894, § 1133, forbids inquiry in habeas corpus proceedings into the legality of any judgment or process by which a prisoner is in custody, or to discharge him prior to the expiration of the term of his commitment, where such prisoner is in custody under process issued on final judgment of a court of competent jurisdiction. *Held*, that where the return to a writ of habeas corpus showed that the prisoner had been charged in a police court with assault by an affidavit properly filed, had pleaded guilty, and that, on evidence heard, he was convicted and sentenced to a term of imprisonment, not yet expired, which return was not traversed, the prisoner was properly remanded to custody.—*Peters v. Koepke*, 59 N. E. 23, 156 Ind. 35.

## FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. HAB. CORP. § 79.

## § 89. — Release from custody.

## [a] (Sup. 1884)

A refusal to make a further return of a writ of habeas corpus, upon the sustaining of exceptions to the return, is equivalent to an admission that all the facts are before the court; and the court may thereupon summarily discharge the prisoner from custody, without

requiring further proof to support the allegations of the petition.—*Joab v. Sheets*, 99 Ind. 328.

## [b] (Sup. 1895)

If a return to a writ of habeas corpus be insufficient, the prisoner may be released without any further hearing or evidence.—*Clayborn v. Thompson*, 40 N. E. 121, 141 Ind. 19.

## FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. HAB. CORP. § 79.

## § 90. Hearing on writ and return.

## [a] (Sup. 1871)

An issue of fact may be formed on the return to a writ of habeas corpus for a child by a denial of its averments, and a trial thereof may be had.—*Speer v. Davis*, 38 Ind. 271.

## [b] (Sup. 1897)

Burns' Rev. St. 1894, § 560 (Rev. St. 1881, § 551), providing that the court shall, at the request of either party, make a special finding of the facts, and state the conclusions of law thereon, does not apply to habeas corpus proceedings, in which Burns' Rev. St. 1894, § 1132 (Rev. St. 1881, § 1118), provides the court shall proceed in a summary way to hear and determine the cause.—*Schleuter v. Canatsy*, 47 N. E. 825, 148 Ind. 384.

## FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. HAB. CORP. § 80.

See, also, 21 Cyc. p. 323.

## § 91. Scope of inquiry and powers of court.

## FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. HAB. CORP. §§ 81-96.

See, also, note, 39 L. R. A. 449; note, 26 Am. Dec. 40.

## § 92. — In general.

## [a] (Sup. 1878)

An inquiry by the state courts, on habeas corpus, whether or not a person charged is really a fugitive from justice, is authorized by 2 Rev. St. p. 421, and is not prohibited by Const. U. S. art. 4, § 2, nor by Rev. St. U. S. § 5278.—*Hartman v. Aveline*, 63 Ind. 344, 30 Am. Rep. 217.

## [b] (Sup. 1879)

On habeas corpus to secure the discharge from arrest of one held under extradition from another state, the question whether the complaint or indictment which is attached to the warrant charges a crime under the laws of the latter state will not be considered, where evidence of such laws is not before the court.—*Tullis v. Fleming*, 69 Ind. 15.

## [c] (Sup. 1904)

Burns' Ann. St. 1901, § 1133, denies to every court or judge the power to inquire into the legality of any judgment or process, whereby the person applying for a writ of habeas corpus is in custody and held "on a warrant issued

from the circuit court on an indictment or information." *Held*, that on a petition for discharge on habeas corpus by one held by a sheriff the only inquiry is whether petitioner is in custody on such warrant.—*Gillespie v. Rump*, 72 N. E. 138, 163 Ind. 457.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Hab. Corp. §§ 81, 83, 87-96; 10 CENT. DIG. Contempt, § 219; 23 CENT. DIG. Extrad. § 45.

**§ 93. — Personal relations or authority.**

[a] (Sup. 1852)

The judge hearing an application for a writ of habeas corpus may, under the statute, cause notice to be given to the party interested in resisting it, or his attorney, and witnesses to be summoned to testify in the premises, and may fully investigate the case.—*Lumm v. State*, 3 Ind. 293.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Hab. Corp. § 81.

**§ 95. — Validity of proceedings.**

[a] (Sup. 1893)

On habeas corpus by a person held on a mittimus issued by a justice on a conviction of vagrancy, where the jurisdiction of the justice is denied, it is competent to show that the affidavit set out in the record, and purporting to be that on which a warrant issued for petitioner, and on which he was tried, was in fact not filed with the justice until after the trial and imprisonment of petitioner, and exclusion of such evidence is reversible error.—*Smith v. Clausmeier*, 136 Ind. 105, 35 N. E. 904, 43 Am. St. Rep. 311.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Hab. Corp. § 82.

**§ 96. — Errors and irregularities.**

[a] (Sup. 1900)

*Burns' Rev. St. 1894*, §§ 1715, 1716, authorize justices of the peace to immediately commit persons for nonpayment of fines imposed, and section 1133 declares that no court shall question the legality of a final judgment of a court of competent jurisdiction on which commitment was issued. *Held*, that since a justice had jurisdiction to commit a defendant for violation of Fish Law 1899, § 10, making it a misdemeanor for any person to have a fish net, seine, etc., a defendant convicted for violation of such section before a justice of the peace was not entitled to question the sufficiency of the affidavit on which the proceedings were based on habeas corpus to obtain his release from commitment for failure to pay fine imposed.—*Pritchett v. Cox*, 56 N. E. 20, 154 Ind. 108.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Hab. Corp. § 81.

**§ 98. Determination of particular or questions.**

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Hab. Corp. §§ 84  
See, also, 21 Cyc. pp. 324-333.

**§ 99. — Custody of infants.**

Evidence, see ante, § 85.

[a] (Sup. 1848)

Under the express provisions of *Rev. p. 606*, §§ 73, 74, the court having jurisdiction may award the custody of children to a parent under such regulations as it may think fit in cases where the husband and wife are living apart, and are not divorced.—*Tarkington v. State ex rel. Tarkington*, 1 Ind. 171.

[b] (Sup. 1851)

When a child is of a sufficient age to exercise discretion in choosing its custodian, on habeas corpus, will see that the child is allowed to go with such parent as it may choose; but when the child is of tender age the court will name the person entitled to custody.—*Bonnell v. Berryhill*, 2 Ind. 6.

[c] (Sup. 1875)

The law gives the possession and control of children to the male parent if begotten and born of wedded parents, and this control is not to be taken away unless an overweighing and strong necessity is shown as to the interest of the father to protect and provide for the child.—*Child v. Dodd*, 51 Ind. 484.

[d] (Sup. 1881)

2 *Rev. St. 1876*, p. 589, § 6, provides that the father of a minor, or if there be no father, then the mother, if suitable persons, respectively, shall have the custody of the person and control of the education of the child, except the exclusion of its guardian. *Held*, that where a mother showed herself entitled to custody against the father, and also able to care for the child, it was not an abuse of the court's discretion to award her custody to her as against the child's foster parents, in the absence of evidence of the latter's pecuniary interest or showing the relative positions of the parties from a social standpoint.—*McKee v. State ex rel. Dickinson*, 80 Ind. 547.

[e] (Sup. 1887)

Under *Rev. St. 1881*, § 2518, providing that the father of a minor shall have the custody of the person and the control of the education of the minor, such father, if he is a suitable person, has a right to the custody of an infant child as against the statutory guardian.—*Brooke v. Logan*, 13 N. E. 669, 112 Ind. 2 Am. St. Rep. 177.

[f] (Sup. 1896)

Ordinarily a father is entitled to the custody of his minor child, after the death of the mother; but the welfare of the child is paramount to the claims of the parent.—*Hussey v. Whiting*, 44 N. E. 639, 145 Ind. 580, 5 Am. St. Rep. 220.

A little girl seven years old, on the death of her mother, and at the mother's request, was taken by her grandparents, with whom she continued to reside for six years. They were well to do, and occupied a large house. The child was of delicate health. When 13 years old her father, who was a widower, who owned no home, and whose business kept him away from home five or six days each week, took her to reside with his sister, who had a family of her own, and resided in a comparatively small house, but was a proper person to care for the child. *Held*, that a judgment restoring the child to the custody of her grandparents, based on the ground that it was for her best interest, would not be disturbed.—*Id.*

An oral agreement by a father that another may have the custody of his minor daughter during infancy does not preclude him from reclaiming her custody.—*Id.*

[g] (Sup. 1897)

A parent has no absolute right to custody of his minor child, and controversy therefor between the parent and a third person should be decided with regard alone to the best interests of the child.—*Schleuter v. Canatsy*, 47 N. E. 825, 148 Ind. 384.

[h] (Sup. 1901)

Under Burns' Rev. St. 1894, § 2682, providing that the father of any minor, if a suitable person, shall have the custody of the person of his child, the father has a prima facie right, as against a statutory guardian, to such custody, but such right is subordinate to the welfare of the child; such statute being but a recognition of the common-law rule.—*Berkshire v. Caley*, 60 N. E. 696, 157 Ind. 1.

In habeas corpus by a father to secure the custody of his daughter from her grandfather, who was also her guardian, the court may inquire as to the character and fitness of the woman in whose care the guardian intended to place the child.—*Id.*

[i] (Sup. 1902)

On habeas corpus for the custody of a child, the interest of the child is the paramount consideration in determining who is best entitled to its custody.—*Bullock v. Robertson*, 65 N. E. 5, 160 Ind. 521.

[j] (Sup. 1905)

A petition for habeas corpus for the custody of a child is addressed to the sound legal discretion of the trial court.—*Willis v. Willis*, 75 N. E. 653, 165 Ind. 325.

A petition for writ of habeas corpus for the custody of a child 18 months of age, alleging that respondent, the husband, and father of the child, by reason of his cruel and inhuman treatment, compelled petitioner, his wife and the mother of the child, to leave him, and go elsewhere to reside; that subsequently, respondent, through false promises, induced petitioner to return to the city in which respondent lived, and there, by false promises and deceptions,

temporarily obtained the possession of the child, and failed to return it in accordance with his promise; that petitioner is a fit person to be entrusted with the custody of the child, while respondent is not a fit or suitable person to have its care and custody, but is addicted to the excessive use of intoxicating liquors, and has a violent, ungovernable temper; and generally alleging that the restraint of the child is wrongful and without cause—is sufficient to sustain the writ, and authorize the delivery of the child to the custody of its mother.—*Id.*

[k] (Sup. 1905)

Where a female infant's father lived with his mother and single sister in a comfortable house, situated in a good neighborhood, and, except for the fact that he smoked cigarettes and cigars, and drank beer occasionally, was of good habits, good moral character, good disposition, industrious, kind, and affectionate, and earned \$100 monthly, he was entitled to the custody of his daughter after the death of his wife, as against his wife's sister, though the latter was slightly better off financially, and perhaps could have afforded the child more advantages.—*Gilmore v. Kitson*, 74 N. E. 1083, 165 Ind. 402.

The mother of an infant cannot, by testamentary provisions or otherwise, deprive the father of his right to the custody of the infant after the mother's death.—*Id.*

The appointment of a legal guardian for an infant, without the knowledge or consent of the infant's father, after the death of its mother, was ineffectual to deprive the father of the right to its custody.—*Id.*

[l] (Sup. 1907)

Where a foreign divorce decree directed that petitioner should have the custody of a minor child of the parties for one week of every three, and that defendant, the child's mother, should be entitled to its custody the balance of the time, petitioner could not obtain the exclusive custody of such child in a collateral habeas corpus proceeding, on the ground that defendant had wrongfully removed the child from the jurisdiction of the court rendering the decree.—*Hardin v. Hardin*, 168 Ind. 352, 81 N. E. 60.

[m] (Sup. 1909)

Though Burns' Ann. St. 1908, § 3065, providing that a guardian appointed for a minor shall have the custody and tuition of the minor and the management of his estate during minority, is mandatory, it does not divest the court of its discretion to deprive the guardian of his legal right to the custody, care, and education of the ward, where it appears that he is unfit, or that his custody and care will not conduce to the best interests of the ward.—*Shoaf v. Livengood*, 172 Ind. 707, 88 N. E. 598.

The welfare of a ward is the principal thing to be considered in awarding the right to his custody, care, and control, and the legal right of a guardian to his custody is secondary thereto.—*Id.*

If the maternal great-grandfather of a child who had been appointed its guardian was 80 years old, infirm, a widower, with no home of his own, residing among his relatives, and unable to care for and educate his six year old ward, who was in the custody of its paternal grandparents, who had given it a good home, treating it as their own child and afforded it all the comforts of life, and were able properly to care for and educate it, the court acted within its discretion in refusing to remove the child and award its custody to the guardian.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Hab. Corp. § 84; 25 CENT. DIG. Guard. & W. §§ 109-115; 37 CENT. DIG. Parent & C. §§ 4-32.

See, also, 21 Cyc. p. 330; note, 20 Am. Dec. 330.

**§ 101. — Arrest in civil actions and proceedings.**

[a] (Sup. 1883)

A person arrested on a proper warrant cannot have an inquiry into his guilt or innocence on habeas corpus.—*Farmer v. Lewis*, 92 Ind. 444, 47 Am. Rep. 153.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Hab. Corp. § 86.  
See, also, 21 Cyc. p. 324.

**§ 102. — Arrest and commitment on criminal charges before indictment.**

[a] (Sup. 1893)

On petition for habeas corpus by one charged with petit larceny, and committed in default of bail, on the ground that the mittimus erroneously describes the offense as grand larceny, the refusal of the court to permit defendant to testify that the charge against him before the justice was for grand larceny is proper where the charge itself is in evidence, showing that it was for petit larceny.—*Davis v. Bible*, 134 Ind. 108, 33 N. E. 910.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Hab. Corp. §§ 87-89.  
See, also, 21 Cyc. pp. 325, 326.

**§ 103. — Extradition.**

Evidence, see ante, § 85.

[a] (Sup. 1867)

If the return to a writ of habeas corpus, in case of the arrest of a person upon the requisition of the governor of another state, alleges that the petitioner is the identical person named in the warrant, the question whether that person committed the crime can only be tried in the state that issued the requisition.—*Robinson v. Flanders*, 29 Ind. 10.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Hab. Corp. §§ 90, 91.  
See, also, 21 Cyc. p. 328; note, 62 C. C. A. 506.

**§ 104. — Commitment on indictment.**

[a] (Sup. 1890)

Petitioner for a writ of habeas corpus alleged that he had been convicted of arson; that, on appeal, the judgment was reversed; he was a second time convicted, and that, on appeal, the judgment was reversed; that information for conspiracy in connection with the alleged arson was filed against him, but dismissed by the prosecuting attorney, a indictment for conspiracy returned, which was subsequently quashed on petitioner's motion, and petitioner ordered to remain in custody to answer any charge that might be brought against him by the grand jury; that, after several days, no accusation being presented, he was again charged on habeas corpus, upon his own motion, and immediately after he was committed on a warrant issued upon an information filed by the sheriff, charging him with conspiracy; and that he was then in custody of the sheriff. It did not appear that there had been any delay in this particular prosecution, and that the offense for which he was in custody was the same as that charged against him in the former prosecutions. *Held* that, under St. 1881, § 1119, providing that in habeas corpus proceedings there shall be no inquiry into the legality of any process issued from the circuit court upon an indictment or information, a judgment of the court below denying the writ, and remanding the petitioner to custody, would not be disturbed.—*Kinncingham v. Kinncingham*, 125 Ind. 180, 24 N. E. 1048.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Hab. Corp. § 92.  
See, also, 21 Cyc. p. 326.

**§ 105. — Final judgment, sentence and commitment.**

[a] (Sup. 1900)

In habeas corpus proceedings it cannot be urged that there was no judgment on which to commit defendant because a justice of the peace sustained a motion in arrest, when the court shows that such motion was not made until after judgment was rendered.—*Pritchett v. Pritchett*, 56 N. E. 20, 154 Ind. 108.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Hab. Corp. §§ 93-95.  
See, also, 21 Cyc. p. 326.

**§ 106. — Commitment for contempt.**

[a] (Sup. 1848)

Inquiry under a writ of habeas corpus is limited to the question as to whether a commitment for contempt was issued by a court of competent jurisdiction and in a case authorized by law.—*Lockwood v. State*, 1 Ind. 161, 60.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Hab. Corp. § 96.  
CENT. DIG. Contempt, § 220.  
See, also, 21 Cyc. p. 327.

**§ 108. Disposition of person.**

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Hab. Corp. §§ 97-100.

See, also, 21 Cyc. p. 333.

**§ 109. — Remand or recommitment.**

[a] (Sup. 1846)

When a habeas corpus issues on a complaint of illegal imprisonment, the judge who issues the writ may, if the authority by which the prisoner is detained be defective, call before him witnesses, inquire into the guilt of the prisoner, and remand, recognize, or discharge him, as he may think proper.—*State v. Best*, 7 Blackf. 611.

[b] (Sup. 1854)

Defendant, who was remanded to jail to await another trial, after the jury had been unnecessarily discharged and he had therefore been once put in jeopardy, applied to the judge of the court of common pleas for a writ of habeas corpus. *Held* that, although the discharge of the jury was equivalent to a verdict of acquittal, yet, as there had been no release of defendant under any judgment of the court, he should be remanded to the circuit court, where he might be discharged on motion, or could plead the discharge of the jury in bar to a second trial.—*Wright v. State*, 5 Ind. 200, 61 Am. Dec. 90.

[c] (Sup. 1854)

Where a prisoner, illegally convicted of felony and sentenced by the court of common pleas of Laporte county to the state prison, petitioned a judge of the court of common pleas of another county for a writ of habeas corpus, on which the record of such conviction and sentence was returned as the cause of detention, it was *held* that such judge rightly ordered the petitioner's discharge from the state prison and his return to the jail of Laporte county to await the further action of the courts of said county.—*Miller v. Snyder*, 6 Ind. 1.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Hab. Corp. §§ 97, 98.

**§ 112. Judgment or order.**

[a] (Sup. 1883)

Rev. St. 1881, § 1118, relating to habeas corpus, provides that the court or judge shall proceed in a summary way to hear and determine the case, and, if no legal cause be shown for the restraint or for continuation thereof, shall discharge the party. *Held*, that it is not error in such case to deny a motion or request that the court make a special finding of facts in writing, and state its conclusions of law thereon.—*McGlennan v. Margowski*, 90 Ind. 170.

[b] (Sup. 1885)

Under Rev. St. 1881, § 1120, providing that, in habeas corpus cases, the court or judge shall summon the prosecuting witnesses, investigate the criminal charge, discharge, let to bail,

or recommit the prisoner as may be just and legal, the entry of a formal judgment in such proceedings is not required.—*Ex parte Richards*, 1 N. E. 639, 102 Ind. 260.

[c] (Sup. 1905)

Where petitioner in habeas corpus proceedings for the custody of a child violated the order of court, awarding her such custody by moving with the child into another county, respondent to the proceedings should have applied for relief to the court whose order was violated, and not to the court of the county to which the petitioner removed.—*Willis v. Willis*, 75 N. E. 653, 165 Ind. 332, 2 L. R. A. (N. S.) 244.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Hab. Corp. § 101.

See, also, 21 Cyc. p. 334; note, 67 L. R. A. 783.

**§ 113. Appeal and error.**

[a] (Sup. 1848)

Under Acts 1847, p. 113, a writ of error will lie to the judgment of the court or judge on a writ of habeas corpus.—*Sherry v. Winton*, 1 Ind. 96, Smith, 1.

[b] (Sup. 1856)

An appeal will lie under the Revised Statutes of 1852 from an order or judgment upon a writ of habeas corpus, whether made in term or vacation, and without the filing of a bond.—*Nichols v. Cornelius*, 7 Ind. 611.

[c] (Sup. 1865)

An appeal will lie from a judgment in habeas corpus awarding the custody of a minor child "until the final order of the court"; such order being final.—*State ex rel. Sharpe v. Banks*, 25 Ind. 495.

Where a final judgment has been rendered on a writ of habeas corpus, an appeal will lie to the Supreme Court under Code, §§ 550, 556, as in other cases.—*Id.*

[d] (Sup. 1871)

An order made, upon considering a return to a writ of habeas corpus, for possession of a child, which alleges an excuse for not producing it, requiring respondent to do so, may be reviewed on appeal to the supreme court under 2 Gav. & H. St. p. 277, § 576, which expressly authorizes appeals for interlocutory orders or judgment upon writs of habeas corpus.—*Speer v. Davis*, 38 Ind. 271.

[e] (Sup. 1872)

A judgment rendered in a proceeding by habeas corpus, awarding the custody of a minor child "until the further order of the court," is final, and an appeal will lie therefrom.—*Ifenson v. Walts*, 40 Ind. 170.

[f] (Sup. 1878)

On appeal from a hearing on petition for habeas corpus by the mother of an illegitimate child to recover possession thereof from one to whom the child had been apprenticed by an or-

phan asylum after the mother had voluntarily abandoned her, the evidence showed that both the relatrix and the defendant were proper persons to have the custody of the child. *Held*, that a judgment for the relatrix should not be disturbed, although the judge's finding did not include the age of the child.—*Copeland v. State ex rel. Kayser*, 60 Ind. 394.

[g] (Sup. 1881)

All the evidence being in the record on appeal, the Supreme Court must weigh the same, and determine the question presented by the petition for the writ of habeas corpus, without special regard to the finding and decision of the circuit court.—*Ex parte Walton*, 79 Ind. 600.

[h] (Sup. 1884)

On an appeal in a habeas corpus proceeding for the possession of a child, it was not error to permit the appellants to perfect their appeal without first surrendering the possession of the child as ordered by the court, as pending the preliminary examination of the cause as well as during the hearing the child was in legal contemplation in the custody of the court, though actually in the possession of the appellants at the time the appeal bond was approved.—*Joab v. Sheets*, 99 Ind. 328.

[i] (Sup. 1884)

In habeas corpus proceedings instituted for the purpose of procuring admission to bail, by a party indicted for murder, the supreme court, upon appeal by the petitioner, will examine and pass upon the evidence.—*Ex parte Kendall*, 100 Ind. 599.

[j] (Sup. 1885)

When a habeas corpus case, to determine to whom should be awarded the custody of a child, is before the supreme court by appeal on the evidence, that court will examine and pass upon its sufficiency to sustain the finding and decision below.—*Jones v. Darnall*, 103 Ind. 569, 2 N. E. 229, 53 Am. Rep. 545.

[k] (Sup. 1905)

Under Burns' Ann. St. 1901, § 650, providing that an appeal taken during the term shall operate as a stay of all further proceedings on the judgment upon the filing of an appeal bond conditioned to duly prosecute the appeal, and pay the judgment and costs which may be rendered against appellant, a bond filed on appeal from a judgment awarding petitioner in habeas corpus proceedings the custody of a child, and assessing the costs to respondent, does not stay the operation of the judgment, in so far as it awards the custody of the child and is self-executing, but merely stays the execution for the collection of costs.—*Willis v. Willis*, 75 N. E. 655, 165 Ind. 332, 2 L. R. A. (N. S.) 244.

[l] (Sup. 1907)

Under Burns' Ann. St. 1901, § 1131, providing that plaintiff in habeas corpus proceedings may except to the sufficiency of the return, a paper filed, stating that the petitioner, for

exception to the third paragraph of says that the paragraph does not state sufficient to constitute a defense to petition writ, was a sufficient exception, where objection was first raised on appeal, and was not being a demurrer.—*Kemper v. Metzger*, 101 Ind. 112, 81 N. E. 663.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Hab. Corp. §§ 10.

2 CENT. DIG. App. & E. § 73.

See, also, 21 Cyc. pp. 335-347.

§ 116. Costs.

[a] (Sup. 1883)

It is not error to tax the costs against unsuccessful defendant in habeas corpus proceedings.—*McGlennan v. Margowski*, 99 Ind. 150.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Hab. Corp. § 11.

See, also, 21 Cyc. p. 348.

§ 117. Operation and effect of determination in general.

[a] (Sup. 1887)

A habeas corpus proceeding brought by a father to recover from a statutory guardian custody of his child is not barred by the judgment upon an application previously made by the father to have the guardian removed and himself appointed in his stead.—*Brook Logan*, 112 Ind. 183, 13 N. E. 669, 2 Am. Rep. 177.

[b] (App. 1902)

Under Burns' Rev. St. 1901, § 1058, and Burns' Rev. St. § 1046, making it the duty of the court in decreeing a divorce to make provision for the guardianship, custody, support, and education of minor children of a marriage, a decree in habeas corpus proceedings by the father to obtain possession of a child, which provided indefinitely for the child's maintenance and decreed the time that the child should be with each of her parents, was not res judicata so as to preclude the court, in a subsequent divorce proceeding brought by the wife, awarding the custody of the child to her.—*Everitt v. Everitt*, 64 N. E. 892, 29 Ind. App. 94 Am. St. Rep. 276.

[c] (Sup. 1905)

The doctrine of res judicata applies to habeas corpus proceedings to obtain the custody of a child.—*Willis v. Willis*, 75 N. E. 655, 165 Ind. 332, 2 L. R. A. (N. S.) 244.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Hab. Corp. §§ 11.

See, also, 21 Cyc. pp. 349-351.

III. SUSPENSION OF REMEDY.

§ 121. Power to suspend in general.

[a] (Sup. 1863)

Neither the president nor the congress of the United States can suspend the issue

writ of habeas corpus by a state court.—Griffin v. Wilcox, 21 Ind. 370.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Hab. Corp. § 122.

See, also, 21 Cyc. p. 352.

**§ 122. Constitutional and statutory provisions.**

[a] (Sup. 1864)

Const. U. S. art. 1, § 8, delegating power to congress to organize courts, etc., contains a delegation to congress of power to suspend the writ of habeas corpus.—Warren v. Paul, 22 Ind. 276.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Hab. Corp. § 123.

**HABENDUM.**

See DEEDS, §§ 28, 97.

**HABERE FACIAS POSSESSIONEM.**

See EJECTMENT, § 120.

**HABITATION.**

See DOMICILE.

**HABITS.**

See—

Accused or other persons, evidence in criminal prosecutions. HOMICIDE, § 163.

CUSTOMS AND USAGES.

Female, evidence in criminal prosecutions.

RAPE, § 40.

Parties, evidence in civil actions. DAMAGES, § 169.

Or other persons, evidence of on issue of contributory negligence. NEGLIGENCE, § 132.

Person insured, promissory warranties, covenants, or conditions subsequent. INSURANCE, § 341.

**HABITUAL CRIMINALS.**

See CRIMINAL LAW, § 1202.

**HABITUAL DRUNKARDS.**

See DRUNKARDS.

**HACKMEN.**

See—

LICENSES, § 14.

Regulation of use of carrier's premises. CARRIERS, § 14.

**HACKS.**

Use of carrier's premises, see CARRIERS, § 16.

**HALF BLOOD.**

Inheritance, see DESCENT AND DISTRIBUTION, § 35.

**HALLUCINATION.**

Testamentary capacity, see WILLS, § 38.

**HAND BAR DOCKETS.**

Fees of clerk of court for printing, see CLERKS OF COURTS, § 11.

**HAND CARS.**

See RAILROADS, §§ 304, 360.

**HANDWRITING.**

See—

Comparison by witnesses—

CRIMINAL LAW, § 491.

EVIDENCE, §§ 561-566.

Opinion evidence. EVIDENCE, §§ 474, 511.

Presumption as to genuineness of. EVIDENCE, § 70.

Submission of writings for comparison. EVIDENCE, §§ 196-198.

Testator and of attesting witnesses, admissibility of evidence. WILLS, § 205.

**HANGING.**

Punishment of crime, see CRIMINAL LAW, § 1219.

**HAPPINESS.**

Constitutional right to pursuit of, see CONSTITUTIONAL LAW, § 86.

**HARBORS.**

See WHARVES.

**HARMLESS ERROR.**

See—

APPEAL AND ERROR, §§ 1025-1074.

CRIMINAL LAW, §§ 1161-1177.

HOMICIDE, §§ 333-342.

JUSTICES OF THE PEACE, § 183.

NEW TRIAL, §§ 27, 32, 56, 64.

**HARVEST.**

Judicial notice of, see EVIDENCE, § 6.

**HATCHWAYS.**

Liability of abutting owner for injury to pedestrian from defect in hatchway in sidewalk, see MUNICIPAL CORPORATIONS, § 808.

# HAWKERS AND PEDDLERS.

## Scope-Note.

[INCLUDES the regulation of persons going from place to place selling or exchanging goods which they carry with them or themselves deliver.

[EXCLUDES sales by traveling salesmen (see *Principal and Agent; Sales*); and regulation of commerce (see *Commerce*). For complete list of matters excluded, see cross-references, post.]

## Analysis.

- § 2. Statutory and municipal regulations.
- § 3. Who are hawkers or peddlers.
- § 4. Licenses and taxes.

## Cross-References.

Sales by traveling salesmen, see **SALES**.

### § 2. Statutory and municipal regulations.

Subjects and titles of statutes, see **STATUTES**, § 107.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Hawk. & P. § 1.

### § 3. Who are hawkers or peddlers.

[a] (Sup. 1886)

One who goes from house to house with samples of goods or merchandise, soliciting orders from persons not dealers, for future delivery, is a "peddler," within the meaning of Rev. St. 1881, § 3106, subd. 23, authorizing cities to restrain hawking and peddling, and an ordinance requiring hawkers and peddlers to procure a license.—*Graffy v. City of Rushville*, 107 Ind. 502, 8 N. E. 609, 57 Am. Rep. 128.

[b] (Sup. 1885)

One who goes from house to house with articles of commerce, there offering them for sale, and delivering them as sold, is engaged in peddling, within Rev. St. 1894, § 3541 (Rev. St. 1881, § 3106), authorizing cities to restrain hawking and peddling.—*City of South Bend v. Martin*, 41 N. E. 315, 142 Ind. 31, 29 L. R. A. 531.

[c] (Sup. 1907)

Aside from statute, a "peddler" may be defined as any person who, by solicitation or outcry, takes anything from house to house in any manner, and offers to sell the same for money, or barter the thing for any other thing, or whoever goes from house to house for the purpose of taking orders for anything for future delivery to be sold or bartered.—*Fallis v. Gas City*, 169 Ind. 508, 82 N. E. 1056.

Acts 1905, p. 252, c. 129, § 53, subd. 37, authorizes cities to license, tax, regulate, etc., peddlers, etc. Acts 1901, p. 560, c. 244, defining and regulating peddling, defines, in section

7 (Burns' Ann. St. 1901, § 7231p), the "peddler" to mean to sell, or offer to sell, manufactured goods, wares, merchandise, directly to a consumer, either by going from house to house, for the purpose of selling and delivering such goods or for the purpose of taking orders for their future delivery. A city passed an ordinance declaring it unlawful for any one engaged in the business of peddling without a license and defining peddling. Held that, in respect of the definition in the ordinance, going from house to house for the purpose of taking orders for teas, coffees, etc., for future delivery, in violation of the ordinance, was properly convicted, since, in empowering cities to exercise the right to regulate and license peddlers, it would be presumed that the legislature intended to clothe the word "peddler" with the significance given it by statute.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Hawk. & P. §§ 3-6.  
See, also, 21 Cyc. pp. 367-374.

### § 4. Licenses and taxes.

Class legislation, see **CONSTITUTIONAL LAW**, § 208.

Delegation of power, see **LICENSES**, § 6.  
Denial of equal protection of laws, see **CONSTITUTIONAL LAW**, § 230.

Requirement of license as regulation of commerce, see **COMMERCE**, § 68.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Hawk. & P. §§ 7-10.  
See, also, 21 Cyc. pp. 374, 375; no Am. Rep. 267.

## HAY.

Duty of landowners to protect haystacks from communication of fire from railroad locomotives, see **RAILROADS**, § 461.

**This Digest is compiled on the Key-Number System. For explanation, see page**

[5 Ind. Dig.—Page 410]

**HAZARD.**

See—  
GAMING.  
LOTTERIES.

**HEADLIGHT.**

On street car as affecting liability for injuries,  
see STREET RAILROADS, § 81.

**HEALTH.***Scope-Note.*

[INCLUDES protection of public from disease or danger to life in general; and violations of health laws, and prosecution and punishment thereof as public offenses.

[EXCLUDES unwholesome or adulterated food (see *Food*; *Adulteration*); medicines (see *Druggists*); intoxicants (see *Intoxicating Liquors*); poisons (see *Poisons*); nuisances as affecting individual rights, liabilities for injuries to the health of individuals, and criminal prosecutions for maintaining nuisances (see *Nuisance*); and special protection of the health of particular classes of persons, as children (see *Infants*) and employes (see *Master and Servant*). For complete list of matters excluded, see cross-references, post.]

*Analysis.***I. Boards of Health and Sanitary Officers.**

- § 2. State and local boards.
- § 3. — Establishment of board and appointment and tenure of members.
- § 5. — Compensation and expenses.
- § 6. — Authority and duties in general.
- § 7. Officers and agents.
- § 9. Orders and other decisions.
- § 11. — Operation and effect.
- § 15. Contracts and indebtedness.
- § 16. — In general.
- § 17. — Employment of physicians and assistants.
- § 18. Liabilities for torts.
- § 19. Actions in general.

**II. Regulations and Offenses.**

- § 20. Power to make regulations.
- § 21. Constitutionality of regulations.
- § 22. Contagious and infectious diseases.
- § 23. — Precautions in general.
- § 25. — Vaccination.
- § 33. Unhealthful practices.
- § 35. Permits for burial or transportation of dead bodies.

*Cross-References.*

See—

Contagious and infectious diseases of animals.  
ANIMALS, §§ 28–33.

Establishment of drains for promotion of public health. DRAINS, §§ 6, 28.

Hospitals. HOSPITALS.

As nuisance. NUISANCE, §§ 3, 6, 61.

Municipal regulations to preserve public health.  
MUNICIPAL CORPORATIONS, § 597.

Opinion evidence as to. EVIDENCE, §§ 477, 501.

Person insured, representations, warranties, or conditions in policy or application therefor.  
INSURANCE, § 201.

Regulation of public schools. SCHOOLS AND SCHOOL DISTRICTS, §§ 144, 156–158.

Regulations constituting exercise of power of eminent domain. EMINENT DOMAIN, § 2.

Words imputing contagious disease as libel or slander. LIBEL AND SLANDER, § 8.

Regulation of particular occupations or professions.

See—

DRUGGISTS.

Manufacture, sale, and use of articles of food or drink. FOOD.

PHYSICIANS AND SURGEONS.

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

## I. BOARDS OF HEALTH AND SANITARY OFFICERS.

Admissibility of records of in action on mutual benefit certificate, see **INSURANCE**, § 818.  
Municipal health department, see **MUNICIPAL CORPORATIONS**, § 191.

### § 2. State and local boards.

Delegation of legislative power to, see **CONSTITUTIONAL LAW**, § 62.  
Liabilities for torts, see post, § 18.  
Power of city to delegate to board of health discretion as to location of tanneries, see **MUNICIPAL CORPORATIONS**, § 591.

FOR CASES FROM OTHER STATES,  
SEE 25 CENT. DIG. Health, §§ 2-5.  
See, also, 21 Cyc. pp. 384, 385.

### § 3. — Establishment of board and appointment and tenure of members.

Reference to and identification of statutes amended, see **STATUTES**, § 138.

[a] (**Sup.** 1885)

Under Rev. St. 1881, § 4993, the county commissioners constitute the board of health for the county.—*Waller v. Wood*, 101 Ind. 138.

FOR CASES FROM OTHER STATES,  
SEE 25 CENT. DIG. Health, § 2.

### § 5. — Compensation and expenses.

Audit and allowance of claims against counties, see **COUNTIES**, § 204.

[a] (**Sup.** 1885)

No appeal lies from an order of the county board of health fixing the compensation of its secretary, since the statute creating boards of health invests them with discretionary power in that regard, and makes no provision for appeal; and quere, whether an allowance by the county commissioners to the secretary of the county board of health is not of itself a determination of the amount of such compensation, within the meaning of the statute.—*Waller v. Wood*, 101 Ind. 138.

Where the county commissioners under their statutory authority as the county board of health made an allowance to the secretary of such board, it will be presumed on appeal that the board of health had determined the amount of his compensation, and that the allowance was made by the county commissioners in payment thereof.—*Id.*

FOR CASES FROM OTHER STATES,  
SEE 25 CENT. DIG. Health, § 4.

### § 6. — Authority and duties in general.

[a] (**Sup.** 1881)

A city ordinance making it the duty of a board of health to provide for the vaccination

of persons as a protection against smallpox does not impose upon the board or its members the duty to do such services personally, but to provide therefor.—*City of Ft. Wayne v. Rosenthal*, 75 Ind. 156, 39 Am. Rep. 127.

FOR CASES FROM OTHER STATES,  
SEE 25 CENT. DIG. Health, § 5.  
See, also, note, 23 Am. Rep. 212.

### § 7. Officers and agents.

Liabilities for torts, see post, § 18.

[a] (**Sup.** 1884)

In a proceeding to determine the right to the office of secretary of the board of health of a county, the complaint alleging that the relator was a physician and surgeon at the time of his election, is sufficient as against objection that it does not show that he was eligible to the office of secretary of the board of health.—*Weir v. State ex rel. Axtell*, 9 Ind. 311.

In a proceeding to determine the right to the office of secretary of the board of health, it was not sufficient to allege that the relator was competent and qualified to hold the office, as the complaint should state the facts showing that the relator was eligible.—*Id.*

[b] (**Sup.** 1885)

Rev. St. 1881, § 4993, provides that the secretary of local boards of health shall be a health officer, and shall be allowed such compensation as the board electing him may determine. *Held* that, when the compensation of such officer was determined by the board of health, the county commissioners should not be required to pay it to be paid by an auditor's warrant on the county treasury.—*Waller v. Wood*, 101 Ind. 138.

No appeal lies from the determination of the board of health of the compensation of a health officer.—*Id.*

[c] (**Sup.** 1904)

Where a county board of health commissioners did not elect a secretary at their meeting in December of a particular year required by Acts 1891, p. 15, c. 15, § 1, the board did not thereby lose jurisdiction to elect a secretary thereafter, but was entitled to elect such secretary at a subsequent meeting after the beginning of the succeeding term.—*Hendershot v. State ex rel. Bennett*, 69 Ind. 679, 162 Ind. 69.

Where the board of health commissioners of a county did not elect a secretary at its meeting in December for the ensuing year required by Acts 1891, p. 15, c. 15, § 1, the board elected a secretary at its first meeting in January after the commencement of the ensuing term, the person so elected was entitled to hold office for the remainder of such term, since the board had no power to elect, except to ex-

the power it had failed to exercise the previous December.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Health, § 6.

See, also, 21 Cyc. pp. 385, 386.

### § 9. Orders and other decisions.

FOR CASES FROM OTHER STATES,

SEE 45 CENT. DIG. Health, § 8.

See, also, 21 Cyc. pp. 387, 396-401.

### § 11. — Operation and effect.

[a] (App. 1904)

The county board of commissioners is ex officio a board of health, and in the exercise of their discretion, within the authority conferred by Burns' Ann. St. 1894, § 6718 (Acts 1891, p. 15, § 8), to protect the public health by the removal of causes of diseases when known, and in all cases to take prompt action to arrest the spread of contagious diseases, the board's acts have the force of an act of the Legislature; the whole authority of the state being included and delegated.—*Anable v. Board of Com'rs of Montgomery County*, 34 Ind. App. 72, 71 N. E. 272, 107 Am. St. Rep. 173.

While the action of a board of health is usually legislative and not subject to review by the courts, yet personal and property rights cannot be arbitrarily stricken down under the guise of the police power of the state, and if such rights are so invaded the board's action is open to review by the courts.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Health, § 8.

### § 15. Contracts and indebtedness.

Individual interest of member of board of health in contracts, see MUNICIPAL CORPORATIONS, § 231.

Individual interest of secretary of city board of health in contracts, see MUNICIPAL CORPORATIONS, § 254.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Health, §§ 13-15.

See, also, 21 Cyc. pp. 388-393.

### § 16. — In general.

[a] (App. 1896)

Burns' Rev. St. § 6718, provides that the county commissioners shall constitute a board of health ex officio for the county, whose duty it shall be to take prompt action to arrest the spread of contagious diseases. A bill was presented to county commissioners by an assignee of a claim for services performed by order of a township trustee as watchman during a smallpox quarantine, to which was attached a certificate by the trustee that the amount claimed was due for the assignor's services as such watchman, and an affidavit of the claimant that the amount was justly due, and no part had been paid to him or to his assignor. *Held*, that the complaint showed no liability on the

part of the county.—*Board of Com'rs of Perry County v. Bader*, 50 N. E. 776, 20 Ind. App. 339.

[b] (App. 1901)

Burns' Rev. St. 1894, § 6718, provides that the board of county commissioners shall protect the public health by the removal of causes of disease, and abate and remove nuisances dangerous to the public health, and shall annually elect a secretary, who shall be the executive officer of the board of health, and serve as health officer. *Held*, that the secretary cannot bind the county for an indebtedness incurred in abating, without authority from the board, a stagnant pond, which had become a nuisance.—*Martin v. Board of Com'rs of Montgomery County*, 60 N. E. 993, 27 Ind. App. 98.

[c] (App. 1903)

Burns' Rev. St. 1901, § 6711 et seq., provides that the secretary of the State Board of Health shall be the health officer of the state: that in the absence of other provision the mayor and council of cities shall constitute a board to protect the public health and prevent spread of contagious diseases; in case of the removal of a city health officer, the vacancy shall be immediately filled. An indigent person became sick with smallpox at plaintiff's home in a thickly populated portion of a city. The secretary of the health board for the county was absent, having left written authority to S. to act in his stead, and S., acting under such appointment and by verbal directions from the secretary of the State Board of Health, quarantined and guarded the house, and employed plaintiff to nurse such person. The guards were afterwards paid by the city. *Held*, that such laws demand a liberal construction, and that the city was liable to plaintiff on the contract of employment.—*Monroe v. City of Bluffton*, 67 N. E. 711, 31 Ind. App. 269.

[d] (App. 1904)

It is the duty of city boards of health to take prompt action to prevent the spread of contagious and infectious diseases, and to such end they may lawfully establish a pesthouse, it being the duty of the state to preserve the public health, and all expenses connected with or incident to the establishment and maintenance of a city hospital for those afflicted with contagious or infectious diseases, whether the persons removed to it are indigent or not, are properly chargeable to the city where the hospital is kept for the prevention of the spread of such disease.—*City of Frankfort v. Irvin*, 34 Ind. App. 280, 72 N. E. 652, 107 Am. St. Rep. 179.

The fact that it was the duty of the overseer of the poor, and not of the city, to provide for poor persons, did not relieve the city from liability for necessary expenses incurred by it in preventing the spread of disease, and therefore a person rendering services and incurring expenses in the burial of such persons who had died of smallpox might recover therefor, as such statute further required such board

to perform such duties as might be required by the State Board of Health, and a rule of the State Board of Health made it the duty of any person having charge of the remains of one who had died of smallpox to cause the body to be interred within 12 hours after death.—Id.

[e] (App. 1905)

Evidence held to constitute an emergency authorizing the secretary of a town board of health to direct plaintiff to nurse a smallpox patient and a physician quarantined in plaintiff's house, and to bind the town for such services, under Burns' Ann. St. 1901, § 6718, requiring the board of health of a town to take prompt action to arrest the spread of contagious and infectious diseases.—Town of Knightstown v. Homer, 75 N. E. 13, 36 Ind. App. 139.

Acts done to prevent the spread of disease being within the jurisdiction of the board of health, as provided by Burns' Ann. St. 1901, § 6718, and the town being only liable when the board or its secretary acts within the scope of its authority, an instruction authorizing a recovery against a town for the destruction of property "by its officers," when done "for the purpose of preventing the spread of disease," was erroneous.—Id.

Where a smallpox patient was taken to plaintiff's house at the instance of plaintiff's husband, and not by any act or command of the town board of health or its secretary, and, after the death of the patient, plaintiff's household furniture, etc., was destroyed, by order of the board of health, to prevent the spread of the disease, the town was only liable for its value at the time it was destroyed.—Id.

Where it did not appear that plaintiff was in indigent circumstances, nor unable financially to provide any and all means for the care and attention of her child, who contracted varioloid from a smallpox patient with whom plaintiff and her son were quarantined in plaintiff's home, and for whom she was employed to care by the secretary of the town board of health, the town, in the absence of a statute, was not liable for services rendered by plaintiff to her son.—Id.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Health, §§ 13, 14.

§ 17. — Employment of physicians and assistants.

[a] (Sup. 1881)

The employment by a board of health of a city of one of its members to vaccinate pupils in a public school is void as against the city, where the members of the board are, by statute, only authorized to receive an annual salary, to be fixed by the common council.—City of Fort Wayne v. Rosenthal, 75 Ind. 156, 39 Am. Rep. 127.

[b] (App. 1897)

Rev. St. 1894, §§ 6718, 6719 (Horner's Rev. St. 1897, §§ 4903, 4994), making the board of

commissioners a county board of health, "the duty it shall be to protect the public health, the removal of causes of diseases, and \* \* \* arrest the spread of contagious diseases," do authorize the board to furnish free medical and medical attendance to a particular family suffering from smallpox, if the family remain in its own home, and it is not shown to be indigent, but only that portion of the expense which was incurred to prevent the spread of the disease is justified.—Board of Com'rs of County v. Fertich, 46 N. E. 699, 18 Ind. App.

[c] (App. 1904)

Where there is some danger of a small epidemic in a city, and the council appoints a committee of three persons, the chairman of which had practically the oversight of the care of persons so afflicted and employed plaintiff to perform services in nursing and caring for patients, in removing certain persons afflicted with the disease, and in burying others who had died of it, and the city council ratified the action of the committee and chairman by paying the bills so made, the city was liable for the services.—City of Frankfort v. Irvin, 34 Ind. App. 280, 72 N. E. 652, 107 Am. St. Rep. 179.

Under Burns' Rev. St. 1901, § 6718, making the mayor and common council of a city the board of health, where the city had no separate board, and making it their duty to protect the health, and to take prompt action to arrest the spread of contagious diseases, and to abate nuisances, the hiring by such board of a nurse to attend smallpox patients was a valid contract, and not in a matter quasi judicial or of a legislative character.—Id.

The fact that the pesthouse, where the services were performed, was located outside city limits, was immaterial as affecting the contract.—Id.

Such contract, made through the agency of a committee or other authorized person, is binding.—Id.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Health, § 15.

See, also, 21 Cyc. p. 389.

§ 18. Liabilities for torts.

[a] (Sup. 1878)

Where the board of commissioners of a county, acting as the board of health, erect and maintain a pest house in grounds belonging to the county, and near a dwelling house, and place in such pest house persons infected with a malignant disease, by reason whereof the occupants of the dwelling house were infected with the same disease, and the occupancy of such house rendered unsafe and unpleasant, it was held that the county was liable for such injury.—Haag v. Board of Com'rs of Van Buren County, 60 Ind. 511, 28 Am. Rep. 65.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Health, § 16.

See, also, note, 5 L. R. A. (N. S.) 635.

**§ 19. Actions in general.**

Aider of pleading by verdict or judgment, see PLEADING, § 433.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Health, §§ 17-23.

See, also, 21 Cyc. pp. 402-406.

**II. REGULATIONS AND OFFENSES.**

Act authorizing boards of health to prepare regulations as unauthorized delegation of legislative power, see CONSTITUTIONAL LAW, § 66.

Construction of penal statutes, see STATUTES, § 241.

Delegation of power to municipality, see CONSTITUTIONAL LAW, § 63.

Municipal regulations to preserve public health, see MUNICIPAL CORPORATIONS, § 597.

Power of city to grant franchise in street in furtherance of public health, see MUNICIPAL CORPORATIONS, §§ 680, 681.

Regulation of manufacture, dispensing and sale of medicines, see DRUGGISTS.

Regulation of manufacture, sale, and use of articles of food or drink, see FOOD.

Regulation of practice of medicine, see PHYSICIANS AND SURGEONS.

Regulation of public schools, see SCHOOLS AND SCHOOL DISTRICTS, §§ 156-158.

Regulations constituting exercise of power of eminent domain, see EMINENT DOMAIN, § 2.

**§ 20. Power to make regulations.**

[a] (Sup. 1907)

A municipal health ordinance authorized by the Legislature as within the police power and not prohibited by the Constitution cannot be assailed on the ground that it is unreasonable.—*Miller v. Town of Syracuse*, 168 Ind. 230, 90 N. E. 411, 8 L. R. A. (N. S.) 471, 120 Am. St. Rep. 366.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Health, § 24.

See, also, 21 Cyc. p. 387; note, 32 L. R. A. 116.

**§ 21. Constitutionality of regulations.**

[a] (Sup. 1900)

Burns' Rev. St. 1894, § 6711 et seq., authorizing the state board of health to adopt rules and by-laws, in harmony with other statutes in relation to the public health, to prevent the spread of contagious and infectious diseases, is a proper delegation of authority, within Const. art. 4, § 1, vesting the legislative authority in the general assembly; and hence such board has power to adopt a rule requiring local boards to compel vaccination of all persons in all cases where an exposure to smallpox is threatened, or where there is danger of such epidemic ensuing.—*Blue v. Beach*, 56 N. E. 89, 155 Ind. 121, 50 L. R. A. 64, 80 Am. St. Rep. 195.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Health, § 25.

See, also, 21 Cyc. p. 387; note, 47 Am. St. Rep. 541.

**§ 22. Contagious and infectious diseases.****FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Health, §§ 26-28.

See, also, 21 Cyc. pp. 393-396.

**§ 23. — Precautions in general.**

[a] (Sup. 1884)

A city, authorized "to remove or confine persons having infectious diseases," has implied power to hire buildings in which to confine such persons.—*City of Anderson v. O'Conner*, 98 Ind. 168.

Under Rev. St. 1881, § 3106, empowering municipal corporations to remove or fine persons having infectious or pestilential diseases, a city has authority to rent a house as a pesthouse for the purpose of confining therein persons having the smallpox.—*Id.*

[b] (App. 1908)

It is the duty of cities, in order to protect the public health, to provide medicines and medical and other assistance to the poor in case of epidemics.—*City of Greenfield v. Black*, 42 Ind. App. 645, 82 N. E. 797.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Health, § 26; 36 CENT. DIG. Mun. Corp. § 1325.

**§ 25. — Vaccination.**

Of school children, see SCHOOLS AND SCHOOL DISTRICTS, § 158.

[a] (Sup. 1881)

City ordinances requiring a board of health to have persons vaccinated as a protection against smallpox did not thereby impose upon the board or its members the duty of performing such services as might be required of physicians, but only to provide that such precaution be taken.—*City of Fort Wayne v. Rosenthal*, 75 Ind. 156, 39 Am. Rep. 127.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. Health, § 28.

See, also, 21 Cyc. p. 393; note, 26 L. R. A. 723.

**§ 33. Unhealthful practices.**

[a] (Sup. 1906)

Acts 1905, p. 82, c. 52, is entitled an act to regulate and in certain cases to prohibit the manufacture, sale, "keeping for sale, owning or giving away of cigarettes," etc., and providing penalties for violation thereof, and declares that it shall be unlawful for any person, directly or indirectly to manufacture, sell, dispose of, give away, or keep for sale any cigarettes, etc., or "keep or own or to be in any way concerned, engaged or employed in owning or keeping any such cigarettes." The act

passed the Senate under a title "An act to regulate the manufacture, sale, and the giving away of cigarettes," etc. When the bill passed the house on third reading, it retained such title, which was afterwards amended by adding a penalty clause. The bill then went back to the Senate and a conference committee reported the bill with its present title under which it was adopted. *Held*, that the act should not be construed as intending to prohibit the act of smoking cigarettes or keeping them in possession for the sole purpose of smoking them.—*State v. Lowry*, 77 N. E. 728, 166 Ind. 372, 4 L. R. A. (N. S.) 528; *Lewis v. State*, Id.

### § 35. Permits for burial or transportation of dead bodies.

[a] (App. 1894)

A railroad company is not liable for refusal to transfer a dead body when the transit permit fails to show the name of the medical attendant, as required by the rules of the board of health, though the certificate of the medical attendant is pasted on the box, it not appearing that the company had knowledge of this.—*Lake Erie & W. R. Co. v. James*, 35 N. E. 395, 38 N. E. 192, 10 Ind. App. 550.

Acts 1891, § 5, provides that the state board of health may adopt rules to prevent outbreaks and the spread of infectious diseases. Rule 5 of the board, concerning the transit of dead bodies, provides that every body must be accompanied by a person having a transit permit from the board of health, showing name of deceased, age, place of burial, cause of death, and, if of an infectious nature, the point to which it is to be shipped, medical attendant, and name of undertaker. *Held* that, where the name of the medical attendant was not contained in a permit presented to defendant railway company, its refusal to carry the body was not wrongful.—Id.

Under Acts 1891, p. 16, § 5, authorizing the board of health to adopt rules in harmony with other statutes in relation to public health, and to prevent the spread of contagious diseases, a rule that, in case of shipment, every dead body must be accompanied by a person in charge with proper tickets and a transit permit from the board of health, or proper health authority giving permission for the removal, and showing the name of the deceased, age, place, and cause of death, the point to which shipment was to be made, the name of the medical attendant and name of undertaker, was within the power of the board, and was reasonable.—Id.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. Health, § 34.

## HEARING.

See—

Persons interested in proposed public improvement. MUNICIPAL CORPORATIONS, § 298.

### In particular actions or proceedings.

See—

Accounting by executor or administrator. EXECUTORS AND ADMINISTRATORS, § 507.

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APPEAL AND ERROR, §§ 816-835.

JUSTICES OF THE PEACE, §§ 169-181.

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Application for liquor license. INTOXICATING LIQUORS, § 70.

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Removal of officers. **OFFICERS**, § 70.

Of policemen. **MUNICIPAL CORPORATIONS**, § 185.

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*See—*

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Parties to actions or deeds bringing in as new parties. **PARTIES**, § 51.

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*See* **RAILROADS**, §§ 92-99, 242, 243, 298-352.

**HIGHWAY ROBBERY.**

*See* **ROBBERY**.

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

# HIGHWAYS.

## *Scope-Note.*

[INCLUDES roads open for free passage to the public, established for public benefit; nature and scope of power to establish and maintain such roads in general; constitutional and statutory provisions relating thereto; appointment and removal, rights, powers, duties, and liabilities of highway boards, officers, etc.; establishment of such roads by statutory proceedings, construction, repair, and improvement thereof, and alteration, vacation, and abandonment thereof; taxes for highway purposes and local assessments for particular roads; title to and rights in the land occupied, and removal of and liabilities for obstructions, encroachments, etc.; and use of such roads, and liabilities for injuries from defects, obstructions, etc., therein, and for injuries from violations of the law of the road causing collisions, etc.]

[EXCLUDES streets in incorporated cities, etc. (see *Municipal Corporations*); roads established by public authority for accommodation of private persons (see *Private Roads*); roads for passage over which tolls are taken (see *Turnpikes and Toll Roads*); bridges (see *Bridges*); dedication of lands to public use as highways (see *Dedication*); exercise of power of eminent domain (see *Eminent Domain*); railways on or crossing highways (see *Railroads*; *Street Railroads*); and highways as boundaries (see *Boundaries*). For complete list of matters excluded, see cross-references, post.]

## *Analysis.*

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## I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

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### (A) ESTABLISHMENT BY PRESCRIPTION, USER, OR RECOGNITION.

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Use of bridge over canal as part of highway, see CANALS, § 21.

### § 1. Nature and essentials of highway by prescription.

[a] (Sup. 1883)

A way which has been used by the public, and recognized by the road officers, as a highway for more than 20 years, is a public highway, although not of great length and terminating on private property.—*Nichols v. State*, 89 Ind. 298.

[b] (Sup. 1883)

In order to constitute a highway by user, the use must not only be uninterrupted and continuous for 20 years, and with the knowledge of the owner of the land, but must be by his consent or without his objection.—*Board of Com'rs of Greene County v. Huff*, 91 Ind. 333.

[c] (Sup. 1891)

Twenty years' use by the public under claim of right, evidenced by the use, will give a right to the road or street of which the owner of the fee cannot divest the public no matter what may have been his intention, not because an intention to dedicate is conclusively presumed, but because the statute of limitation has divested the owner of the right by destroying the remedy.—*Town of Marion v. Skillman*, 26 N. E. 676, 127 Ind. 130, 11 L. R. A. 55.

[d] (App. 1892)

A highway may become such by long user.—*Zimmerman v. State*, 31 N. E. 550, 4 Ind. App. 583.

FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. High. §§ 1, 2.

### § 2. Constitutional and statutory provisions.

[a] (App. 1908)

Under the express provisions of Burns' Ann. St. 1901, § 6762, a public highway may be established by 20 years' user.—*Gillespie v. Duling*, 41 Ind. App. 217, 83 N. E. 728.

At common law individuals could gain easements only by prescription, and the public only by dedication, but Burns' Ann. St. 1908, § 7663, establishes highways by 20 years' use, regardless of other evidences of dedication.—*Id.*

FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. High. § 3.

### § 4. Land subject to prescription.

[a] (App. 1898)

A highway may be acquired by adverse user on a railroad right of way parallel with the railroad.—*Blumenthal v. State*, 51 N. E. 496, 21 Ind. App. 665.

FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. High. §§ 5, 16.

### § 5. Mode and extent of use.

[a] (Sup. 1874)

A highway cannot be regarded as established by use where the evidence shows that the road was never surveyed nor worked by authority, and that the track was continually changed to accommodate fields and to go around obstructions.—*Stephenson v. Farmer*, 49 Ind. 234.

[b] (Sup. 1881)

A road becomes a public highway by 20 years' user under the statute, or in less time with the assent of the owner and such use that public and private interests would be affected by a change.—*Ross v. Thompson*, 78 Ind. 90.

[c] (App. 1908)

The word "public" in the expression "the road is open to public use" means "all those who have occasion to use" the road.—*Gillespie v. Duling*, 41 Ind. App. 217, 83 N. E. 728.

The fact that a road is not open at both ends and furnishes access and egress to but one property owner does not prevent its being a public highway, since the law does not fix the number of persons who must travel on a road to determine its existence.—*Id.*

[d] (App. 1908)

The fact that an ancient highway is rarely used except by a few persons, to whom it affords a means of ingress and egress from their land, does not make it the less a public highway.—Small v. Binford, 41 Ind. App. 440, 83 N. E. 507, 84 N. E. 19.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 6, 7.

#### § 6. Duration and continuity of use.

Ascertainment and entry of highway by user, see post, § 15.

[a] (Sup. 1854)

A public road, not recorded, which had been used for 20 years or more, was under the act of 1849 a public highway.—Epler v. Niman, 5 Ind. 459.

[b] (Sup. 1857)

By statute user of a highway for 20 years is an absolute bar; but a highway may be established by user for a shorter period.—Hays v. State, 8 Ind. 425.

[c] (Sup. 1881)

A road that has been used by the public uninterruptedly for 20 years, with the knowledge and consent of the owner of the title, becomes a public highway.—Bidinger v. Bishop, 76 Ind. 244.

[d] (Sup. 1881)

Where there has been 20 years' user of a way by the public, the way is to be deemed a public one, and those asserting rights in it are not bound to show an original intent to dedicate.—Ross v. Thompson, 78 Ind. 90.

[e] (Sup. 1881)

Where a highway was uninterruptedly used by the public for more than 30 years, the right thereto was acquired independently of any order of the board of commissioners.—Webb v. Carr, 78 Ind. 455.

[f] (Sup. 1884)

The user of a road as a public highway for 20 years vests a right in the public, of which the owner in fee cannot divest them; and, where the road leads to a stream, a right to bridge it is impliedly vested.—Kyle v. Board of Com'rs of Kosciusko County, 94 Ind. 115.

[g] (Sup. 1886)

The use of a road as a highway for 20 years vests an indefeasible right in the public.—City of Ft. Wayne v. Coombs, 107 Ind. 75, 7 N. E. 743, 57 Am. Rep. 82.

[h] (Sup. 1886)

User under claim of right for 20 years, will establish a highway as effectually as an express grant.—Cleveland v. Obenchain, 107 Ind. 591, 8 N. E. 624.

[i] (Sup. 1887)

When the use of a highway attempted to be acquired by prescription is interrupted, prescription is annihilated, and must begin again.—Shellhouse v. State, 11 N. E. 484, 110 Ind. 509.

[j] (App. 1898)

In a prosecution for obstructing a public highway, evidence showing a continuous and undisputed public use of the way for over 20 years is sufficient to show that it is a public highway, though there is no evidence of a dedication.—Cromer v. State, 52 N. E. 239, 21 Ind. App. 502.

[k] (App. 1898)

Uninterrupted use by the public of a road continuously for 20 years constitutes it a highway.—Blumenthal v. State, 51 N. E. 496, 21 Ind. App. 665.

[l] (App. 1905)

After the expiration of 20 years' use, the statute makes a road a public highway, regardless of its origin or the objection of landowners.—McClaskey v. McDaniel, 74 N. E. 1023, 37 Ind. App. 59.

[m] (Sup. 1909)

Where obstructions were placed in a way not to obstruct public travel, and the public continuously asserted its right to use the way by removing the obstructions when necessary, the public use was not interrupted thereby.—Pitser v. McCreery, 172 Ind. 663, 88 N. E. 303, 89 N. E. 317.

While a highway acquired by user is in a sense a prescriptive way, it is also a statutory way, as distinguished from a common-law prescription; and, it being immaterial whether it is used with consent, or over the objection of the landowner, obstructions therein or interruptions of the use could operate only as overt acts or objections to the use, no more effective than ordinary declarations.—Id.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 8, 9.

#### § 7. Adverse character of use in general.

[a] (Sup. 1858)

Where a road was by an order of the proper authority located on the line between two farms, so far as such an order could locate it, but in point of fact was opened and used for 27 years on the land of one, a supervisor may not, under the statutes of this state, open the road on the line.—Lemasters v. State, 10 Ind. 391.

[b] (Sup. 1885)

Under section 5035, Rev. St., providing that roads which have been used as highways for 20 years shall be deemed public highways, a road becomes a public highway after such user without reference to the question of dedication or consent of the landowner.—Strong v. Makeever, 102 Ind. 578, 1 N. E. 502, 4 N. E. 11.

After a highway has been in use 20 years, and according to statute becomes a public highway, the course of the same must be as it has been used, and not as originally intended by

'the owners of adjoining land, and a court has no authority to order the record of the road according to the latter mode.—Id.

A person who wishes to make the question that by mistake or otherwise the highway used is not upon the proper line, should pursue the proper legal remedy for the correction of the mistake before the expiration of the 20 years' use, which, according to section 5035, Rev. St. 1881, confirms the highway as public property. Merely objecting is of no avail after the expiration of that time.—Id.

[c] (Sup. 1887)

Before a highway can be established by prescription, the general public under a claim of right, and not by mere permission of the owner, must have used some defined way, without interruption or substantial change, for 20 years or more, and a gate erected across the way, and maintained and kept closed at certain stated times during a period of 4 years, by the owner, evincing an intention to exclude the public from the uninterrupted use thereof, destroys any prescriptive right not already fully accrued.—*Shellhouse v. State*, 110 Ind. 509, 11 N. E. 484.

Where the owners of land devote a portion of it for use as an alley or passageway for their own private purpose, such alley or passageway will not be converted into a public highway simply because the public also uses it by permission from the owners.—Id.

[d] (Sup. 1891)

Where adjoining landowners agree upon their division line, and establish a road supposed to be on the land of one of them, which road for 50 years is used by the subsequent owners of the land and by the public, the road cannot be closed by the owner of one of the tracts, when he finds by a resurvey that the road is on his land, instead of the adjoining land, as it was supposed to be.—*Bales v. Pidgeon*, 129 Ind. 548, 29 N. E. 34.

[e] (App. 1896)

Under *Burns' Rev. St. 1894*, § 6762 (Rev. St. 1881, § 5035), providing that, when a way has been used by the public for 20 years, it shall be deemed a public highway, the uninterrupted use of a road for such time, whether with the owner's consent or over his objection, constitutes it a public highway.—*Brown v. Hines*, 44 N. E. 655, 16 Ind. App. 1.

[f] (Sup. 1900)

Where a part of the right of way of a railroad company was used by persons hauling freight to and from the company's cars, and both such part and another part of the right of way was used by the general public as a highway, there was no such exclusive or adverse use of the part used for freighting as would make it a highway by prescription.—*Baltimore & O. S. W. R. Co. v. City of Seymour*, 55 N. E. 953, 154 Ind. 17.

[g] (Sup. 1902)

The public user of a strip on a railway land for a highway, which was neither exclusive nor adverse, did not prove an implied dedication, or a prescriptive right, no matter how long continued.—*Cannon v. Cleveland, C., St. L. R. Co.*, 62 N. E. 8, 157 Ind. 682.

[h] (Sup. 1909)

*Burns' Ann. St. 1908*, § 7663, providing for the establishment of a highway after 20 years' user, is not to be construed with section 6178, regulating the acquisition of easements, it being immaterial to user under the highway statute whether the use is with the consent or over the objection of the landowner.—*Pittsford v. McCreery*, 172 Ind. 663, 88 N. E. 303, 8 Ind. App. 317.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 10, 12–14

§ 8. Claim or color of right to use.

[a] (Sup. 1905)

A charge that, in order to constitute a highway, it is sufficient if the road in question shown to have been used as a public road "as a right" for a period of 20 years, is subject to the objection of not requiring the user to have been under a claim of right, especially when taken in connection with another charge which stated that, "for a road to be a public highway by user, it must have been used \* \* \* under a claim of right."—*Seaboard R. Co. v. Norman*, 74 N. E. 165 Ind. 126.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. § 11.

§ 9. Use and recognition of pre-existing road or other way.

[a] (App. 1892)

Under *Rev. St. § 5035*, which provides that "all public highways" used as such more than 20 years shall be deemed public highways, a lane traveled by the public continuously for 40 years is a public highway.—*Lafayette, N. A. & C. R. Co. v. Etzler*, 3 Ind. App. 562, 30 N. E. 32.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. § 15.

§ 10. Use where proceedings to establish highway defective.

[a] (Sup. 1880)

Where the evidence shows that the way has been used for more than 20 years, and regularly worked from time to time as a public highway, and the survey gives the terminus exactly and the line of the road between them, distances and directions from point to point, so that any practical surveyor could easily ascertain and describe the road as it is surveyed, it is sufficient.—*Higham v. Warner*, 69 Ind. 549.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. § 17.

**§ 11. Operation and effect.**

Extent of dedication, see DEDICATION, §§ 49, 50.

FOR CASES FROM OTHER STATES,  
SEE 25 CENT. DIG. HIGH. §§ 19-22.

**§ 14. — Extent of highway.**

Ascertainment and entry of record of highway by user, see post, § 15.

[a] A road which has been used by the public uninterruptedly for 20 years becomes a public highway; and its width, as used at the end of that time, is the established width of the road.—(Sup. 1834) *Epler v. Niman*, 5 Ind. 459; (1860) *Hart v. Trustees of Bloomfield Tp.*, 15 Ind. 226.

[b] (Sup. 1883)

The character of a way established by user as a highway, is not to be determined by its length nor from the place where it terminates, and the fact that it is short and terminates in private property is immaterial.—*Nichols v. State*, 89 Ind. 298.

[c] (App. 1907)

Where the boundaries of a highway have never been established by any competent authority, but the right of the public to travel over the road has been established by continuous use, the width of the road is determined by the width of the use.—*Anderson v. City of Huntington*, 40 Ind. App. 130, 81 N. E. 223.

[d] (Sup. 1909)

*Burns' Ann. St.* 1908, § 7663, creates a highway by 20 years' user, and declares that all highways, previously laid out according to law, or used as such for 20 years or more, shall continue as located and as of their original width, respectively, until changed according to law. *Held*, that "their original width" related to the width of the highway when the proceeding was begun to ascertain and record it, and not to a possibly wider or narrower way at some remote or recent period.—*Pitser v. McCreery*, 172 Ind. 663, 88 N. E. 303, 89 N. E. 317.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. HIGH. § 21.

**§ 15. Ascertainment and entry of record of highway by user.**

[a] (Sup. 1874)

To entitle a public highway, established by use for 20 years or more, to be entered of record, it should be ascertained and described with the same certainty that would be necessary in establishing a highway originally.—*Stephenson v. Farmer*, 49 Ind. 234.

[b] (Sup. 1878)

The only issue to be tried in a proceeding to ascertain and record a highway is whether the alleged highway has existed by user for more than 20 years with the consent of the owners, or has been laid out and not recorded;

and no viewers are necessary to such a proceeding.—*Vandever v. Garshwiler*, 63 Ind. 185.

In a proceeding under Rev. St. p. 534, § 45, for ascertaining and recording a highway, the petitioners cannot be compelled to elect on which of several paragraphs of the petition they will proceed to trial.—*Id.*

A motion to dismiss a petition for ascertaining, describing, and entering of record an unrecorded highway, no ground for such motion being specified, is properly overruled.—*Id.*

A petition to ascertain and record a highway used by the public for more than 35 years before the filing of the petition should state the names of the owners, that the court may order the proper notice to be given.—*Id.*

The sufficiency of a petition to ascertain and enter of record an unrecorded highway may be tested by demurrer or motion, the same as the complaint in other actions.—*Id.*

[c] (Sup. 1879)

Under 1 Rev. St. 1876, p. 534, § 45, providing for the recording of highways, used for more than 20 years, proceedings may be instituted by boards of county commissioners without petition by or notice to any one, any person competent to sue may, on petition or motion, become a party to such proceedings, and no question as to the sufficiency of the petition can be raised. Parties aggrieved by the action of the board of commissioners have their remedy by appeal or by injunction.—*Gibbons v. Copper*, 67 Ind. 81.

[d] (Sup. 1880)

Under 1 Rev. St. 1876, p. 534, § 45, the board of commissioners of a county may, upon their own motion, proceed to ascertain, describe, and enter of record a public highway, alleged to have been used for 20 years, but not recorded. It is, however, proper to commence such proceedings by petition, when moved by any person other than such board. A written petition is not necessary in either case.—*Higham v. Warner*, 69 Ind. 549.

[e] (Sup. 1885)

Under Rev. St. 1881, § 5035, giving the county commissioners power to cause roads which have been used as highways for 20 years without being recorded to be ascertained, described, and recorded, *held* that, as the rights of property holders were involved, actual notice of the proceedings was necessary, though the statute made no provision therefor.—*Yelton v. Addison*, 101 Ind. 58.

[f] (Sup. 1885)

Orders by a board of township trustees finding for remonstrants on a petition to ascertain a record of the location of a highway on the ground of prescriptive user, and thereafter denying the petitioner's motion for a new trial, did not in any sense amount to a judgment precluding the county board from afterwards ascertaining, and making a record of the highway as established by 20 years' user, nor

preventing persons from thereafter objecting to the establishment of such highway on a different line.—*Strong v. Makeever*, 1 N. E. 502, 4 N. E. 11, 102 Ind. 578.

[g] (*Sup.* 1885)

Where the petition and the evidence, in proceedings to have a highway declared on the ground of 20 years' user, agree that there was a highway commencing at the north end of a certain road, but disagree as to the distance of the north end of that road from the named corner of land, such variance will overthrow the proceedings.—*Washington Ice Co. v. Lay*, 103 Ind. 48, 2 N. E. 222.

Parties who appear before the board of county commissioners in a proceeding to have a road declared a highway by reason of 20 years' user, and make no objection to the failure to give proper notice, waive whatever objections might have been made, and cannot raise them on appeal.—*Id.*

[h] (*Sup.* 1893)

Where, in an action to establish a public highway on the ground that it had been used for 20 years, evidence as to dedication was admitted, it was error to refuse an instruction that such evidence was competent as tending to show the land became a highway by its continuous and uninterrupted use by the general public without objection for a period of 20 years or more, but it should be considered only in relation to the question at issue as to whether it became a public highway as the result of such use.—*McKeen v. Porter*, 34 N. E. 223, 134 Ind. 483.

It is not an abuse of discretion, in a proceeding for the ascertainment of a highway, which has been used as such without record, to allow an amendment changing the description so as to shift somewhat the location of the way, although there has already been one trial, and the petitioners have once before amended their petition in the matter of description.—*Id.*

[i] (*Sup.* 1897)

Notice to the owner of the land affected is essential to the validity of a proceeding under Rev. St. 1894, § 6762 (Rev. St. 1881, § 5035), empowering the county commissioners to ascertain and enter of record public highways which have been used as such for 20 years or more.—*Town of Hardinsburg v. Cravens*, 148 Ind. 1, 47 N. E. 133.

[j] (*Sup.* 1903)

In a proceeding for the ascertainment, description, and entry of record of a public highway by user, the burden is on the petitioner to affirmatively show that none of an objector's land would be unconstitutionally taken.—*McCreery v. Fallis*, 67 N. E. 673, 162 Ind. 255.

Acts 1897, p. 192, c. 127 (Burns' Rev. St. 1901, § 6762), providing for the ascertainment and determination of public highways which

have been or may be used as such for 20 or more, and the establishment of their location at not less than 30 feet, only partially repealed by Acts 1867, p. 133, c. 62, providing that public highways used as such for 20 years or more shall be public highways, and giving the board of county commissioners power to ascertain and describe, and enter of record such highways, and left that act in force as to prescriptive highways less than 30 feet wide.—*Id.*

Acts 1897, p. 192, c. 127 (Burns' Rev. St. 1901, § 6762), providing that all public highways which have been or may be used as such for 20 years or more shall be deemed public highways, and may be ascertained, described, and entered of record by the board of county commissioners, and the width thereof determined and described, "which width shall not be less than 30 feet," applies only to prescriptive highways having a width of 30 feet or more.

[k] (*Sup.* 1909)

If a way has been continually used as a highway for 20 years, its status as a public highway is fixed by Burns' Ann. St. 1908, § 7663, so that it may be ascertained and entered of record as the statute provides; and it is immaterial whether the use has been with the consent or over the objection of adjoining landowners, as the statute involves neither prescription nor dedication, though the way established by the statute is analogous to a way established by prescription.—*Pitser v. McCreery*, 172 Ind. 88, N. E. 303, transferred from Appellate Division, 1909) 86 N. E. 980.

"Use as a highway," within Burns' Ann. St. 1908, § 7663, creating a highway by 20 years' user, contemplates a continuous use of the way as a public road which every person has a right to use for travel; and, though the way need not be kept in repair, or actually used by the public authorities, the use by the public must be under a claim of right, either with the landowner's consent, or over his objection.

Interruptions preventing a way from becoming a public highway by 20 years' user, provided by Burns' Ann. St. 1908, § 7663, must be interruptions of the right of user by constituting denials of the right of public use, and not merely of the use itself by acts, for the convenience of the adjoining landowners, which incidentally impede travel.—*Id.*

Where a way has ripened into a public highway by 20 years' user, as provided by Burns' Ann. St. § 7663, the status of the way is fixed, so that it may be entered of record, though the proceeding is contested by an adjoining landowner.—*Id.*

A finding, in a proceeding under Burns' Ann. St. 1908, § 7663, for the ascertainment of a highway by user, that the public has continued for 20 years to lay down fences and gates interposed by adjoining landowners to assert the right to use the way, is equivalent to a finding of adverse assertion of right.

public, warranting a judgment that the way be entered of record as provided by the statute.—*Id.*

The width of a way at the end of 20 years' user by the public is the width the statute fixes as the width of the way to be entered of record, as provided in Burns' Ann. St. 1908, § 7663.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 23, 75.

#### § 16. Pleading existence of highway.

Effect of failure to reply, see PLEADING, § 182.

#### § 17. Evidence as to existence of highway.

In proceedings to ascertain and enter of record, highway by user, see ante, § 15.

[a] (Sup. 1893)

On an application to establish a highway under Rev. St. 1881, § 5035, on the ground of user, it is competent to prove facts tending to show dedication, as well as user.—*McKeen v. Porter*, 134 Ind. 483, 34 N. E. 223.

[b] (Sup. 1905)

Under Burns' Ann. St. 1901, § 6762, providing that all public highways which have been or may be used as such for 20 years or more shall be deemed public highways, an unexplained user of a highway by the public for 20 years or more will be presumed to have been under a claim of right.—*Southern Indiana R. Co. v. Norman*, 74 N. E. 896, 165 Ind. 126.

[c] (App. 1908)

Where the public highway touching plaintiff's property has been vacated, leaving as his only way out another road, the presumption is strong that such latter road is a public way.—*Gillespie v. Duling*, 41 Ind. App. 217, 83 N. E. 728.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. § 24.

#### (B) ESTABLISHMENT BY STATUTE OR STATUTORY PROCEEDINGS.

Establishment by user where proceedings defective, see ante, § 10.

Establishment over railroad right of way, see RAILROADS, § 96.

Laws relating to as encroachment by Legislature on judiciary, see CONSTITUTIONAL LAW, § 55.

Power of person appearing as friend of court, see *AMICUS CURIAE*, § 3.

Private roads, see PRIVATE ROADS, § 2.

Right of remonstrant in proceedings to lay out highway to witness' fees, see WITNESSES, § 25.

Streets in cities, see MUNICIPAL CORPORATIONS, § 649.

Under laws of eminent domain, see EMINENT DOMAIN.

#### § 18. Nature and essentials of statutory highway.

[a] (Sup. 1887)

A cul-de-sac may in certain cases be laid out and established as a highway.—*Adams v. Harrington*, 14 N. E. 603, 114 Ind. 66.

[b] (Sup. 1908)

All roads laid out under legislative enactment are public highways belonging to the state, under full control of the Legislature, which may, in the absence of constitutional limitations, exercise such control directly.—*State ex rel. Board of Com'rs of Hendricks County v. Board of Com'rs of Marion County*, 170 Ind. 595, 85 N. E. 513.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. § 25.

See, also, note, 29 Am. Rep. 51.

#### § 19. Constitutional and statutory provisions.

Abridging privileges and immunities of citizens of the several states, see CONSTITUTIONAL LAW, § 207.

Abridging privileges and immunities of citizens of the United States, see CONSTITUTIONAL LAW, § 206.

Class legislation, see CONSTITUTIONAL LAW, § 208.

Denial of equal protection of laws, see CONSTITUTIONAL LAW, § 234.

Grants of special privileges and immunities, see CONSTITUTIONAL LAW, § 205.

Implied repeal of statute by act relating to same subject, see STATUTES, § 161.

Persons entitled to raise question of constitutionality, see CONSTITUTIONAL LAW, § 42.

Re-enactment of former statute and adoption of provisions previously construed, see STATUTES, § 225½.

Reference to and identification of act amended, see STATUTES, § 138.

Saving clause in statutes, see STATUTES, § 277.

Special or local laws, see STATUTES, §§ 73, 97.

[a] (Sup. 1884)

The attempt on the part of the Legislature by Acts 1867, p. 135, to amend Act June 17, 1852, relating to the opening, vacating, and changing of highways, was void.—*McIntyre v. Marine*, 93 Ind. 193.

[b] (Sup. 1887)

The fact that Acts 1885, p. 162 (gravel road law), detached from all other laws, is incomplete in the sense that it cannot be practically administered is immaterial as it is not to be detached, but must be taken as part of a uniform system of law, and not as an isolated act, independent of all others.—*Robinson v. Rippey*, 12 N. E. 141, 111 Ind. 112.

[c] (Sup. 1908)

Acts 1905, p. 521, c. 167, entitled "An act concerning highways," which was intended to be a compilation, revision, and codification of statutes relating to highways, repealed by im-

plication Acts 1903, p. 255, c. 145, entitled "An act concerning gravel and macadamized roads." Judgment (1907) 81 N. E. 480, affirmed.—*Findling v. Foster*, 170 Ind. 325, 84 N. E. 529.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 28, 29.

### § 20. Necessity and utility of road.

Determination of questions, see post, § 42.

Opinion evidence as to, see EVIDENCE, §§ 411, 472, 474½.

[a] (Sup. 1865)

That cannot be deemed a highway of public utility which, if established, would render unfit for use another of much greater importance (as, for example, an important line of railway), or make the transit of passengers upon the latter seriously dangerous.—*Crossley v. O'Brien*, 24 Ind. 325, 87 Am. Dec. 329.

[b] (Sup. 1880)

There is no right to open and maintain a highway over land without the consent of the owner, where such highway has been found not to be a public utility.—*Blackman v. Halves*, 72 Ind. 515.

[c] (Sup. 1882)

Whether a proposed highway will be of public utility depends, not upon whether there is an absolute necessity for it, but upon whether the public convenience requires it.—*Green v. Elliott*, 86 Ind. 53.

[d] (Sup. 1898)

That the highway sought to be established might otherwise become a highway by use cannot affect the question of its utility.—*Opp v. Timmons*, 48 N. E. 1028, 149 Ind. 236.

[e] (Sup. 1898)

A road will be established if public convenience requires it, though there is no absolute necessity therefor, and it will be used by a few persons more than others.—*Fritch v. Patterson*, 49 N. E. 380, 149 Ind. 455.

[f] (Sup. 1906)

In order to establish the public utility of a proposed highway, it is not necessary to show that the entire community, or even a large portion thereof, will use the same, but it is sufficient if it will be a public convenience, although it will especially conduce to the convenience of one or more persons over that of others.—*Heath v. Sheetz*, 74 N. E. 505, 164 Ind. 665.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. § 26.

### § 21. Establishment by legislative act.

[a] (Sup. 1836)

A statute requiring a survey of a town to be made and declaring the map of the same to be a public record constitutes the streets and alleys in the town public highways.—*West v. Blake*, 4 Blackf. 234.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. § 37.

### § 22. Jurisdiction and powers of authorities.

To alter highway, see post, § 71.  
To vacate highway, see post, § 76.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 31–36.

### § 23. — In general.

[a] (Sup. 1859)

Our county commissioners have no jurisdiction to lay out a road, unless it is through more than one township.—*Dan Green*, 12 Ind. 303.

[b] (Sup. 1865)

Jurisdiction will not be deemed to have been acquired by the county board to establish a highway, unless the facts necessary to sustain the jurisdiction appear affirmatively on the record. But, when the jurisdiction has been obtained, the same presumption will be in favor of the regularity of all subsequent proceedings as is entertained in ordinary cases in courts of general jurisdiction.—*Crossley v. O'Brien*, 24 Ind. 325, 87 Am. Dec. 329.

The course of proceeding required by statute when inclosures interfere is not requisite to the jurisdiction of the county to establish a highway.—*Id.*

[c] (Sup. 1884)

Boards of county commissioners have jurisdiction to locate, vacate, and change highways in their respective counties.—*Crosby v. Marine*, 93 Ind. 193.

[d] (Sup. 1892)

The board of county commissioners has original and exclusive jurisdiction over the establishment of highways in a county outside the limits of incorporated cities and towns.—*Rassier v. Grimmer*, 28 N. E. 866, 29 N. E. 130, 130 Ind. 219; *Chicago & A. R. Co. v. Board of Commissioners*, 30 N. E. 291, 130 Ind. 405.

[e] (Sup. 1899)

The jurisdiction of the board of county commissioners over the subject-matter of locating or changing a public highway is not devested by reason of the fact that the proposed location or change will appropriate the use of such highway any part of the way of a railroad company.—*Gold v. Board of Commissioners*, 53 N. E. 219, 130 Ind. 232.

County commissioners have jurisdiction over the person of a landowner across whose lands they directed a highway to be laid where such owner was made a party to the petition, was named therein and in the notice and in the report of the viewers as the persons whose lands would be affected by the contemplated change, and was served with notice of the proceedings, under Burns' Act, St. 1894, §§ 6742–6746 (*Horner's Rev. Stat.*).

§§ 5015-5019), authorizing the county commissioners to locate or change a highway.—Id.

Under Burns' Rev. St. 1894, § 6742 et seq., the board of county commissioners is invested with plenary jurisdiction over the subject-matter in proceedings to establish, locate, or change public highway; and jurisdiction of the parties is obtained by publication or posting notices, as prescribed by section 6742.—Id.

[f] (App. 1902)

Under Burns' Rev. St. 1901, 6742, providing for a location of a highway by petition to the county commissioners, and section 8080, expressly depriving township trustees of power to vacate or change any highway, it was no objection to the jurisdiction of the county commissioners on a petition for the location of a road that it lay wholly within one township.—Renard v. Grande, 64 N. E. 644, 29 Ind. App. 579.

[g] (App. 1906)

The board of commissioners has original jurisdiction of the establishment of highways, and, where the landowners are properly notified, it has jurisdiction of the parties, and its jurisdiction is not lost by any irregularities in the proceeding thereafter.—Sisson v. Carithers, 72 N. E. 267, 73 N. E. 924, 35 Ind. App. 161.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 31-34, 36;

36 CENT. DIG. Mun. Corp. § 714.

See, also, 30 Cyc. p. 1380.

## §24. — Roads in different jurisdictions.

Laws as encroachment by executive on judiciary, see CONSTITUTIONAL LAW, § 79.

[a] (Sup. 1877)

An order of a board of commissioners locating a highway, if otherwise regular, is not invalidated by the fact that one of the termini and part of the way is within the limits of an incorporated town.—Sparling v. Dwenger, 60 Ind. 72.

[b] (Sup. 1908)

Acts 1905, p. 527, c. 167, § 21, provides that, where proceedings are instituted for the location, vacating, or change of a public highway "extending into two or more counties," the county board of commissioners before whom the petition is first filed shall have jurisdiction. Held that, in view of the comprehensiveness of the act and of section 123 (page 579) thereof providing the manner of appeal from the decision of the board and of the practical construction given to the act of 1853 relating to highways, the board had jurisdiction to locate a highway on and along the county line and not otherwise extending into the other county.—Cooper v. Harmon, 170 Ind. 113, 83 N. E. 704.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 35, 56, 98.

## § 25. Establishment by ordinance or resolution of local authority.

[a] (Sup. 1884)

Public highways may be established by order of the board of commissioners of the county, by express grant, or by dedication, arising by a presumption from a continued use of the highway for a considerable period of time by the public as a public highway with knowledge thereof by the owner and without objection on his part.—Carr v. Kolb, 99 Ind. 53.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 38, 39.

## § 26. Amendment or repeal of statute pending proceedings.

[a] (Sup. 1856)

A dismissal of a petition for a highway lying in a single township, pending before the county commissioners before the passage of Code 1852, changing the law authorizing such petition, is error, since the proceeding was saved by the statute with reference to pending suits.—Sayres v. Gregory, 7 Ind. 633.

[b] (Sup. 1895)

Rev. St. 1894, §§ 5656, 5662, 5663 (Act 1893, p. 329), amending Rev. St. 1881, §§ 4286, 4292, 4293, providing that benefits to public highways from drainage shall be assessed to the township, and paid out of the road fund, instead of assessed to the county, and that notice should be given by publication, instead of posting, without any saving clause, did not affect the jurisdiction of the commissioners in pending cases, but merely changed the mode of proceeding therein.—Steele v. Empson, 142 Ind. 397, 41 N. E. 822.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. § 30.

## § 28. Parties.

[a] (Sup. 1865)

To give the county commissioners jurisdiction of a petition for a highway, it must be signed by 12 freeholders of the county; but the withdrawal of one of the petitioners after the jurisdiction has attached will not oust it.—Little v. Thompson, 24 Ind. 146.

[b] (Sup. 1878)

A petition under Rev. St. p. 534, § 45, for ascertaining and recording a highway, need not be signed by 12 freeholders of the county.—Vandever v. Garshwiler, 63 Ind. 185.

[c] (Sup. 1879)

Under Rev. St. 1876, p. 534, § 45, it is within the power of the board of commissioners to institute and maintain proceedings to lay out, vacate, or change public highways without making any one a party to them.—Gibbons v. Copper, 67 Ind. 81.

[d] (Sup. 1880)

Under 1 Rev. St. 1876, p. 531, § 15, the petition for the opening of a highway is suffi-

cient, as against a collateral attack, if it appears that either an owner, an occupant, or an agent was properly named and notified.—*Porter v. Stout*, 73 Ind. 3.

[e] (Sup. 1837)

The right of petitioners to insist, in the circuit court, upon a motion to withdraw their names, made before the board of county commissioners had decided upon the sufficiency of the petition, is not waived by permitting the remonstrants in the first instance to move in the circuit court to dismiss the petition for want of jurisdiction, and allowing the case to be disposed of upon that motion.—*Black v. Campbell*, 112 Ind. 122, 13 N. E. 409.

[f] (Sup. 1892)

A petition for the opening of a highway under Rev. St. 1881, §§ 5001, 5015, is sufficient to give jurisdiction if it makes either the owner, occupant, or agent a party thereto; and a complaint in an action to enjoin the opening of a road through plaintiff's land, on the ground of want of jurisdiction in the road proceedings because plaintiff was not made a party, which does not negative the fact that the occupant of the land was made a party to the proceedings, is demurrable.—*Ryder v. Horsting*, 130 Ind. 104, 29 N. E. 567, 16 L. R. A. 186.

[g] (Sup. 1892)

Where it appeared that, after the withdrawal of certain petitioners, the remaining petitioners were less than the required number, the proceeding was properly dismissed.—*Ralston v. Beall*, 171 Ind. 719, 30 N. E. 1095.

[h] (Sup. 1894)

Notice to a mortgagee, under Rev. St. 1894, § 6856 (Rev. St. 1881, § 5092), providing that in a proceeding to lay out a highway notice shall be given by publication of the viewers' meeting, binds a purchaser at a sale under foreclosure of the mortgage, made after the assessment is levied.—*Murphy v. Beard*, 138 Ind. 560, 38 N. E. 33.

[i] (App. 1902)

Under Burns' Rev. St. 1901, § 6742 (Hornor's Rev. St. 1901, § 5015), relating to the petition and notice in proceedings to open highways, the board of commissioners have no jurisdiction unless it is established that 12 of the persons whose names are signed to the petition are freeholders of the county in which the highway is proposed to be located, and that 6 of them reside in the immediate neighborhood of such highway.—*Thrall v. Gosnell*, 62 N. E. 462, 28 Ind. App. 174.

FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. High. §§ 40-46.

See, also, 30 Cyc. p. 1380.

§ 29. Petition or other application.

Denial of application as barring action to quiet title, see JUDGMENT, § 584.

Presumptions as to petition, see post, § 54.

Secondary evidence of contents, see EVIDENCE, § 162.

[a] (Sup. 1854)

Where there were two sections of a statute in force concerning highways, and a petition was filed for leave to do a certain act, and it was materially defective, upon the section on which it was evidently founded, the practice act of 1852, not being in force, it was not competent for the court to allow such amendments as would bring it under the other section.—*Spencer v. Graham*, 5 Ind. 158.

[b] The fact that a petition, under Acts 1849, p. 103, § 11, for the location of a highway, while stating the owners of the land through which it would pass, failed to state who occupied the land, will not affect the jurisdiction of the board of commissioners.—(1855) *Milhollin v. Thomas*, 7 Ind. 165; (1856) *Donahey v. Thomas*, 8 Ind. 255.

[c] (Sup. 1861)

A petition for the location of a highway to lie wholly within one county, not setting out the names of the owners, occupants, or agents of the lands through which the proposed highway will pass, is insufficient to authorize the county board to act upon it.—*Hays v. Campbell*, 17 Ind. 430.

If a petition to a county board for the location of a county road is so insufficient as to form no basis for the action of the board, an objection thereto will be fatal at any stage of the proceeding.—*Id.*

[d] (Sup. 1863)

A petition for the location of a highway need not allege that the petitioners are freeholders, or that six of them reside in the immediate neighborhood of the proposed highway; but these facts, though not alleged, may be proved on the hearing on the petition.—*Brown v. McCord*, 20 Ind. 270.

[e] (Sup. 1865)

An objection that the names of those who will be affected by a proposed highway are not given in the petition for it should be taken before the appointment of viewers.—*Crossley v. O'Brien*, 24 Ind. 325, 87 Am. Dec. 329.

[f] (Sup. 1870)

A petition for the laying out of a highway, which fails to give the names of the owners, occupants, or agents of the land through which the highway passes, is fatally defective. In such a case, to say that the owners of the land are the heirs of a designated person is not giving the names of the owners.—*Hughes v. Sellers*, 34 Ind. 337.

An objection to petition for location of a highway because of its failure to give the names of the owners of land involved or a portion of them is not waived by the failure to make it before said commissioners, but may be raised by motion in arrest of judgment on appeal to the circuit court.—*Id.*

[g] (Sup. 1873)

Where, on petition for a highway, a remonstrant over whose land it would pass ap-

peared in the commissioners' court and filed his claim for damages, without objecting to the sufficiency of the petition, the right to object was thereby waived.—*Fisher v. Hobbs*, 42 Ind. 276.

[h] (Sup. 1875)

A petition to lay out and open a highway, which describes the beginning point as "near" the corner between the northwest and northeast quarters of a certain section, without designating which corner, is bad, though it states the highway is to run from thence south "between" a certain 80-acre tract of land.—*Farmer v. Pauley*, 50 Ind. 583.

[i] (Sup. 1876)

A petition for a highway, which describes the highway in several places as "running on the line dividing" the lands of certain named proprietors, without averring that it ran upon or over such lands, or what part of such road passed upon each tract, is sufficient, under 1 Rev. St. 1876, pp. 531, 532, § 16, providing that, where the road is laid out on the line dividing the land of two individuals, each shall give half of the road.—*Hedrick v. Hedrick*, 55 Ind. 78.

Where all the owners of lands which will be affected by the construction of a proposed highway have been duly notified of the pendency of a petition to establish such highway, but the petition and notice are defective in not averring to whom each separate tract of such lands severally belongs, an amendment of such petition, so as to show the ownership, will not constitute a fatal variance between such petition and notice.—*Id.*

Amendment of petition to establish a highway so as to show the ownership of the different tracts of land to be affected is proper, all the owners having had notice of the proceeding.—*Id.*

[j] (Sup. 1876)

A petition for the location of a highway is fatally defective where, instead of setting out the full given names of the owners of the land, it gives initials only of the Christian names of the individual owners, and the firm names only of the owners in partnership.—*Vawter v. Gilliland*, 55 Ind. 278.

[j] (Sup. 1877)

A petition to locate a highway is not insufficient, though it states that "the names of the owners, agents, or occupants of the lands through which such proposed highway would pass are as follows," and then gives the names of various persons, without specifying in which of such relations any of such persons stand to any of the tracts of land described.—*Meyers v. Brown*, 55 Ind. 596.

[k] (Sup. 1877)

Filing a remonstrance against granting a petition for the establishment of a highway, without objecting to the sufficiency of the pe-

tition, waives such objection.—*Sowle v. Cosner*, 56 Ind. 276.

[kk] (Sup. 1877)

A petition for the location of a highway, and the reports of viewers and reviewers locating the same, describing the beginning point thereof as being "at or near the residence of" a person named, are too indefinite and uncertain to authorize the location of the same.—*De Long v. Schimmel*, 58 Ind. 64.

[l] (Sup. 1877)

A petition to locate a highway described it as commencing at a point in a certain highway "south of and adjacent to the right of way" of a railroad named, running thence to intersect and connect with another highway described, "to be so widened or turned southerly at or near its terminus as to make a safe and convenient passage from one highway to the other," and run through and affect lands owned by, etc. *Held*, that the petition did not describe the starting point or terminus with sufficient certainty.—*McDonald v. Wilson*, 59 Ind. 54.

A petition to locate a highway must describe it with sufficient certainty to enable a practical surveyor to run it.—*Id.*

[ll] (Sup. 1877)

A petition for a highway, after setting forth the beginning, described the course as follows: "Thence bearing southerly to avoid" a certain creek, "and keeping on the most favorable ground, running easterly and northerly in and through the land of" a person named, "100 yards back to" a given section line. *Held*, that the description of the course was too uncertain and indefinite.—*Scraper v. Pipes*, 59 Ind. 158.

[m] (Sup. 1879)

A mere clerical error in a petition for the location of a highway was supplied by the order of the county board establishing the highway, and no objection was taken to the petition on this account. *Held*, in a motion to dismiss the case, that there was a waiver of this error.—*Turley v. Oldham*, 68 Ind. 114.

[mm] (Sup. 1881)

A description in a petition to open a highway, which gives its course as "thence northwest 14 rods, with an angle of about 10°," is void for want of certainty.—*Smith v. Weldon*, 73 Ind. 454.

[n] (Sup. 1882)

Petition for the establishment of a highway considered, and *held* sufficient.—*Breitweiser v. Fuhrman*, 88 Ind. 28.

[nn] (Sup. 1882)

The fact that the name of one of the land-owners through whose land the proposed highway was to run was stated to be the "Indianapolis & Vandalia Railroad Co.," instead of the "Terre Haute & Indianapolis Railroad Co.," was not such a variance as could in any way injure or deceive other owners affected

by the road, so as to entitle them to enjoin the opening of the highway.—*Schmidt v. Wright*, 88 Ind. 56.

[o] (Sup. 1882)

As the change of a highway requires the vacation of a portion thereof, and the location of such portion on a different line, the vacation and location may be made in the same proceeding.—*Bowers v. Snyder*, 88 Ind. 302.

[oo] (Sup. 1883)

Uncertainty, in a petition for a highway, as to the names of owners of lands affected, should have been taken advantage of by a motion to make more specific; and, in failure thereof, it cannot be reached by a motion in arrest of judgment.—*Dillman v. Crooks*, 91 Ind. 158.

[p] (Sup. 1884)

A petition, in a proceeding for the location of a highway, alleging that the petitioners are citizens of the county, but failing to allege that they are resident freeholders, is sufficient after a verdict.—*Watson v. Crowsore*, 93 Ind. 220.

A petition in a proceeding before the county commissioners for the location of a road need not state the width of the proposed road.—Id.

[pp] (Sup. 1884)

A petition for the location or alteration of a highway should show that the petitioners are freeholders, and that six of them reside in the immediate neighborhood of the highway proposed to be located or changed.—*Conaway v. Ascherman*, 94 Ind. 187.

A petition for a highway need not aver that the proposed road will be of public utility.—Id.

A petition for a proposed highway is reasonably certain if the description is sufficient to enable a surveyor to locate the highway.—Id.

[q] (Sup. 1884)

A description in a petition for locating a road, "commencing about 80 rods west of the northeast corner of section 2, township 18 north, range 10 east, where the road running east from Springport intersects the dirt road sometimes known as the 'Irvin' or 'Bazzle' road; thence east on the township line dividing sections 2 and 35 and 1 and 36 to the range line; thence east between sections 6 and 31 and sections 32 and 5 to the road running north from Rogersville a distance of about 2½ miles,"—is sufficiently definite.—*Clift v. Brown*, 95 Ind. 53.

[qq] (Sup. 1885)

Whether the petition for the location of a public way was properly signed, etc., is a matter on which the finding of the commissioners is conclusive; no objection having been taken before them.—*Forsythe v. Kreuter*, 100 Ind. 27.

[r] (Sup. 1885)

In a petition to locate a highway, a statement by the petitioners, followed by the words "as we believe," was equivalent to an unqualified assertion by them that it was true.—*Thayer v. Burger*, 100 Ind. 262.

[rr] (Sup. 1885)

It is within the discretion of the circuit court to permit amendments being made to petitions for the assessments of highways, and it is not an abuse of such discretion to permit an amendment changing in a slight degree the line in a proposed highway in a case where the change does not affect the interests of any persons.—*Burns v. Simmons*, 101 Ind. 557, 1 N. E. 72.

[s] Amendments to petitions in highway cases will be allowed.—(Sup. 1885) *Burns v. Simmons*, 101 Ind. 557, 1 N. E. 72; (App. 1902) *Thrall v. Gosnell*, 62 N. E. 462, 28 Ind. App. 174.

[ss] (Sup. 1885)

While the Indiana highway law requires that the petition to establish a highway shall be signed by freeholders, it does not require that this should appear upon the face of the petition.—*Washington Ice Co. v. Lay*, 103 Ind. 48, 2 N. E. 222.

Where it appears by appellants' motion to dismiss an appeal from the decision of the county board in proceedings to establish a highway, and otherwise, that appellants were the owners of all the land over which the highway passes, and that they voluntarily appeared in the proceedings before the commissioners, the petition cannot be objected to because it failed to state the names of the landowners.—Id.

[t] (Sup. 1886)

An objection that the petition is not signed by the requisite number of freeholders cannot be made after the report of the viewers is filed.—*Osborn v. Sutton*, 108 Ind. 443, 9 N. E. 410.

[tt] (Sup. 1887)

Technical accuracy is not necessary in the description of a proposed road, but it is enough that the general description shall be such that a surveyor can with the assistance of the points definitely named, trace, and designate the proposed route.—*Adams v. Harrington*, 14 N. E. 603, 114 Ind. 66.

The word "about," where the context limits and restrains its meaning, does not materially impair the certainty of a description of highway.—Id.

[u] (Sup. 1888)

In a petition for a highway, the following description: "Commencing at the road crossing over the Michigan Central Railroad known as 'Bendig's Crossing,' in section \* \* \*; thence easterly and along the north line of said railroad to the intersection of a road running

north and south, and along the east side of \* \* \* said highway to be forty feet wide, \* \* \* and running through lands owned by \* \* \*,"—sufficiently designates the beginning, course, termination, and width of the proposed highway.—*McDonald v. Payne*, 114 Ind. 359, 16 N. E. 795.

[uu] (Sup. 1888)

A petition to establish a highway on a proposed line, described as "beginning at the signboard in the north line of the N. E.  $\frac{1}{4}$  of section 17 in township 1 north, range 2 west, where the H. road intersects the F. road; running thence," etc.,—was sufficient, as a road need not be described, with technical certainty, but only so as to enable a surveyor to trace and designate it.—*Wells v. Rhodes*, 114 Ind. 467, 16 N. E. 830.

[v] (Sup. 1894)

An objection to an application to the county commissioners to locate and open a highway that a sufficient number of freeholders have not joined therein must be raised by remonstrance.—*Bronnenburg v. O'Bryant*, 139 Ind. 17, 38 N. E. 416.

After the commencement of proceedings before county commissioners to locate and open a highway, and before the jurisdiction of the board has been determined, the board may allow the petition to be amended by adding new names thereto.—*Id.*

[vv] (Sup. 1894)

Where no appeal was taken from a final order of the board of county commissioners establishing a highway, the sufficiency of the petition on which such order was based, and which became merged therein, will not be considered on appeal from an order setting aside all proceedings subsequent to the entry of such final order.—*Badger v. Merry*, 139 Ind. 631, 39 N. E. 309.

[w] (Sup. 1897)

A single petition for free gravel roads (Acts 1895, p. 145, § 2) may ask for the establishment of several disconnected roads.—*Board of Com'rs of Monroe County v. Harrell* 46 N. E. 124, 147 Ind. 500.

[ww] (App. 1904)

Acts 1899, p. 128, c. 97, providing for the improvement of highways, requires the proceeding to be initiated by a petition to the county commissioners, signed by 50 freeholders, which shall definitely describe the beginning and terminus of each of the roads, giving the general direction of all roads, together with the estimated distances, and declares that, if any part of a road is to be new, it shall be described with such definiteness as will enable any practical land surveyor to locate it. *Held*, that such act contemplated the construction of new roads as well as the improvement of roads already in existence.—*Davern v. Board of*

Com'rs of Decatur County, 72 N. E. 268, 34 Ind. App. 44.

[x] (App. 1905)

Under Burns' Ann. St. 1901, § 6742, authorizing the county board to locate, vacate, or change any highway on the petition of 12 freeholders, a petition for a highway is sufficient to confer jurisdiction of the subject-matter though it also contains a prayer for relief partially beyond the power of the board to grant.—*Harris v. Curtis*, 72 N. E. 1102, 34 Ind. App. 438.

[xx] (App. 1905)

Where the original petition for the establishment of a highway did not contain the names of the owners of the land through which the proposed highway would pass, the commissioners' court properly permitted it to be amended so as to cure such defect.—*Sisson v. Carithers*, 72 N. E. 267, 73 N. E. 924, 35 Ind. App. 161.

Where a petition for the establishment of a highway described the route as commencing at the southeast corner of the southeast quarter of section 32, etc., the starting point was defined with sufficient certainty.—*Id.*

[y] (Sup. 1908)

Under Acts 1905, p. 527, c. 167, § 21, requiring a petition for the location of a public highway extending into two or more counties to be signed by 24 freeholders, the fact that many of the signers of such petition signed their Christian names by the initials does not warrant the dismissal of the petition, but merely entitles defendants upon proper motion to have the full Christian and surname of each petitioner entered of record.—*Cooper v. Harmon*, 170 Ind. 113, 83 N. E. 704.

In a petition to locate a highway under Acts 1905, p. 527, c. 167, § 21, it is not necessary to allege that the proposed highway will be of public utility, nor that the cost thereof will be less than the benefits, since it is the duty of the board of county commissioners to appoint viewers, if the jurisdictional facts exist, and thereafter the matters suggested are to be considered.—*Id.*

[yy] (Sup. 1908)

Burns' Ann. St. 1908, § 7712 (Acts 1907, p. 137, c. 96, § 1), amending Acts 1905, p. 551, c. 167, § 63, and Acts 1905, pp. 551-561, c. 167, §§ 64-83, providing for the improvement of any highway upon petition of 50 or more freehold voters of any township which includes an incorporated town of less than 30,000 population, or upon petition of the majority of freehold voters in townships containing not over 100 voters, and Burns' Ann. St. 1908, § 7713 (Burns' Ann. St. Supp. 1905, § 6790; Acts 1905, p. 551, c. 167, § 64), requiring such petition to set out the beginning, course, and terminus of the highway, together with a recommendation as to its width and of the charac-

ter of the improvement, do not require the petition to allege that it is signed by 50 or more freehold voters of a township and whether the township includes an incorporated town of less than 30,000 inhabitants, or that the petitioners are a majority of the freehold voters and that there are less than 100 freehold voters therein; the only provision as to the allegations required being section 7713, which refers only to the description of the highways to be improved.—*Hall v. McDonald*, 171 Ind. 9, 85 N. E. 707.

*Burns' Ann. St. 1908, § 7713* (*Burns' Ann. St. Supp. 1905, § 6790*), requires the petition for highway improvements to set out the beginning and terminus and a general description of the highway, with a recommendation of its width and of the character of improvements to be made. Acts 1905, p. 552, c. 167, § 68, require the engineer and viewers appointed in highway improvement proceedings to determine and report the width of each highway to be improved. The petition recommended the highways to be improved to the width as now established, and described some of them as running in a northeasterly and southwesterly direction, and also described them by fixed monuments. *Held*, that the recommendation as to the width of the highways was sufficient on demurrer, since their width could be ascertained from the highways or from the public records, and the description of the highways was sufficiently certain; the remedy, if any, being a motion to make more definite.—*Id.*

[z] (*App. 1908*)

A petition for a highway described it as located in Davis township, Starke county, Ind., to be 40 feet wide, and to begin at the northeast corner of section 30, in township 34, range 2 west, to extend north along the section line between sections 19 and 20, in such township and range, and terminate at the northeast corner of section 19, being of the total length of a mile. *Held* that, as a surveyor, with the assistance of the points definitely named, would be able to trace the proposed route, the description was sufficiently definite.—*Fancher v. Coffin*, 41 Ind. App. 489, 84 N. E. 354.

A description in a highway petition is sufficient when a surveyor can, by the aid thereof, lay out and designate the proposed highway.—*Id.*

[zz] (*Sup. 1909*)

While under *Burns' Ann. St. 1908, § 7649*, the petition for the location of a highway must be signed by 12 freeholders of the county, 6 of whom reside in the immediate neighborhood of the highway proposed to be located, as required by said section, it is not necessary to the sufficiency of the petition that such facts be alleged therein.—*Etna Life Ins. Co. v. Jones*, 89 N. E. 871.

The petition for the location of a highway need only describe the line of the proposed

highway with reasonable certainty, and a surveyor may locate it.—*Id.*

Where the petition does not show that it does not contain the names of all the owners, occupants, or agents of the lands through which the proposed highway passes, it is not sufficient for failing to show that the persons named are all the owners, etc.—*Id.*

The circuit court may properly permit amendment of the petition in highway proceedings pending an appeal, even to the changing of the route or as to jurisdictional matter; and the amendment of the petition for the location of a new highway, and the vacation of a highway, so as to more definitely describe the part of the highway sought to be vacated, is proper.—*Id.*

FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. High. §§ 47-50.

See, also, 30 Cyc. p. 1380.

### § 30. Notice.

Of proceedings of commissioners or viewers, see post, § 38.

Of proceedings to ascertain and enter of record unrecorded highways, see ante, § 15.

Waiver of notice by appearance, see post, § 31.

[a] A notice of an application, under *Rev. St. 1849, p. 103, § 11*, for the location of a highway, need not be signed by more than 12 of the petitioners.—(*Sup. 1855*) *Milhollin v. Tipton*, 7 Ind. 165; (*1856*) *Donahey v. Tipton*, 8 Ind. 255.

Since *Rev. St. 1843, p. 189, § 52*, the county auditor power to administer oaths necessary for the performance of the duties of his office, and since, by virtue of that act, he is clerk of the board of commissioners of highways, the proof of putting up notices of an intended application, and the petition was signed by the requisite number of freeholders, might be made on oath administered by the county auditor.—*Id.*

[b] (*Sup. 1865*)

A county board cannot take jurisdiction of an application for the location of a highway unless it appear that notice of the application has been given, that 12 freeholders of the county have signed the petition, and that the petitioners are of the immediate neighborhood of the road.—*Little v. Thompson*, 2 Ind. 146.

[c] (*Sup. 1868*)

Notice of a petition for the location of a highway need not be signed by any number of freeholders.—*Wright v. Wells*, 29 Ind. 354.

Upon a petition for the location of a highway, the sufficiency of the proof of the giving of the notice of the petition is a jurisdictional fact, which must be determined by the board of commissioners before the appointment of viewers.—*Id.*

[d] (Sup. 1880)

The Legislature has the power to prescribe what shall be reasonable notice of the pendency of a petition for the opening of a highway, and whether it may be given to the owner or to the occupant of land.—Porter v. Stout, 73 Ind. 3.

[e] (Sup. 1882)

The fact that one of the county commissioners posted the notice of the petition for highway does not affect the validity of the order establishing the road.—Schmidt v. Wright, 88 Ind. 56.

The marriage and subsequent change of name of one of the owners of the land through which the proposed road would run did not require a new and additional notice to her in order to give the court jurisdiction as to her.—Id.

[f] (Sup. 1892)

A valid highway cannot be established without notice to the landowner affected, or his agent or occupant.—Ryder v. Horsting, 20 N. E. 567, 130 Ind. 104, 16 L. R. A. 186.

[g] (Sup. 1892)

Under Rev. St. 1881, § 5015, jurisdiction of the parties in proceedings to establish a highway outside the limits of a municipal corporation is obtained by posting notices as prescribed by such section.—Chicago & A. R. Co. v. Sutton, 30 N. E. 291, 130 Ind. 405.

[h] (Sup. 1902)

An objection to the form of notice of presentment of a petition for the construction of a road cannot be raised after the board has taken action on such petition.—Gifford v. Baker, 62 N. E. 690, 158 Ind. 339.

Notice of the presentation of a petition to construct a road, stating that the petition would be presented on the first day of the next term of the board of commissioners, "which will be held on the first day of May," is not defective because such term in fact commenced on the "first Monday" in May, all persons being charged with notice of the statutory requirement (Burns' Rev. St. 1901, § 7821) that such board shall meet on the first Monday of each month.—Id.

[i] (App. 1902)

Where a petition for the location of a highway was filed after due notice, as required by Burns' Rev. St. 1901, § 6742 (Horner's Rev. St. 1901, § 5015), providing for the notice to be given in such cases, and subsequently an amended petition was filed changing the length of the proposed highway from  $2\frac{1}{2}$  to  $1\frac{3}{4}$  miles, but no new notice was given, the board of commissioners had no jurisdiction to determine the matters set forth in such amended petition, since, in effect, it amounted to a new proceeding.—Thrall v. Gosnell, 62 N. E. 462, 28 Ind. App. 174.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 60-70; 10 CENT. DIG. Clerks of C. § 95.

### § 31. Appearance and representation by attorney.

[a] (Sup. 1855)

One who appears in an application to a board of commissioners for the location of a highway, and remonstrates, and has assessors appointed on his own motion, cannot object to want of notice of the application.—Milhollin v. Thomas, 7 Ind. 165; (1856) Donahey v. Thomas, 8 Ind. 255.

[b] (Sup. 1862)

The notice required on an application for the location of a highway will be deemed admitted or waived, on appeal, where the objectors appeared, made objections, had reviewers appointed, and took other proceedings.—Daggy v. Coats, 19 Ind. 259.

[c] (Sup. 1873)

Where, on a petition for a highway, a remonstrant over whose land the proposed road would pass appeared in the commissioners' court and filed his claim for damages, without objecting to the insufficiency of the notice given, objection was thereby waived.—Fisher v. Hobbs, 42 Ind. 276.

[d] (Sup. 1878)

In a proceeding to ascertain and record a highway, under the provisions of Rev. St. § 45, appearance of the parties without notice cures the defect of want of notice.—Vandever v. Garshwiler, 63 Ind. 185.

[e] (Sup. 1887)

A judgment in favor of the petitioners in a proceeding under Rev. St. 1881, § 5035, "to ascertain, describe, and enter of record" a public highway, will not be reversed for failure of the petition to state the names of all the owners, agents, and occupants of the lands through which the highway passes, where all of such parties appeared without objecting to the want of notice.—Orton v. Tilden, 110 Ind. 131, 10 N. E. 936.

FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. High. § 70.

### § 32. Remonstrances or answers to petition.

[a] (Sup. 1865)

It is not necessary under our statute that the persons remonstrating against the location, vacation, or change of a highway should reside immediately on the line of the highway to be located, vacated, or changed, but it is enough if they reside in the vicinity, or within such reasonable distance thereof that they would be affected thereby in their convenience of travel, or otherwise.—Wilson v. Whitsell, 24 Ind. 306.

[b] (Sup. 1865)

When a person, not a party to the original remonstrance against a proposed highway, is permitted in the circuit court to become a party, he occupies the same relation to the proceedings as the original remonstrants.—*Smith v. Alexander*, 24 Ind. 454.

[c] (Sup. 1865)

In proceedings on a petition for a highway, it is not proper to file an answer or a demurrer thereto. Such pleadings should be stricken from the files.—*Logan v. Kiser*, 25 Ind. 393.

[d] (Sup. 1870)

In a proceeding to lay out and establish a highway, a person filed with the board of county commissioners two remonstrances,—the first relying on the ground that the proposed highway was not of public utility; the second, on the ground that it ran through his inclosed land, damaging him to the extent of a certain sum specified, and asking the appointment of reviewers to assess his damages. *Held*, that the remonstrances raised no objection to the proposed highway on the ground that it ran through the remonstrator's inclosure of one-year standing without his consent, and that a good way could otherwise be had; and such objection was thereby impliedly waived.—*Cummins v. Shields*, 34 Ind. 154.

[e] (Sup. 1873)

Where, on petition for a highway, a remonstrant over whose lands it would pass appeared in the commissioners' court and filed his claim for damages, without objecting to the utility of the road, the objection was thereby waived.—*Fisher v. Hobbs*, 42 Ind. 276.

[f] (Sup. 1880)

Persons may remonstrate on the ground of the inutility of the proposed highway, and also claim damages in the same remonstrance.—*Peed v. Brenneeman*, 72 Ind. 288.

[g] (Sup. 1880)

The right to remonstrate against the utility of a highway sought to be established is not waived by first remonstrating on account of the damages that will be sustained by the remonstrating landowner.—*Schmied v. Keeney*, 72 Ind. 309.

[h] (Sup. 1881)

Any person through whose land a proposed highway will pass may in opposition thereto show that the statute has not been complied with in reference to some part of the road, whether he owns the land over which that particular part of the road will run or not.—*Smith v. Weldon*, 73 Ind. 454.

[i] (Sup. 1884)

In a proceeding for the establishment of a highway, a plea in abatement setting up that one of the signers of the petition was induced to sign it by a promise of other signers that they would build a certain fence for such signer

was bad, where it appeared that the petition was signed by 33 persons, and such petition did not show that any of the parties to the petition therein set forth possessed any qualifications of proper petitioners required by the statute.—*Denny v. Bush*, 95 Ind. 31.

In a proceeding for the establishment of a highway, a remonstrance by a landowner claiming damages was improperly dismissed. The petition was filed before the final action of the board, though it was not presented until the fourth term after the filing of the original petition.—*Id.*

[j] (Sup. 1886)

A remonstrance alleging that a proposed road is located for a certain distance beyond a previously appropriated for a public ditch, is not averring that the ditch will be improved by the construction of the road, is insufficient, as Rev. St. 1881, § 5095, confers on the board authority to make all necessary alterations in the line of the proposed road.—*Osborn v. Sutton*, 9 N. E. 410, 108 Ind.

[k] (Sup. 1888)

Under Rev. St. 1881, § 5023, conferring the right to object to the location of a highway on the resident freeholders of the county, a remonstrance must show on its face that the signers are such resident freeholders.—*Rhodes*, 114 Ind. 467, 16 N. E. 830.

An averment in a remonstrance that the proposed highway would not be of "public utility" is a negative pregnant, equivalent to an admission that it would be of public utility.—*Id.*

Where a remonstrance, alleging that the proposed highway was not of public utility, was rejected by the commissioners and circuit court as to that allegation, as not showing that the remonstrants were resident freeholders, the court does not err in refusing to allow the remonstrance to be amended in that respect; there being no reason why the amendment should not have been allowed in the commissioners' court, and no showing that what actually occurred there.—*Id.*

[l] (Sup. 1891)

In a proceeding for the establishment of a highway, a person, who was not a party to the proceeding, appeared before the board of county commissioners, and filed a "plea in abatement," alleging that less than six persons, signers of the petition for the highway, resided in the neighborhood thereof. The board struck out the plea, on the ground that the contestant was not a party to the proceeding. *Held*, that, if contestant had a right to contest the jurisdiction of the board, he had the right to do so without filing any plea whatever, and his petition was properly stricken out.—*Irwin v. Smith*, 129 Ind. 340, 28 N. E. 702.

[m] (Sup. 1894)

A remonstrance filed in proceeding for the establishment and opening a highway is in the nature of an answer to the petition, and raises an

ed of before the county board and on  
o the circuit court.—*Bronnenburg v.*  
t, 38 N. E. 416, 139 Ind. 17.

**App. 1898)**

in a trial before a board of county com-  
missioners of a remonstrance for damages on  
struction of a highway, the petitioners make  
petition to the sufficiency of the remon-  
strance and also fail to do so on an appeal of  
to the circuit court, they waive all ob-  
jections to the remonstrance in that it did not  
specify damage, and evidence of specific  
damages is admissible.—*Lake Erie & W. R. Co.*  
v. *State*, 48 N. E. 1042, 19 Ind. App. 8.

**App. 1909)**

in *Burns' Ann. St.* 1908, § 7657, au-  
thorizing the filing by any freeholder of and re-  
siding in the county of a remonstrance against  
the construction of a highway as not being of public util-  
ity, not being a corporation, not being a free-  
holder and residing in the county, had no  
right to file a remonstrance raising the question  
of public utility.—*Ætna Life Ins. Co. v. Jones*,  
187 Ind. 871.

**CASES FROM OTHER STATES,**  
**SEE 25 CENT. DIG. High. §§ 71-76.**

#### **Conduct of proceedings on applica- tion in general.**

**App. 1888)**

in highway cases where parties appear and  
state they will be confined to the grounds  
of objection stated in their remonstrance.—  
*State v. State*, 104 Ind. 516, 3 N. E. 863.

the board of county commissioners has  
the right to act in all matters pertaining to  
the establishment and construction of county  
highways, and may hold a special session convened upon oral  
application from the county auditor.—(Sup. 1888)  
*Fleming*, 114 Ind. 500, 10 N. E. 487;  
*Doenitz v. Seelinger*, 127 Ind. 422, 25  
Ind. 337, 26 N. E. 887.

**App. 1890)**

in the trial of proceedings to establish a  
public highway commencing at the bank of a  
stream, questions as to the title to the bed of  
the stream are not involved.—*Moore v. Auge*, 125  
Ind. 25, 25 N. E. 816.

**App. 1891)**

in proceedings of the board of commis-  
sioners to lay and establish a public highway,  
the board may make an adversary one, save as the  
petitioner shows the insufficiency of the petition is in-  
sufficient as to questions of public utility and  
sustained by those over whose land the  
highway may be established.—*Irwin v. Armuth*,  
129 Ind. 702, 129 Ind. 340.

**App. 1902)**

under the statute providing that the re-  
viewers appointed in pursuance of a  
petition to construct a road shall be prima  
facie competent of the facts therein contained,

the burden of proof is upon parties objecting  
to the construction of such road to establish  
the facts stated in their remonstrance, and  
hence remonstrants are properly required to  
open and close the proceedings.—*Gifford v. Ba-*  
*ker*, 62 N. E. 690, 158 Ind. 339.

Where two petitions for the construction  
of a road were presented to a board of county  
commissioners at the same time, they were  
properly treated as one petition.—*Id.*

**FOR CASES FROM OTHER STATES,**  
**SEE 25 CENT. DIG. High. §§ 77-81.**

#### **§ 34. Dismissal of proceedings.**

Petition to ascertain and enter of record un-  
recorded highway, see ante, § 15.

**[a] (Sup. 1880)**

Where the evidence shows that the names  
of all the owners, occupants, or agents of the  
land through which the road would pass are  
not set forth in the petition, it is a matter  
of defense, and a cause for dismissal.—*Schmied*  
*v. Keeney*, 72 Ind. 309.

**[b] (Sup. 1886)**

A delay on the part of the committee to  
assess benefits in making a report is not a  
cause for dismissing the proceedings.—*Osborn v.*  
*Sutton*, 108 Ind. 443, 9 N. E. 410.

**[c] (App. 1906)**

A motion to dismiss a petition to locate  
and change a highway on the ground that it  
does not ask for a change in an existing high-  
way, but seeks to establish a new highway and  
vacate a different one, which is not supported  
by any evidence, should be overruled.—*Harris*  
*v. Curtis*, 72 N. E. 1102, 34 Ind. App. 438.

In proceedings for the establishment of a  
public highway, where the want of jurisdiction  
does not appear on the face of the petition, a  
motion to dismiss must be supported by facts  
showing such want.—*Id.*

**FOR CASES FROM OTHER STATES,**  
**SEE 25 CENT. DIG. High. § 80.**

#### **§ 35. Commissioners or viewers.**

**FOR CASES FROM OTHER STATES,**  
**SEE 25 CENT. DIG. High. §§ 82-131.**

#### **§ 37. — Appointment and qualifica- tions.**

**[a] (Sup. 1854)**

Under the highway act of 1849, a peti-  
tioner for a road cannot act as a viewer.—  
*Epler v. Niman*, 5 Ind. 459.

The establishment of a road under the  
order of the commissioners is void if one of  
the petitioners therefor was appointed and  
acted as viewer.—*Id.*

In a suit for obstructing a road, an ob-  
jection that one of the viewers was a petitioner  
for the laying out of the road was fatal.—*Id.*

**Index is compiled on the Key-Number System. For explanation, see page iii.**

## [b] (Sup. 1859)

Persons who own land along a proposed highway are not competent viewers, and their report is a nullity.—*Daggy v. Green*, 12 Ind. 303.

## [c] (Sup. 1875)

In the absence of any statutory requirement therefor, it is not necessary that the oath taken by the viewers appointed by the board of commissioners in proceedings to lay out and establish a highway should be subscribed by them.—*Hays v. Parrish*, 52 Ind. 132.

## [d] (Sup. 1882)

Failure to object, either before the board or in the circuit court, that viewers or reviewers were not properly sworn, will not constitute a waiver of objection.—*Brown v. Stewart*, 86 Ind. 377.

## [e] (Sup. 1886)

Objections to the competency of the committee must be made within a reasonable time after the committee is appointed.—*Osborn v. Sutton*, 108 Ind. 443, 9 N. E. 410.

It is within the power of the board of county commissioners to appoint a member of the committee to take the place of one of the original members, rendered incapable of serving on account of physical infirmities.—*Id.*

## [f] (Sup. 1892)

Rev. St. §§ 5092, 5093, relative to roads, provide that there shall be appointed "three disinterested freeholders of the county as viewers, and a competent surveyor or engineer," to lay out the road. The viewers and engineer, after taking an oath "to discharge their duties respectively," shall "assess and determine the damages sustained" by the owners of property through which the road extends, provided "such viewers shall not be required to assess damages," except in certain cases. Section 5094 requires the viewers and engineer to make "a report," and provides that, where the lands are liable to be assessed for two or more roads, "the viewers" shall take into consideration that fact in assessing. *Held*, that an engineer is not ineligible because he or his brother-in-law owned real estate within the limits assessable for the construction of the road laid out, the viewers alone being empowered to make the assessments, and his duty being simply to aid the viewers in the location of the work, and in making estimates of cost, etc.—*Thompson v. Goldthwait*, 132 Ind. 20, 31 N. E. 451.

## FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 82-89, 91, 92.

## § 38. — Notice of proceedings.

Notice of application for establishment of highway, see ante, § 30.

## [a] (Sup. 1883)

Under Act March 3, 1877 (Rev. St. 1881, § 5092) § 2, relating to the construction of roads, providing that the county auditor shall notify

the viewers and surveyor of the time and place of their meeting to make the view, and to also give notice by publication in a newspaper printed in the county for three consecutive weeks next prior to the meeting, notice by publication in a newspaper printed in the county for three consecutive weeks is sufficient, although the three weeks were not next prior to the meeting, where it appears that a full and fair opportunity was given to the viewers to intervene between the close of the third publication and the day of the meeting.—*Board of Com'rs of Carroll County*, 86 Ind. 303.

## [b] (Sup. 1894)

In a proceeding under Rev. St. 6855 (Rev. St. 1881, § 5091) et seq., providing for laying out and improving roads, a parcel of land to be assessed is not entitled to a separate notice, as the notice by publication of the viewers' meeting, required by section 6856, is sufficient.—*Murphy v. Beard*, 138 Ind. 560, 33 N. E. 33.

## FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. High. §§ 93-97.

## § 39. — Acts and proceedings in laying out a road.

## [a] (Sup. 1875)

The view and report, in proceedings to lay out and establish a highway, are not rendered insufficient by the fact that only two viewers appointed by the board of commissioners took the required oath and made the report.—*Hays v. Parrish*, 52 Ind. 132.

## [b] (Sup. 1885)

The statute regulating the establishment of free gravel roads imperatively requires the notice of the time appointed for the meeting of the viewers, and the notice so provided is the first one required to be given. *Held*, that the viewers cannot legally meet and transact business at a time different from that specified in the notice; and, if there is no meeting pursuant to the notice, the proceedings are void, and an injunction may issue to restrain the collection of a special tax levied in aid of the road by virtue of such proceedings.—*Board of Com'rs of Tipton County*, 138 Ind. 575, 3 N. E. 263.

## [c] (Sup. 1894)

A report made by two out of three viewers is sufficient.—*Brounenburg v. O'Bryen*, 138 Ind. 17, 38 N. E. 416.

## FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 98-106.

## § 40. — View.

## [a] (App. 1904)

*Burns' Rev. St. 1901, § 6742*, relating to the establishment of highways, provides for the filing of a petition and giving of notice, and requires the board of commissioners to "appoint three persons to view such highway." Section 6745 makes it the duty of the

a precept to the sheriff commanding to notify the viewers of the time of their report, and "such viewers at such time" shall view the highway. The report of the duly appointed showed that they did not until several days subsequent to that in the commissioners' order. *Held*, the report was not void, as the commissioners had no authority to name the day on which they were to meet, and section 6743 of the auditor to issue the precept as to the time, and not mandatory.—*Shup-Bubner*, 70 N. E. 390, 32 Ind. App.

VIEWERS FROM OTHER STATES.

25 CENT. DIG. High. § 104.

### — Report and proceedings thereon.

Evidence to show acceptance of report. INDICENCE, § 417.

sup. 1566)

report of viewers appointed to lay out the highway reported in favor of its utility. They had laid out the road commencing at a quarter post between certain sections, running through the lands of A. and B. to a quarter post between two certain other sections thereto, terminating at the intersection of the road to C. *Held*, that the course and location of the highway were sufficiently stated. *Manman v. Forrest*, 27 Ind. 233.

sup. 1870)

proceeding before the board of county commissioners to locate a public highway, the report of the first viewers appointed is insufficient. It does not show that they have laid out and marked the highway, and, when it runs along the line dividing the lands of different owners, that they have so laid it out that the adjoining owner shall give half of the road to the first and second viewers, appointed upon receipt being made, have no authority to lay out and mark the highway.—*Hughes v. Hughes*, 34 Ind. 337.

sup. 1877)

report of viewers locating a proposed highway should prescribe its width.—*De Long v. Long*, 58 Ind. 64.

sup. 1880)

Where one of the remonstrants claimed that in case the proposed road should be located, and the viewers neither found for nor against him on the question of damages, the report was so defective that there should be a venire de novo.—*Peed v. Brenne*, 34 Ind. 288.

Where viewers failed to find either for or against one of the remonstrants on the question of damages, and a venire de novo is granted, the question of public utility and damages is reopened up, not only as to him, but as to all the remonstrants.—*Id.*

[e] (Sup. 1881)

When the report of viewers in highway proceedings is adverse to the petitioners for the opening of the highway, the commissioners should act upon the report, and deny the prayer of the petition.—*Doctor v. Hartman*, 74 Ind. 221.

[f] (Sup. 1881)

The improper rejection by commissioners of the report of road viewers does not divest the former of jurisdiction over the matter before them, but they may proceed to order a review; and they have power to proceed in the matter until the final order or conclusion is reached.—*Grimwood v. Macke*, 79 Ind. 100.

[g] (Sup. 1882)

Where remonstrance against a proposed highway includes the ground of damages and the inutility of the proposed road, it cannot be objected that the reviewers exceeded their authority in reporting the highway of public utility.—*Brown v. Stewart*, 86 Ind. 377.

Where viewers in their report stated that they made a review on a highway, setting it out that the highway thus viewed was 30 feet wide, and that they marked out such road, it sufficiently describes the road.—*Id.*

Where remonstrants united in the same remonstrance the question of utility and damages, they cannot complain that the reviewers took action on both questions and reported the highway of public utility.—*Id.*

Irregularities in the reports of viewers is no ground for dismissing the entire proceedings.—*Id.*

So where parties to a proceeding for the establishing of a highway admitted that all the proceedings prior to the appointment of the viewers were regular, it is improper to dismiss the entire proceedings on the ground of mere irregularities in the reports of the viewers.—*Id.*

[h] (Sup. 1883)

Rev. St. 1881, §§ 5016, 5017, relating to highways, provide that, if the viewers shall deem the highway to be located, or the change to be made, of public utility, they shall lay out and mark the same on the best ground, not running through any person's inclosure of one-year standing without the owner's consent, unless, on examination, a good way cannot otherwise be had; that such viewers shall make a report of their proceedings at the next session of the board, "giving a full description of such location, change, or vacation by metes and bounds and by course and distance, except that in case of the vacation of a road, or any part thereof, such description only as will designate it clearly shall be required"; and that when objection is made to the proposed highway, vacation, or change as not being of public utility, and thereupon other viewers are appointed, as provided in section 5023, such other viewers shall report whether or not in their opinion it will be of public utility. *Held*, that

where the report of viewers appointed to locate a public road is favorable, but is silent as to the public utility of the location, or if it does not state that the location is of public utility, it will be presumed that they deemed it of public utility.—*Heagy v. Black*, 90 Ind. 534.

[i] (Sup. 1884)

In a proceeding for the establishment of a highway, objections to the report of the viewers must be presented to the board of commissioners, and, if not there made, they are deemed waived.—*Clift v. Brown*, 95 Ind. 53.

[j] (Sup. 1888)

Where in the report of the viewers a highway is laid and described substantially as in the petition, the substitution of the words "Bending's Crossing" for "Bendig's Crossing" as the point of commencing is an immaterial variance; parol evidence being admissible to identify the monument.—*McDonald v. Payne*, 114 Ind. 359, 16 N. E. 795.

[k] (Sup. 1888)

In a collateral proceeding to restrain the collection of assessments for a gravel road established by county commissioners, the report of viewers appointed to locate the road, stating that they, "in pursuance of a certified copy of said petition, and an order from the said board of commissioners, \* \* \* did meet on the — day of August, 1881," etc., is sufficient to show that they met on the day appointed, August 22, 1881.—*Hobbs v. Board of Com'rs of Tipton County*, 116 Ind. 376, 19 N. E. 186.

[l] (Sup. 1892)

Under Rev. St. § 5016, which imposes on viewers the duty to ascertain whether a highway will be of "public utility," and to "lay out and mark" it "on the best ground," and under section 5017, providing for a report by such viewers giving a description of such location "by metes and bounds," their report that they have "proceeded to review, mark, and locate the proposed highway," with a description of the road, is sufficient, and they are not required to state therein that the road will be of public utility, and is located on the best ground.—*Campbell v. Fogg*, 132 Ind. 1, 31 N. E. 454.

In a proceeding to establish a highway, a report of the viewers describing the location of the proposed highway as commencing on a public highway at the southeast corner of a certain section, township, range, and county in the state, thence north on the section line for a distance of about three-fourths of a mile where the proposed highway would intersect with another highway, and where the proposed highway would terminate, sufficiently describes the proposed highway in view of the law fixing the width of highways.—*Id.*

[m] (Sup. 1892)

Where the report originally filed by the viewers was defective, and the board referred it back to them for correction, no new notice to

the parties interested was necessary.—*Fu*  
*Cummings*, 132 Ind. 453, 30 N. E. 949.

[n] (Sup. 1894)

Where the report of reviewers that they were sworn, it will be presumed they were sworn to do the things they appointed to do.—*Bronnenburg v. O'I*  
139 Ind. 17, 38 N. E. 416.

[o] (Sup. 1896)

Where the record of the board of commissioners of proceedings before them to establish a highway shows that the viewers' report, as originally submitted, was amended to include additional property in the assessment for benefits, a petition, in an action to restrain the collection of such assessment, which shows that the board orally instructed the viewers to report petitioner's land, it having subsequently been included by the amendment, is not material.—*Bowen v. Hester*, 143 Ind. 511, 41 N. E. 330.

The board of commissioners have authority, in proceedings to establish a highway, to amend the report of the viewers and reappoint by them to examine the proposed route, and report the lands that will be benefited thereby, by adding a list of the lands so reported, and to assess such additional lands together with those reported as benefited by the viewers.—*Id.*

That certain property was not mentioned in the report of the viewers, as benefited by the establishment of a proposed highway, will not deprive the commissioners of jurisdiction, if the notice of the return of the report, at the time that the commissioners would meet to hear it, has been duly published, as required by Rev. St. 1894, § 6800 (Rev. St. 1881, § 6800).—*Id.*

[p] (Sup. 1902)

When the board of commissioners in a proceeding for the establishment of a free road has considered the report of the viewers and decided that the apportionment of the expenses has been fairly and equitably made, and have confirmed it, it becomes the unequipped duty of the auditor under Burns' Rev. St. § 6860, to spread the report on the record, and to place the assessments not stayed by judgment on a duplicate for collection, and to defend the property owners may have assessments, or, if they have one, whether they will care to make it, is of no legal consequence to the auditor, and no ground for hesitation in the discharge of his duty.—*Smyth v. State*  
*Braun*, 62 N. E. 449, 158 Ind. 332.

[q] (App. 1902)

Under Burns' Rev. St. 1901, § 4408, requiring to opening highways, and making it the duty of the board of trustees to accept or reject the report of the commissioners within a certain number of days after it is filed, failure to so accept or reject the report nullifies the proceedings.—*Town of*

gomery v. Baltimore & O. S. W. R. Co., 85 N. E. 217, 29 Ind. App. 662.

[r] (Sup. 1904)

Burns' Ann. St. 1901, § 6744 (Horner's Ann. St. 1901, § 5017), provides that the viewers appointed in proceedings to locate and open a public highway shall report, giving a full description of such location by metes and bounds and courses and distances. The report of road viewers recited that they met as directed "in the order attached and made a part hereof"; that they proceeded to view the proposed highway, which was to be 32 feet wide, and to commence at the place stated in the "order attached herunto," and over the route as stated in "said order"; and that the proposed highway would be of public utility. The order attached was the order to the viewers, in which the location of the proposed highway was stated in detail. *Held*, that the proposed highway was sufficiently described in the report of the viewers.—*Lake Erie & W. R. Co. v. Shelley*, 71 N. E. 151, 163 Ind. 36.

[s] (App. 1904)

A report of viewers in highway opening proceedings, reciting that the highway was to be 30 feet in width, and was to commence at a place where a public highway intersects the section line on the west side of the N. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 21, township 7 N., range 10 W., running thence south to the southwest corner of said section 21, joining to the public highway on the west side of section line of section 28, township and range aforesaid, was not defective for insufficiency of description.—*Merom Gravel Co. v. Pearson*, 69 N. E. 694, 71 N. E. 54, 33 Ind. App. 174.

Where objectors in highway opening proceedings claimed that the description in the viewers' report was written after the report had been filed, and without the viewers' knowledge, and that the report was insufficient for want of a description, the burden was on the objectors to prove such fact in the commissioners' court.—*Id.*

[t] (App. 1904)

The remedy of any person aggrieved by the report of viewers that the highway petitioned for was not of public utility was not by motion to set aside the report, but was under Burns' Rev. St. 1901, § 6753, permitting action on a second petition on a bond for costs being filed by the petitioners.—*Schepman v. Buhner*, 70 N. E. 390, 32 Ind. App. 562.

[u] (App. 1905)

In proceedings to establish a highway, it is not necessary that the width of the highway be stated in the viewers' report.—*Sisson v. Carithers*, 72 N. E. 267, 73 N. E. 924, 35 Ind. App. 161.

Objections to the report of highway viewers, in that it was "insufficient in law," and "not made in accordance with law," were insufficient for indefiniteness.—*Id.*

[v] (App. 1906)

In proceedings for the establishment of a road, a report of viewers to the effect that the route selected passed through inclosures of more than one year's standing on lands of certain persons and that a good way for the road could not otherwise be had without departing essentially from the route petitioned for, showed that the viewers proceeded in accordance with Burns' Ann. St. 1901, § 6743, providing that the viewers shall proceed to view the highway to be located, and, if they shall deem it of public utility, shall lay it out, not running through any person's inclosure of more than one year's standing unless a good way could not otherwise be had without departing from the route petitioned for.—*Baker v. Gowland*, 76 N. E. 1027, 37 Ind. App. 364.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 90, 108-131.

## § 42. Determination as to necessity and utility of road.

[a] (Sup. 1885)

In determining whether a proposed highway will be of public utility, though it is necessary to consider the wants of the particular neighborhood which desires it, yet the interests of the community outside of such neighborhood ought not be disregarded.—*Crossley v. O'Brien*, 24 Ind. 325, 87 Am. Dec. 329.

In deciding whether a proposed highway will be of public utility, the damages, which, if it were established, would have to be paid for the land appropriated, ought to be taken into consideration.—*Id.*

[b, c] (Sup. 1882)

The public utility of a proposed highway on a decision of a board of commissioners need not be shown by direct evidence, but may be inferred from facts contained in the case.—*Hagaman v. Moore*, 84 Ind. 496.

[d] (Sup. 1882)

On the question of the public utility of a highway, damages and all expenses which will result from the construction should be considered.—*Rominger v. Simmons*, 88 Ind. 453.

[e] (Sup. 1884)

On proceedings to establish a highway, all the damages and benefits determinable from all the evidence are to be considered.—*Watson v. Crowsore*, 93 Ind. 220.

[f] (Sup. 1886)

In proceedings to establish a highway it is not error to exclude evidence of an existing highway which does not affect the one proposed to be opened.—*Kyle v. Miller*, 108 Ind. 90, 8 N. E. 721.

[g] (Sup. 1886)

The only remedy petitioners may resort to when an adverse report is made on the subject of the utility of a highway petitioned for is to

file their bond for costs and petition over again.—*McKee v. Gould*, 8 N. E. 724, 108 Ind. 107.

[h] (*Sup.* 1892)

In proceedings to open a highway over respondents' land, it was proper to allow a witness, who was acquainted with the value of land in the neighborhood, to testify that the proposed highway would be a convenience to persons residing on a certain part of the land, and would make a difference in the market value thereof.—*Hire v. Kniseley*, 130 Ind. 295, 29 N. E. 1132.

[i] (*Sup.* 1898)

In determining the utility of a highway, existing ways, condition of population, location of markets, character of soil, physical features of the locality, etc., are proper subjects of inquiry.—*Opp v. Timmons*, 48 N. E. 1028, 149 Ind. 236.

[j] (*Sup.* 1898)

Under Burns' Rev. St. 1894, §§ 6735, 6737, 6752 (Horner's Rev. St. 1897, §§ 5010, 5012, 5025),—providing that, before the county commissioners can grant petition to establish a highway in two counties, they must determine whether the damages assessed are greater than the public utility of the highway, and leaving it to them to determine by whom the damages shall be paid, except that any amount in excess of such utility cannot be paid out of the county treasuries,—where, after the commissioners have, on a petition for a highway, allowed one \$50 damages, and determined that the damages assessed are not greater than the public utility, and found in favor of the highway, and declared that each county shall pay half the damages, such person appeals, and gets verdict for \$450 damages, the case should be returned to the county commissioners to determine whether the damages exceed the utility, and who shall pay them; and therefore a judgment, without this, that the damages shall be paid half by each county cannot be enforced.—*State ex rel. Bible v. White*, 51 N. E. 481, 151 Ind. 364.

[k] (*Sup.* 1903)

On an issue as to the public utility of a proposed highway, it is proper to consider the location of established ways, their proximity to the proposed road and their accessibility, but not the number of miles of highway in the township, the amount of taxable property, the rate of road taxation, the amount of the road fund, nor the number of road hands in the district.—*Sterling v. Frick*, 171 Ind. 710, 86 N. E. 65, 87 N. E. 237.

[l] (*App.* 1903)

On proceedings for the location of a highway, evidence concerning existing highways, location of markets with relation to the residences of the inhabitants, the character of the soil, the location of schoolhouses, churches, graveyards, and the condition of other high-

ways already in use, are proper subjects of inquiry in determining the utility of the way.—*Angell v. Hornbeck*, 67 N. E. 23, 100 Ind. App. 59.

Where, in proceedings on the location of a highway, there was evidence that the proposed highway would be of public utility, it was proper to instruct that the benefits accruing to a landowner should be considered in connection with all the other evidence in the case," as all the jury to consider all the evidence, where the benefits should have been instructed to consider such as bore properly on the issue of damages and benefits.—*Id.*

[m] (*Sup.* 1905)

Evidence held sufficient to support a finding of the jury in highway proceedings that the proposed highway would be of public utility within the requirements of the highway act.—*Speck v. Kenoyer*, 73 N. E. 896, 164 Ind. 104.

Under the general highway act, limiting the right of viewers to lay out highways to highways as will, in their judgment, be of public utility, and declaring a want of public utility a ground of remonstrance, the question of public utility is generally one of fact, to be determined in the light of public convenience and interest, but it is not essential that the contemplated road be absolutely necessary to the public.—*Id.*

Under Burns' Ann. St. 1901, § 6743, providing it the duty of viewers in highway proceedings to lay out and mark the same on the ground, without departing essentially from the route petitioned for, and section 6750, entitling a landowner to have new viewers appointed to reconsider the question of public utility of a proposed highway, the determination of the question of public utility on a trial in the circuit court on issues of inutility and damages is limited to the utility of the route selected by the viewers, and the utility of other proposed routes is immaterial.—*Id.*

[n] (*Sup.* 1905)

In proceedings to establish a highway, questions of public utility of the proposed highway and of damages to remonstrators are proper subjects for the jury.—*Heath v. Sheetz*, 74 N. E. 505, 164 Ind. 665.

In proceedings for the establishment of a highway, evidence held sufficient to support a finding that the proposed highway would be of public utility.—*Id.*

[o] (*Sup.* 1908)

On an issue as to the public utility of a proposed highway, it was proper to exclude evidence as to how much it would cost to lay out a good road through the timber," since it was not asked for an indefinite answer, and since witnesses had testified to the cost of putting the road in such passable condition as would be required for the road district, which was as far as the question was material.—*Sterling v. Frick*, 171 Ind. 710, 86 N. E. 65, 87 N. E. 237.

instruction in a proceeding to establish that, in deciding the question of utility, the jury should determine whether a "useful" road, and that usefulness would exceed its cost the jury find for the petitioners, was not error in leading the jury to believe that, if it would be useful to one citizen or to a number, the finding should be for the expense of public utility regardless of public inconvenience or private utility falls short of utility, and that in determining the same the jury should consider whether the road was already supplied with sufficient highway in the neighborhood leading to towns, and the proposed road would be convenient to persons only, etc.—Id.

instruction, in a proceeding to establish a highway, that if the benefits to land are equal to or greater than the damages by the construction the jury should find against the grant on the question of damage, was not precluding consideration of the cost of building and rebuilding fences, where the jury directed to determine the amount of respondent's damages through the facts alleged in remonstrance, one item of remonstrance was that it would be necessary to build and fence a specified amount of fence.—Id.

#### FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. High. §§ 26, 27, 111, 12-135.

#### LOCATION OF ROAD.

on, see post, §§ 69-72.

pike or toll road, see TURNPIKES AND ROADS, §§ 12-14.

#### FOR CASES FROM OTHER STATES,

25 CENT. DIG. High. §§ 27, 137-145.

#### — In general.

(Sup. 1857)

where the proceedings for opening a highway show the termini thereof, and that its course is to follow that of the Ohio river, *held*, that the beginning, course, and termination of the road are sufficiently shown within the instruction of Rev. St. 1831, p. 446, § 2.—*Hays v. Hays*, 1 Ind. 425.

(Sup. 1865)

where the viewers appointed to lay out a highway laid an "inclosure" on the route petitioned for, the owner of which will not consent that the road shall be located through it, and they find that a good route for a road can be located there had, they cannot locate the road through such inclosure; nor can they locate the road through such other route, if such route would be a material departure from the route mentioned in the petition.—*Crossley v. O'Brien*, 24 Ind. 329. Am. Dec. 329.

[c] (Sup. 1885)

In ordering a highway to be entered of record the county board and the circuit court on appeal are confined to the highway as described in the petition.—*Washington Ice Co. v. Lay*, 103 Ind. 48, 2 N. E. 222.

#### FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. High. §§ 27, 137-140.

#### § 45. — Township or section lines.

[a] (Sup. 1894)

Where a highway was located upon a section line, it matters not upon whose land it was located. The division line as to the public was not the section line, and public interests require that the highway shall not vary its course to correspond with partition lines however irregular.—*Hawkins v. Stanford*, 37 N. E. 794, 138 Ind. 207.

[b] (Sup. 1897)

There is no presumption that, because a highway had some portion of its course on a section line, it followed the line throughout.—*Seisler v. Smith*, 46 N. E. 993, 150 Ind. 88.

[c] (Sup. 1900)

The location of a highway partly on a "half-section line," forming part of a city's boundary, under Highway Law, § 16 (Rev. St. 1881, § 5016; Horner's Rev. St. 1897, § 5016; Burns' Rev. St. 1894, § 6743), authorizing the county commissioners to locate a highway on any section line forming a city boundary, cannot be sustained, though the objectors' lands lie outside the city, and do not border on the part of the proposed road located on the corporate limits, since by surrendering their lands for the road they paid for an interest in it as an entirety, and, the commissioners being unauthorized to locate the road on the portion forming such boundary, a part of the consideration failed.—*Gascho v. Sohl*, 58 N. E. 547, 155 Ind. 417.

Under Highway Law, § 16 (Rev. St. 1881, § 5016; Horner's Rev. St. 1897, § 5016; Burns' Rev. St. 1894, § 6743), as amended by Acts 1895, p. 14, authorizing the county commissioners to locate a highway on any section line which forms a city boundary, the commissioners cannot locate a proposed road on a "half-section line," though it forms a part of the boundary of a municipal corporation.—Id.

#### FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. High. §§ 33, 137, 139.

#### § 46. — Exemption of particular species of property.

Railroad property, see RAILROADS, § 96.

[a] (Sup. 1870)

The provision of Gav. & H. St. p. 363, § 16, providing that the viewers, in laying out or changing a highway, shall not run "through any person's inclosure of one-year standing without the consent of the owner, unless, upon examina-

tion, a good way cannot otherwise be had," should be construed by adding thereto the words "without departing essentially from the route petitioned for."—*Cummins v. Shields*, 34 Ind. 154.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 141-145.

#### § 48. Laying out road.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 146, 151-154, 169-172.

#### § 49. — In general.

[a] (Sup. 1845)

In opening a road established by the county commissioners, the supervisor cannot deviate from the course of the road so established.—*Phipps v. State*, 7 Blackf. 512.

[b] (Sup. 1878)

The board of commissioners has no authority to lay out and mark highways, but these acts are to be performed by the viewers; and the duty of the board is to cause a record thereof to be made after the report of the viewers.—*Suits v. Murdock*, 63 Ind. 73.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 151-154.

#### § 53. Judgment or order establishing road.

Arrest of judgment, see JUDGMENT, § 263.

[a] (Sup. 1840)

Under Rev. St. 1838, p. 403, authorizing county commissioners to establish roads of a "width not exceeding forty feet," an order by them establishing a road of undefined width is void.—*White v. Conover*, 5 Blackf. 462.

[b] (Sup. 1846)

The establishment of a road whose width is not defined is void.—*Carlton v. State*, 8 Blackf. 208.

[c] (Sup. 1868)

In a proceeding for the location of a highway, the final order of the board of commissioners was as follows: "And the board, having duly examined and considered said report, accept and approve the same, and it is now ordered that said road be, and the same is hereby, located to the width of 25 feet." The petition stated the beginning, terminus, course, and distance of the road. *Held*, that the order was sufficiently definite.—*Ruston v. Grimwood*, 30 Ind. 364.

[d] (Sup. 1878)

Where the record of proceedings before county commissioners to open a highway through inclosed lands does not show that the proposed road was to be located on the line between adjoining proprietors, the objection that the order of the board did not direct that the highway be taken equally from adjoining proprietors will

not be considered.—*Suits v. Murdock*, 63 Ind. 73.

[e] (Sup. 1881)

Where viewers have been appointed upon petition for the location of a highway, and made a report adverse to the petitioners, judgment approving their report has been entered by the board of commissioners, such board has no right to set such judgment aside and appoint reviewers.—*Doctor v. Hartman*, 74 Ind. 221.

Under section 23 of the highway law, authorizing freeholders of the county living on the line of the proposed highway to restrain and litigate the utility of the proposed highway, freeholders whose lands are taken cannot confer jurisdiction on the county commissioners to vacate a judgment refusing to open the highway, and thus prejudice the interests of those whose lands are not taken.

[f] (Sup. 1884)

An order directing the opening of a proposed highway, but not fixing its width, is void.—*Win v. Fulk*, 94 Ind. 235.

[g] (Sup. 1893)

Rev. St. 1881, § 5028, provides that an order for laying out of any highway shall specify the width thereof." *Held*, that an order of the commissioners that "a road be established and opened as prayed for in the petition" is void, there being no statutory requirement that the petition in such a case should mention the width of the road.—*Hudson v. Voreis*, 124 Ind. 642, 34 N. E. 503.

A petition for the location of a highway does not necessarily contain a description of the width, and an order locating and establishing a highway, giving no other specification of width than by reference to the petition, is a compliance with the statute.—*Id.*

[h] (Sup. 1894)

A board of county commissioners has no power to set aside its previous final and recorded order establishing a highway.—*Badger v. Merry*, 139 Ind. 631, 39 N. E. 309.

[i] (Sup. 1900)

A judgment of a county board of commissioners establishing a highway before the damages were paid, as required by Burns' Rev. St. 1894, § 6752, as a condition precedent thereto is void, and payment 30 days later into the county treasury for the use of the parties entitled thereto will not render it operative.—*Helms v. Bell*, 58 N. E. 707, 155 Ind. 502.

[j] (Sup. 1903)

The power of county commissioners to vacate a highway, statutory, they cannot, after a final order of theirs establishing a highway has been made and recorded, vacate or modify it.—*Robson v. Richey*, 65 N. E. 1032, 159 Ind. 600.

[k] (App. 1904)

On proceedings to lay out a highway, the objection did not direct the trial court's action.

the fact that the judgment was defective in specifying the width of the road, appeal by the objector he assigned no reason, and there was an affirmance. That the objector's opposition to a motion for an order directing a correction of the judgment by the trial court was of no merit.—*Gravel Co. v. Pearson*, 69 N. E. 694, 71 Ind. 4, 33 Ind. App. 174.

#### App. 1905)

Order establishing a highway, failing to state the width as required by Burns' Ann. St. § 6755, is void.—*Sisson v. Carithers*, 12 Ind. 267, 73 N. E. 924, 35 Ind. App. 161. Where there is an order for the laying out of a highway, and it was void for failure to specify the width thereof as required by Burns' Ann. St. § 6755, an order for the correction thereof may be made either by the Supreme or Appellate Court.—*Id.*

#### Sup. 1906)

Proceedings to establish a gravel road were appointed, and the viewers' report, containing a description of the road in detail, was read in full in the gravel road record. The viewers' book entry, after reciting a trial and finding against remonstrators, decreed that the board found for petitioners and approved the report of the viewers, with one specification, and after finding that the improvement was of public utility, and that the damages would not exceed the benefit conferred by the road constructed, etc. *Held*, the proceedings were not void because the order of the board did not state the kind, location and extent of the road, as required by Burns' Ann. St. § 6755, c. 145, § 5.—*Todd v. Crail*, 12 Ind. 402, 167 Ind. 48.

#### App. 1906)

Where, in proceedings for the establishment of a public road, the route selected by the board was passed through a private inclosure of less than one year's standing, and a jury trial was ordered in favor of the establishment of a highway, the proceedings were proper for the judgment to follow the verdict and direct the establishment of a highway on the route selected.—*Baker v. Gowland*, 12 Ind. 1027, 37 Ind. App. 364.

#### Sup. 1910)

Proceedings to establish a highway, and an order to modify the judgment by striking out the portion thereof as set forth the description and location of the highway was properly overruled.—*Wing v. Stahley*, 91 N. E. 234.

Proceedings to establish a highway, and an order of the judgment directing the proper authorities to cause the highway to be opened and repaired, and requiring the auditor of public accounts to transmit a copy of the order and a copy of the report to such trustee, was proper.—*Id.*

#### CASES FROM OTHER STATES,

25 CENT. DIG. HIGH. §§ 155-164.

### § 54. Record of proceedings.

Mandamus to compel, see MANDAMUS, § 90. Presumptions as to regularity of proceedings, see EVIDENCE, §§ 82, 83.

#### [a] (Sup. 1868)

Where the record of the board of county commissioners stated that proof of legal notice of the petition for the location of a highway had been made, and set out a copy of a notice, to which an affidavit was attached, which stated that three copies of the notice had been posted up in the township "according to law," it did not appear that the affidavit was the only proof made to the board, and that the board had jurisdiction.—*Wright v. Wells*, 29 Ind. 354.

#### [b] (Sup. 1870)

The record of the board of county commissioners in a proceeding to locate a highway need not contain the evidence by which it was proved that the proper notice had been given of the intention to present the petition for the highway. It is enough if the record shows that the fact was proved without showing how it was proved.—*Kissinger v. Hanselman*, 33 Ind. 80.

#### [c] (Sup. 1882)

The finding of county commissioners as to the number and qualifications of the petitioners for a highway, and the notice given, if not questioned at the time, cannot be in subsequent proceedings.—*Breitweiser v. Fuhrman*, 88 Ind. 28; *Rominger v. Simmons*, 88 Ind. 453.

#### [d] (Sup. 1883)

Under Rev. St. 1881, § 501, which provides that, in a petition for the location, change, or vacation of a highway, the names of the owners and occupants or agents of the lands through which the same may pass shall be set forth, where the names of all the owners of the lands are not set forth it will be presumed that the names of the agents or occupants were set forth, in the absence of any showing to the contrary.—*Heagy v. Black*, 90 Ind. 534.

#### [e] (Sup. 1888)

Where notice of proceedings to establish a gravel road was published as required by Rev. St. 1881, § 5092, it will be presumed, in a collateral proceeding, that the petition, which by section 5092 is sufficient in the first instance if signed by five landowners, was signed by a majority of the landowners whose lands are reported as benefited and to be assessed, before the order establishing the road, as required by section 5095, where the record of the proceedings before the board shows the original petition with a large number of signatures, and recites a finding by the board that a majority had so signed.—*Hobbs v. Board of Com'rs of Tipton County*, 116 Ind. 376, 19 N. E. 186.

Where the board of county commissioners, after appointing commissioners to apportion the expense of a road, directed the auditor to give notice by publication of the filing of their report, and of the time when the board would meet to hear the same, as required by Rev. St.

1881, § 5006, a recital in the record of the proceedings that the board met in special session called by the auditor, and confirmed the report, after finding that notice of the filing and of the time fixed for the hearing had been given, is sufficient, in a collateral proceeding, to show that due notices were given.—Id.

[f] (Sup. 1909)

Viewers reported that a proposed highway would be of public utility, and thereafter a remonstrance was filed, and reviewers appointed, who reported that it would not be of public utility, and judgment was rendered against the petitioners. *Held* that, while it would have been proper practice for the commissioners' record to have shown that the first viewers' report had been made, the failure to do so did not deprive the board of jurisdiction, or make its subsequent acts void, as under Burns' Ann. St. 1908, §§ 7653, 7657, making it the duty of the board to appoint reviewers on the filing of a remonstrance, it was its duty to appoint such reviewers without making an order establishing said highway on the report of the viewers, and, as under sections 7652, 7653, and 7657, the board was not authorized to appoint reviewers until after the viewers had reported in favor of the public utility of the proposed highway, it will be presumed that said board received the report of the viewers before appointing the reviewers.—Fowler v. Newsom, 90 N. E. 9.

FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. High. §§ 90, 108, 169-172.

§ 55. Defects and objections, and waiver thereof.

[a] (Sup. 1870)

The validity of proceedings to establish a road is not affected by payment of a part of the damages awarded to the remonstrator into court for his use by one of the petitioners it not being presumed that such would influence the court prejudicially to the remonstrator.—Cummins v. Shields, 34 Ind. 154.

[b] (Sup. 1878)

An objection to proceedings of the board of commissioners establishing a highway that the damages should have been ordered to be paid out of the county treasury is waived by failing to appeal from the proceedings.—Suits v. Murdock, 63 Ind. 73.

[c] (Sup. 1888)

A person who appears before the board of county commissioners in a proceeding for the location of a highway and who failed to make objections there will be deemed to have waived all defects or irregularities in the proceedings, except such as render them wholly invalid.—Wells v. Rhodes, 16 N. E. 830, 114 Ind. 467.

[d] (Sup. 1892)

In a proceeding before the board of county commissioners to establish a road, any irregularities therein which do not affect the sub-

stantial rights of the parties will be disregarded.—Fulton v. Cummings, 30 N. E. 949, 132 Ind. 453.

[e] (Sup. 1900)

The board of commissioners has power to establish highways; but the conditions and manner of its exercise, being clearly defined by the statutes, must be substantially observed or the proceeding becomes a nullity.—Helms v. Bell, 58 N. E. 707, 155 Ind. 502.

[f] (Sup. 1909)

After answering to the merits of a petition for the establishment of a highway by filing a remonstrance with the county board and an appeal to the circuit court, appellant cannot be heard on a plea in abatement on the ground that petitioners failed to file a bond for costs, as required by Burns' Ann. St. 1901, § 6753 (Acts 1879, p. 148, c. 57), where a petition is filed for a highway over a route which has been held on a prior petition not to be of public utility.—McKaig v. Jordan, 172 Ind. 84, 87 N. E. 974.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 173-175.  
See, also, 30 Cyc. p. 1380.

§ 56. Curative statutes.

Validity in general, see CONSTITUTIONAL LAW, § 193.

[a] (Sup. 1886)

A law legalizing the action of a county board in laying out a county road is not unconstitutional, within Const. art. 4, § 22, prohibiting special or local laws for laying out and opening highways.—Johnson v. Board of Com'rs of Wells County, 107 Ind. 15, 8 N. E. 1.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. § 176.

§ 57. Appeal and error.

Change of venue, see VENUE, § 36.

FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. High. §§ 177-203.

§ 58. — In general.

Scope and extent of review on appeal from order subsequent to final order of establishment, see APPEAL AND ERROR, § 876.

§ 58 (1). *Right of review and appellate jurisdiction in general.*

[a] (Sup. 1880)

Appeals from the order of the board of commissioners establishing or relocating a highway are on the same footing as ordinary civil actions, and a change of venue thereof from the judge may be granted.—Schmied v. Keeney, 72 Ind. 309.

[b] (Sup. 1907)

"Section 102," as used in Burns' Ann. St. 1905, § 6735, providing that an appeal shall

an order dismissing a highway petition establishing a highway, as provided in 102 of this act, means section 123. of 102.—*Williamson v. Houser*, 169 Ind. 82 N. E. 771.

CASES FROM OTHER STATES,

25 CENT. DIG. High. §§ 177-198, 200-3.

### (2). *Persons entitled to appeal, and parties.*

(Sup. 1866)

board of commissioners is not a necessary party to an appeal from an order of establishing a highway.—*Wright v. ...* 7 Ind. 67

(Sup. 1877)

board of commissioners is not a proper party to an appeal from an order of such establishing, or refusing to establish, a highway, whether the question of damaged by a remonstrant is or is not in *Jameson v. Board of Com'rs of Cass* 56 Ind. 466.

(Sup. 1880)

board of commissioners is not, either in circuit court or the supreme court, a proper necessary party to an appeal from an order of the board of commissioners establishing or relocating a public highway.—*Schmiedeknecht v. ...* 72 Ind. 309.

petitioner for the establishing of a highway should be made the plaintiff, and a defendant the defendant, in the circuit court, if the case is tried de novo on appeal from a decision of the commissioners.—*Id.*

(Sup. 1883)

persons whose lands are affected by the location of a highway, and who have petitioned and asked for damages, may appeal uniting with other remonstrators.—*Obenchain*, 90 Ind. 50.

(Sup. 1884)

appeal from an order of the commissioners relocating a way may be taken by any person on affidavit showing a substantial injury and the filing of a proper bond.—*Fleming*, 95 Ind. 78.

(Sup. 1891)

contestant who was not a party to a petition to establish a highway had no right to appeal from the decision of the circuit court reversing the action of the highway commissioners.—*Irwin v. Armuth*, 129 Ind. 340, 28 Ind. 102.

(Sup. 1907)

in 1903, p. 255, c. 145 (*Burns' Ann. St.* 1907), authorize the board of county commissioners to construct gravel roads upon petition of a majority of the landowners benefited by the road. Section 7 provides that on or before the day set for the hear-

ing of the report of the viewers the owners of the land affected may remonstrate against the report, first, because the same is not according to law; second, assessment too high; third, damages too low; fourth, costs more than benefits; and fifth, not a public utility. Section 14 provides that any person who appeared and filed a remonstrance before the board of commissioners shall be allowed an appeal to the circuit court in like manner as appeals are now allowed to be taken from the board of commissioners to the circuit court, and on such appeal the only question that may be tried in the circuit court shall be the questions raised before the board of commissioners. *Burns' Ann. St.* 1901, § 6754, relating to highways, provides that any person aggrieved by any decision of the board of commissioners may appeal therefrom to the circuit court of such county. Section 7859, relating to organization of boards of commissioners, provides that from any decision of such commissioners there shall be allowed an appeal to the circuit court by any person aggrieved. *Held*, that landowners had the right to appeal to the circuit court from a decision of the board of county commissioners finding that a majority of the landowners had signed a petition for a road.—*Ross v. Becker*, 169 Ind. 166, 81 N. E. 478.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 177-198, 200-203.

### § 58 (3). *Decisions reviewable.*

[a] (Sup. 1865)

Viewers who were appointed upon a petition for a highway reported that the proposed way would not be of public utility, and also assessed the damages of the persons who would be affected by the way if it should be established. The board of commissioners thereupon dismissed the petition unless the petitioners would open and maintain the road at their own expense. *Held*, that an appeal would lie under 1 Gav. & H. St. p. 364, § 26, to the court of common pleas.—*Crossley v. O'Brien*, 24 Ind. 325, 87 Am. Dec. 329.

[b] (Sup. 1865)

No appeal lies from an order sustaining a demurrer to an answer to a petition for a highway, as no such pleadings as an answer and demurrer are proper in such case.—*Logan v. Kiser*, 25 Ind. 393.

[c] (Sup. 1877)

Where damages have been assessed in favor of a person who objects to the location of a highway which has been petitioned for, the decision of the board of commissioners as to whether such highway is one of sufficient importance to the public that such damages, and the costs attendant, be paid out of the county treasury, is final and not reviewable.—*Jameson v. Board of Com'rs of Cass County*, 56 Ind. 466.

## [d] (Sup. 1883)

Under the statute making the question of paying damages on the establishment of a highway out of the county treasury, one solely for the consideration of the board of commissioners, its judgment and determination in that regard cannot be controlled or reviewed by any other court.—*Wilkinson v. Bixler*, 88 Ind. 574.

## [e] (Sup. 1886)

No appeal to the circuit court lies from an order of the board of county commissioners confirming the report of original viewers, finding that a proposed highway is not of public utility.—*McKee v. Gould*, 108 Ind. 107, 8 N. E. 724.

## [f] (Sup. 1886)

In proceedings for the establishment and construction of a free gravel road under Rev. St. 1881, § 5091 et seq., the final order by the board of county commissioners is the order confirming the assessments of benefits made by the committee appointed as required by section 5096 of the statute; and an appeal will not lie to the circuit court from an order rejecting a motion to vacate former orders approving the report of the viewers, and directing the improvement to be made.—*Neptune v. Taylor*, 108 Ind. 459, 8 N. E. 566.

## [g] (Sup. 1889)

No appeal to the circuit court lies from an order of the board of county commissioners confirming the report of reviewers, finding that a proposed highway is not of public utility.—*Jones v. Duffy*, 119 Ind. 440, 21 N. E. 348.

[h] Under the Indiana statutory proceedings for the construction of gravel roads, an appeal does not lie from an order of the commissioners for the construction of the road, but only from the final order confirming the report of the freeholders appointed to estimate the expense of the improvement.—(Sup. 1889) *Tomlinson v. Peters*, 120 Ind. 237, 21 N. E. 910; (1890) *Anderson v. Claman*, 123 Ind. 471, 24 N. E. 175.

## [i] (Sup. 1890)

Under Rev. St. 1881, § 5024, which makes it the imperative duty of the county commissioners to enter judgment refusing to establish a highway when the second viewers have reported against its utility, it is proper to dismiss an appeal from such judgment; the circuit court having no greater jurisdiction in the matter than the commissioners.—*Bowman v. Jobs*, 123 Ind. 44, 23 N. E. 976.

## [j] (Sup. 1890)

A proposed highway commenced at the bank of a river, of such size as to be called a "lake," and used by the public for fishing, hunting, and bathing, and ran about 40 rods, intersecting with other public highways. Held that, notwithstanding the proposed road was open only at one end, the finding of a jury that

it would be of public utility should be sustained on appeal.—*Moore v. Auge*, 125 Ind. 562, 25 N. E. 816.

## [k] (Sup. 1892)

In proceedings on petition before a board of county commissioners for the establishment of a free gravel road, an appeal to the circuit court will lie only from a final order of the board.—*Wilson v. McClain*, 131 Ind. 335, 30 N. E. 1063.

## [l] (Sup. 1894)

Where no appeal was taken from a final order of the board of county commissioners establishing a highway, the sufficiency of the petition on which such order was based, and which became merged therein, will not be considered on appeal from an order setting aside all proceedings subsequent to the entry of such final order.—*Badger v. Merry*, 139 Ind. 631, 39 N. E. 309.

## [m] (Sup. 1896)

On appeal in proceedings to establish a highway, the Supreme Court will not disturb findings, supported by the evidence, as to public utility.—*Forsyth v. Wilcox*, 143 Ind. 144, 41 N. E. 371.

## [n] (Sup. 1908)

The highway act (Acts 1905, p. 579, c. 167, § 123; Burns' Ann. St. 1908, § 7793) provides for a hearing de novo in the circuit court on appeal from decisions of the board of commissioners, and authorizes the Supreme Court to finally determine the cause or to refer it back to the county board. A judgment of the circuit court authorized the highway improvements petitioned for, made final disposition of all the questions involved in the appeal, and certified it back to the board of commissioners, with directions to proceed according to the law; and no motion was made to modify the judgment. Held, that the judgment was a "final judgment," and appealable to the Supreme Court under Burns' Ann. St. 1901, § 644 (Burns' Ann. St. 1908, § 671), permitting an appeal to the Supreme Court from all final judgments, and Burns' Ann. St. 1908, § 1393 (Acts 1907, p. 137, c. 96), requiring appeals in proceedings to establish highways to be taken directly to the Supreme Court.—*Hall v. McDonald*, 171 Ind. 9, 85 N. E. 707.

## [o] (Sup. 1908)

Under Rev. St. 1881, § 5024, providing that, if a majority of the viewers report against the public utility of a highway, it shall not be established, but, if they report favorably thereto, the highway shall be opened, as amended by Acts 1905, p. 524, c. 167, § 10, by adding the proviso that an appeal shall lie to the circuit court from an order dismissing the petition, or ordering the highway established, petitioners may appeal from an order of the commissioners dismissing their petition.—*Kelley v. Augsperger*, 171 Ind. 155, 85 N. E. 1004.

Where, in highway proceedings, a motion to dismiss was sustained, and the judgment adjudged that the remonstrators recover of petitioners their cost, such action of the court fully disposed of the case, and was a final appealable judgment, and not merely a judgment for costs.—Id.

[p] (Sup. 1909)

Under Burns' Ann. St. 1908, § 7658 (Acts 1905, p. 524, c. 167, § 10), providing that, if a majority of the viewers report against the public utility of a highway, it shall not be established, but, if they report favorably, it shall be opened, and providing for appeal to the circuit court from an order dismissing the petition or ordering the highway, petitioners may appeal from an order dismissing their petition, on the return of an adverse report of the viewers.—Gangloff v. Lawler, 171 Ind. 726, 87 N. E. 131.

[q] (Sup. 1910)

Where, on proceedings to establish a public highway, the board of county commissioners entered an order finding the road of public utility, and ordering the payment of proper damages before the opening of the road, it was sufficient to authorize an appeal to the circuit court, although it contained clerical errors affecting its grammatical sense, and though it was unskillfully drawn; it having finally determined the public utility of the road and the amount of damages which must be paid.—Glen-denning v. Stahley, 91 N. E. 234.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 177-198, 200-203.

§ 58 (4). *Presentation and reservation of grounds of review.*

[a] (Sup. 1862)

Alleged defects in proceedings concerning the location or change of highways, had before the township trustees, must be presented to the consideration of the board of commissioners while the cause is in progress before them, or they will not be available in the circuit court on appeal.—Shafer v. Bardener, 19 Ind. 294.

[b] (Sup. 1865)

The objection that one of the petitioners for a highway is not a resident of the county in which such way is asked for cannot be taken for the first time by motion or by a plea in abatement, in the circuit court, on appeal from the decision of the board of commissioners, but must be made before the appointment of viewers.—Little v. Thompson, 24 Ind. 140.

[c] (Sup. 1865)

It is too late on appeal to the circuit court to deny for the first time the right of parties to make objection to the establishment of a

proposed highway.—Wilson v. Whitsell, 24 Ind. 306.

[d] (Sup. 1865)

A question as to the definiteness of the location in proceedings to establish a public road cannot first be raised on appeal.—Smith v. Alexander, 24 Ind. 454.

An objection as to the sufficiency of a notice of a petition for a highway cannot be made for the first time on appeal to the circuit court, even by one who did not become a party to the proceedings until after the appeal was taken.—Id.

[e] (Sup. 1884)

In proceedings to establish a highway, objections not affecting the jurisdiction of the commissioners' court will not be considered when made for the first time on appeal to the circuit court from such commissioners' court.—Lowe v. Ryan, 94 Ind. 450:

On appeal from an order opening a highway, an objection that the road will pass through appellant's inclosure of more than a year's standing, and that he had not given his consent to such location, not presented before the commissioners' court, cannot be raised in the circuit court.—Id.

[f] (Sup. 1885)

On appeal from the board of commissioners to the circuit court in proceedings to locate a highway, nothing can be tried except what was put in issue before the board, and objections can only be taken to facts upon which the jurisdiction of the board depends by appearing before the commissioners and making such objections at the time the petition is presented and before the appointment of viewers.—Forsythe v. Kreuter, 100 Ind. 27.

[g] (Sup. 1885)

Objections to the report of viewers in proceedings to locate a highway must be presented to the board of commissioners, and cannot be first raised in the Supreme Court.—Thayer v. Burger, 100 Ind. 262.

Objections to the report of commissioners on laying out a way cannot first be taken in the supreme court on appeal.—Id.

[h] (Sup. 1886)

No question can be raised on appeal which was not presented to the board of county commissioners, and objections to the petition and proceedings must be specifically stated.—Osborn v. Sutton, 108 Ind. 443, 9 N. E. 410.

[i] (Sup. 1837)

Where a party appears before the board of county commissioners without objecting to the sufficiency of a notice for the construction of gravel roads, he waives his right to make such objection on appeal.—Robinson v. Rippey, 12 N. E. 141, 111 Ind. 112.

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

In a proceeding to establish a gravel road, under the gravel roads acts (Act March 3, 1877; Act April 8, 1885), where there is a petition signed by a number of freeholders, and it is adjudged sufficient by the board of commissioners, the proceedings will not be void; and, unless the objection is made before the board that the petition is not signed by the requisite number of freeholders, it will not be available on appeal.—Id.

Objections to the sufficiency of the bond required by the gravel roads act of 1877 to be filed in proceedings for the establishment of such roads must be made in the commissioners' court, or they will not be considered on appeal.—Id.

The delay of the board of commissioners in acting on a petition for the establishment of a gravel road, under the law (Act March 3, 1877; Act April 8, 1885), does not oust jurisdiction, and if the party does not urge that objection in the commissioners' court it will not be available on appeal.—Id.

[j] (Sup. 1888)

An order on a motion to dismiss a petition for a public highway because of lack of notice will not be reviewed on appeal when such objection was not raised before the county board, and the motion is not made of record by a bill of exceptions.—Mathews v. Droud, 114 Ind. 268, 16 N. E. 599

[k] (Sup. 1890)

Under Elliott's Supp. § 1485, no appeal lies from a judgment of a board of county commissioners ordering the construction of a free gravel road, at the instance of owners of land assessed therefor who failed to appear and remonstrate before the board.—Wilkinson v. Lemasters, 122 Ind. 82, 23 N. E. 688.

[l] (Sup. 1892)

In a proceeding before the board of county commissioners to establish a road where an appeal is taken to the circuit court, no question can be tried on appeal that was not presented to the board of commissioners before the appeal was taken, notwithstanding that, on appeal, the cause is tried de novo.—Fulton v. Cummings, 30 N. E. 949, 132 Ind. 453.

[m] (Sup. 1895)

In proceedings to establish a highway, the question of the sufficiency of proof in the circuit court as to the qualifications of the petitioners cannot be raised for the first time in the supreme court.—Forsyth v. Wilcox, 41 N. E. 371, 143 Ind. 144.

In proceedings to establish a highway, where remonstrant appears generally, and raises in the commissioners' court and the circuit court only the questions of public utility and the amount of his damages, he waives all objections to the qualifications of petitioners, sufficiency of the petition, notice, order to view, report of viewers, and the failure to appoint second viewers.—Id.

[n] (Sup. 1908)

In a proceeding for the establishment of a highway, only those questions raised before the board of commissioners, except jurisdictional questions, can be raised in the circuit court on appeal.—Kinzer v. Brown, 170 Ind. N. E. 618.

[o] (App. 1908)

In proceedings for the establishment of a highway, objections to the petition not previously made before the board of commissioners are unavailable either in the Circuit or Appellate Court.—Fancher v. Coffin, 41 Ind. 489, 84 N. E. 354.

In highway proceedings objector's remonstrance, verified by his attorney, is not subject to amendment by the objector's agent, to which petitioners replied, filing a petition to strike out parts thereof, which was sustained by the board of commissioners, and viewers were thereupon appointed pursuant to the remonstrance, who reported against the board as to the utility of the highway and damages to objector. Held, that petitioners, having appeared to and answered the remonstrance before the board of commissioners, and not objecting, could not object for the first time on appeal to the circuit court that the remonstrance was defective because not verified by the party.—Id.

[p] (Sup. 1909)

In highway proceedings, objections to the jurisdiction of the county commissioners depends, not apparent on the face of the record, can only be taken by motion, and such objections before the board when the petition is presented, and before the appointment of viewers.—Aetna Life Ins. Co. v. Jones, 170 Ind. 871.

Acts 1905, p. 579, c. 167, § 123 (Burns' Supp. St. 1908, § 7793), provides that any person aggrieved by any decision of the county commissioners in any proceeding relating to highways may appeal therefrom, etc., and that such appeal shall be tried de novo, and may be limited to any issue tried, "or that might have been tried, before the county board." Held, that the last clause only authorizes the trial of such issues on appeal as might have been presented under issues made before the board, and does not authorize the trial of issues not presented to the board.—Id.

[q] (Sup. 1910)

Under Acts 1905, p. 579, c. 167, § 123, providing that an appeal from the decision of the board of county commissioners in a highway proceeding shall be tried de novo, and may be limited to any issue tried, or that might have been tried, before the county board, the jurisdiction of the board could not be challenged on appeal in the circuit court, on the ground that the petition for the improvement of the highway was not signed by the requisite number of freeholders: such question not having

presented before the board.—George v. N. E. 606.

FROM OTHER STATES,  
CENT. DIG. High. §§ 177-198, 200-

(5). *Proceedings for transfer.*

p. 1848)

appearance of remonstrants to the open-highway before the board of commissioners made them parties, so that they were take notice of an appeal; and summon them as appellees was not necessary.—Hardesty, 1 Ind. 79, Smith, 53.

appeal from the decision of county commissioners ordering a road prayed for to the original papers must be filed in circuit court, the court of appeal; and sufficient to file a transcript of them.

p. 1855)

an appeal taken to the circuit court and board of county commissioners in the locating a public highway, no other were filed in that court but a transcript of the proceedings of the board. The appeal was properly dismissed.—Moore v. Smock, 6 Ind. 392.

p. 1855)

Rev. St. 1843, pp. 186, 187, §§ 37, board of commissioners could not allow from their decision establishing a bond and approving the appeal bond since were incumbent upon the auditor.—v. Hulings, 7 Ind. 144.

provisions of Rev. St. 1843, pp. 186, 187, 38, and of General Highway Act 1865, in relation to appeals from the board of commissioners, are to be read together; and those of the Revised Code of 1843 governed in relation to highway proceedings, except as to the manner in which the appeal was to be taken.

affidavit required by Rev. St. 1843, pp. 186, 187, 38, to authorize an appeal from the board of commissioners, was sufficient for the maintenance of the appeal, and an appeal was taken by a person who was not a party to the proceedings, the appeal was sustained, though the road was through appellant's land, and the board dismissed the appeal and approved the bond.

p. 1860)

appeared from the record on appeal from the board of commissioners vacating a highway that the commissioners had taken an appeal, specifying the penalty of the bond and the surety to be taken. The auditor filed the bond, and sent a transcript. *Held*, that the auditor should have approved the bond as an act of his own

judgment, and, as it was left in doubt by the record whether he did so approve it or merely filed it under the approval of the commissioners, the appeal was not well taken.—Shepherd v. Dodd, 15 Ind. 217.

[e] (Sup. 1865)

Where viewers appointed to report as to the utility of a proposed highway make a conditional report that, if the petitioners for the way will open it, the change is of public utility, otherwise not, and the board of commissioners make an order to the effect that, when the new route is opened and made as good as the old one, it will be established and located as a highway, and afterwards make another order declaring the new route to be a public highway and vacating the old road, an appeal taken in less than 30 days from the last order is in time.—Wilson v. Whitsell, 24 Ind. 306.

[f] (Sup. 1868)

A bond signed by the appellants only is not a bond with surety, as required by 1 Gav. & H. Rev. St. p. 364, § 26, allowing an appeal from the decision of the county commissioners in a proceeding for the location of a highway, and the defect cannot be cured by filing a proper bond in the Appellate Court.—McVey v. Heavenridge, 30 Ind. 100.

[g] (Sup. 1868)

An application was made to the county commissioners for permission to organize an association for the construction of a gravel road, under Act 1865. A contest was filed by persons alleged therein to be owners of the land, which was subject to taxation on the construction of the road. The application was granted, and an appeal to the circuit court was dismissed because the statute under which such proceedings were had did not provide for an appeal from the decision of the commissioners. *Held* that, no affidavit having been filed as required by 1 Gav. & H. St. p. 253, § 31, under which the appeal was allowable, and the persons taking the appeal not being parties to the proceeding before the commissioners, it was properly dismissed.—Jones v. Theiss, 30 Ind. 311.

[h] (Sup. 1870)

An appeal by a petitioner for the establishment of a highway from an order of the board of county commissioners having been taken in term time of the circuit court, all adverse parties before the commissioners were obliged to take notice of the appeal, and were bound to look to their interest in the circuit court; and the omission of the name of one of the appellees from the docket was unimportant.—Smith v. Searce, 34 Ind. 285.

[i] (Sup. 1877)

Though, on appeal from the decision of the county board locating a highway, appellant should cause a summons to be issued out of the circuit court, returnable on the first day of its next term, requiring the appellees to ap-

pear and answer, failure to sue out such summons is not ground for dismissal of the appeal.—*Scraper v. Pipes*, 59 Ind. 158.

[j] (*Sup.* 1883)

Where several persons interested filed separate remonstrances on the ground that the proposed road will not be a public utility, one of them may appeal from the order made against him by filing bonds with his co-remonstrator as his surety.—*Leffel v. Obenchain*, 90 Ind. 50.

[k] (*Sup.* 1890)

Under Rev. St. 1881, § 5772, which provides that any person aggrieved by a decision of the county commissioners may appeal to the circuit court, but, if such person is not a party to the proceeding, such appeal shall not be allowed, unless he shall file an affidavit showing his interest in the matter, a person who is named in a petition for opening a highway as one whose land is to be taken therefor need not file such an affidavit in order to appeal from an order establishing such highway, since he is a party to the proceeding.—*Wilson v. Wheeler*, 125 Ind. 173, 25 N. E. 190.

[l] (*Sup.* 1886)

Rev. St. 1894, § 6754 (Rev. St. 1881, § 5027), providing that any person aggrieved by the decision of the board of commissioners in laying out a highway may appeal therefrom, and that, in case proceedings be had in more than one county, the auditors of each county, on being notified of such appeal, shall transmit to the court to which the appeal is taken all the proceedings in such county, and upon the determination of such appeal such clerk shall notify the auditors of all the counties interested therein, does not make each appeal a separate case, which must be brought up on a separate transcript of the record.—*Glassburn v. Deer*, 41 N. E. 376, 143 Ind. 174.

Under Rev. St. 1894, § 6754 (Rev. St. 1881, § 5027), providing for appeals from any decision of the board of commissioners in laying out a highway, and the filing by appellants of a bond with surety, a bond given by one appellant, with another appellant as surety, is sufficient.—*Id.*

[m] (*Sup.* 1899)

That parties not appealing were not duly summoned on the appeal is immaterial, when the appeal is taken in term time, as Rev. St. 1881, § 5775 (Burns' Rev. St. 1894, § 7862; Horner's Rev. St. 1897, § 5775), requires summons only when appeal is taken in vacation.—*Kirsch v. Braun*, 53 N. E. 1082, 153 Ind. 247.

[n] (*Sup.* 1903)

An appeal from an order of county commissioners establishing a highway cannot be taken after the 30 days limited by Burns' Rev. St. 1901, §§ 7859, 7860.—*Robson v. Richey*, 65 N. E. 1032, 159 Ind. 660.

[o] (*Sup.* 1909)

Where the court allows the filing of a substituted bond, it is not required that the sub-

stituted bond be signed by the same persons who signed the original bond, and there is no presumption that it is so signed.—*Fowler v. Newsom*, 90 N. E. 9.

By granting leave to appellants to file such substituted bond and approving it when filed, the circuit court necessarily found that an appeal bond had been filed, and approved by the auditor within the required time.—*Id.*

The granting of leave to file such substituted bond, and approving it when filed, was equivalent to a finding that the bond was sufficient, and complied with the statute.—*Id.*

Where a petition in highway proceedings is signed by several persons, and an appeal from the judgment of the board of commissioners is taken by one of those persons, another petitioner may sign the appeal bond as a surety.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. HIGH. §§ 177-198, 200-203.

§ 58 (6). *Record and proceedings not in record.*

[a] (*Sup.* 1863)

The circuit court cannot entertain an appeal from the board of commissioners in a matter relating to highways unless the original papers before the board are brought also before the court.—*Purviance v. Drover*, 20 Ind. 238.

[b] (*Sup.* 1870)

A ruling of the circuit court dismissing an appeal from the board of county commissioners in a proceeding to change the location of a highway cannot be presented to the supreme court except by a bill of exceptions.—*Burntrager v. McDonald*, 34 Ind. 277.

[c] (*Sup.* 1877)

Under 2 Rev. St. 1876, p. 177, §§ 345, 346, a motion to dismiss an appeal from an order of the board of commissioners to the circuit court can be made part of the record only by a bill of exceptions, or by order of the circuit court; and only by such bill will the action of that court thereon be reviewed by the Supreme Court.—*Scotten v. Divilbiss*, 60 Ind. 37.

[d] (*Sup.* 1879)

Error alleged on an appeal in highway proceedings that the court erred in rendering judgment that the highway should be opened is not sustained by the record, which fails to show that the court rendered any such judgment.—*Turley v. Oldham*, 68 Ind. 114.

[e] (*Sup.* 1881)

An appeal to the supreme court from a decision of the circuit court dismissing an appeal from an order of a board of commissioners for the opening of a highway will only review what occurred in the circuit court; and therefore, where a bill of exceptions recites the proceedings which resulted in a dismissal of the

appeal, but fails to state the grounds upon which the appeal was dismissed, or to assign any reason for dismissing it, all the presumptions must be indulged in favor of the decision below dismissing the appeal.—Cox v. Lindley, 80 Ind. 327.

[f] (Sup. 1882)

Upon an appeal from an order of a board of highway commissioners establishing a highway, only such issues and questions are open in the circuit court as were before the board, except such as are properly raised by amendment.—Green v. Elliott, 86 Ind. 53.

[g] (Sup. 1890)

Where, on appeal from the decision of county commissioners laying out a highway, no affidavit of interest appears among the files, or in the transcript, which the law requires the county auditor to make full and complete, it will be presumed, in the absence of any showing to the contrary, that no such affidavit was filed.—Wilson v. Wheeler, 125 Ind. 173, 25 N. E. 190.

[h] (App. 1902)

Where, on appeal from a decision locating a highway, appellant makes affidavit showing that H. was a member of the board of county commissioners, and, when the proceedings were pending before it, owned real estate that would be affected by the improvement, but the record shows that all the proceedings were had before the other two members of the board, and contains an entry that H., being the owner of such land, declined to act, the record must control.—Renard v. Grande, 64 N. E. 644, 29 Ind. App. 579.

[i] (Sup. 1909)

Burns' Ann. St. § 7793, providing that persons aggrieved by any decision in highway proceedings may appeal to the circuit court by filing a bond, and section 6023, providing that within 20 days after the filing of such bond, the auditor shall make out a complete transcript of the proceedings, and deliver the same and the bond to the clerk of court to which the appeal is taken, do not require that the record of the proceedings before the board of commissioners or the transcript filed by the auditor in the circuit court should show that an appeal was taken from the decision of the board to the circuit court, or that the appeal bond should be incorporated or mentioned in said record or transcript.—Fowler v. Newsom, 90 N. E. 9.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 177-198, 200-203.

§ 58 (7). *Effect of appeal.*

[a] (Sup. 1879)

Where an appeal is taken to the circuit court from an order of a board of commissioners for the location of a highway as the case

stands for trial de novo, the reports of the reviewers are thereby vacated.—Turley v. Oldham, 68 Ind. 114.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 177-198, 200-203.

§ 58 (8). *Hearing and determination of cause in general.*

[a] (Sup. 1856)

The object of an appeal to the circuit court from an order of the county commissioners laying out a road is to give the party the benefit of a trial on questions of fact in a court where a jury can be called; and it follows that the appointment of reviewers by the circuit court was irregular, and that their report was properly set aside.—Kemp v. Smith, 7 Ind. 471.

[b] (Sup. 1883)

On appeal to the circuit court from the decision of highway commissioners, the case stands as if originally instituted there to be tried on its merits; and an inquiry as to what was proved before the commissioners is not legitimate, nor need the transcript of their proceedings contain any of the proofs adduced before them.—Brown v. McCord, 20 Ind. 270.

[c] (Sup. 1875)

The practice on appeal to the circuit court in proceedings to lay out and establish a highway is not to appoint viewers, but to try the case de novo in the circuit court by the court or a jury.—Hays v. Parrish, 52 Ind. 132.

[d] (Sup. 1877)

Where, in a proceeding to establish a highway, one appeal is taken from the order locating it, and another from an order of the board approving the report of reviewers as to damages, they should be consolidated as constituting one cause.—Jamieson v. Board of Com'rs of Cass County, 56 Ind. 466.

[e] (Sup. 1880)

An appeal from an order of the county board establishing or relocating a highway is, by 1 Rev. St. 1876, p. 357, § 36, placed on the same footing as an ordinary civil action, and a change of venue from the judge for cause may be granted therein.—Schmied v. Keeney, 72 Ind. 309.

[f] (Sup. 1882)

On appeal from the proceedings of a county board in locating a highway, it is error to refuse to allow a party to show that the county board unlawfully prevented him from filing a remonstrance.—Breitweiser v. Fuhrman, 88 Ind. 28.

[g] (Sup. 1883)

On appeal from proceedings before a board of commissioners for the establishment of a highway, where the remonstrance, having been amended in the circuit court, is for damages

only, the remonstrant is entitled to open and close.—*Peed v. Brennenman*, 89 Ind. 252.

[h] (Sup. 1883)

Since the proceedings before a board of commissioners to establish a highway are set aside by appeal to the circuit court, and the issues are tried de novo, a motion to set aside such proceedings is useless.—*Dillman v. Crooks*, 91 Ind. 158.

[i] (Sup. 1885)

The petition for establishing a highway need not be offered in evidence in proceedings in the circuit court on appeal from a decision of the board, as it is a paper in the case, as the complaint is in an ordinary action.—*Washington Ice Co. v. Lay*, 103 Ind. 48, 2 N. E. 222.

[j] (Sup. 1891)

On appeal in proceedings to establish a highway, the circuit court properly refused to allow appellant to file a plea in abatement alleging that less than six persons signing the petition resided in the neighborhood, since he had a right to contest the jurisdiction without filing any plea.—*Irwin v. Armuth*, 129 Ind. 340, 28 N. E. 702.

[k] (Sup. 1892)

Rev. St. 1881, § 5095, provides that the county commissioners, on return of the report of the viewers appointed by them in proceedings for the construction of roads, shall not make an order for such improvement "until a majority of the resident landholders of the county whose lands are reported as benefited and ought to be assessed, and also the owners of the majority of the whole number of acres of all the lands that are reported as benefited and ought to be assessed, shall have subscribed the petition" asking for such improvement. *Held*, where an appeal was taken to the circuit, and the cause tried there by a jury, who returned a special verdict, on which judgment was entered for the petitioners, that such verdict need not show that all the landowners in the county whose lands were benefited signed the petition, regardless of the fact that they had not been included in the report of the viewers, but was sufficient if it showed that the names and acres designated therein constitute a majority of the names and acres reported by the viewers as benefited.—*Fulton v. Cummings*, 132 Ind. 453, 30 N. E. 949.

On trial of an appeal from an order of the board of highway commissioners allowing a highway, it was not error for the court to permit the petitioners to read to the jury the report of viewers, with a plat of the lands reported benefited attached as an exhibit, where the court instructed that the contents of these papers were not evidence of the facts therein contained, as such report was one of the papers in the case, and fixed the limit of the territory to be assessed, and without which the jury

could not have intelligently applied the evidence.—*Id.*

FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. High. §§ 177-19203.

§ 58 (9). *Scope and extent of review.*

[a] (Sup. 1862)

The necessary papers of record in the case are operative in the appellate court to establish a prima facie case, at least, for the party whose favor they are; and, if reviewed by the court, appointed, no proof of the notices required to be made on appeal.—*Daggy v. Coats*, 19 Ind. 203.

On appeal from the order of the county commissioners to the common pleas, no new evidence can be introduced in favor of or against the proposed highway, as matter of right, but the cause must be tried on the papers on file, if it is tried before the commissioners' court, no new viewers or reviewers can be appointed except by mutual consent.—*Id.*

[b] (Sup. 1865)

When the report of the viewers is silent concerning an "inclosure" found on the land for a proposed road, it will be presumed that there is none, or that the owner has given the necessary consent required.—*Crossley v. O'Brien*, 24 Ind. 87, 37 Am. Dec. 329.

Where, on appeal on a proceeding to establish a highway, in which the report of the viewers is silent as to the interference of such way with inclosures, the questions of damages and damages only are submitted to the jury, and the remonstrants do not ask that the question concerning inclosures shall be also submitted, it is too late afterwards to raise an objection about it.—*Id.*

[c] (Sup. 1876)

On appeal to the circuit court in a proceeding to establish a highway, the report of the viewers appointed by the county commissioners cannot be called in question.—*Vawter v. Land*, 55 Ind. 278.

[d] (Sup. 1877)

On appeal in a proceeding for the location of a highway, an agreement entered into by the viewers, on record that with certain specified objections the matters are regular is a waiver of all irregularities prior to such entry, except those specified.—*Sowle v. Cosner*, 56 Ind. 276.

[e] (Sup. 1879)

Where, on appeal to the circuit court from a proceeding for a highway, the verdict is that the road will be of public utility, and no damage to one, the Supreme Court will not disturb the action of the circuit court; the evidence being conflicting.—*Spencer v. R. Co.*, 60 Ind. 603.

[f] (Sup. 1880)

Where the remonstrance is against the public utility of the proposed road and on

of damages, two issues are presented which must be tried by the circuit court on appeal from the commissioners.—*Schmied v. Keeney*, 72 Ind. 309.

[g] (Sup. 1884)

Where, on appeal from highway commissioners, a jury is sworn in the circuit court and evidence introduced, the remonstrants cannot file a plea alleging disqualification of some of the petitioners of the highway.—*Denny v. Bush*, 95 Ind. 315.

[h] (Sup. 1888)

An order refusing a motion for a venire de novo on a petition for a public highway will not be disturbed when the verdict covers the issues which were before the county board, and there is no affirmative showing of prejudicial error.—*Mathews v. Droud*, 114 Ind. 268, 16 N. E. 599.

[i] (Sup. 1892)

Where proceedings for laying out a highway were had before the board of commissioners without objection, on appeal to the circuit court there was no abuse of discretion in refusing to permit a remonstrance to be filed on an affidavit showing that the attorney employed by the remonstrator employed another attorney to appear and make the proper defense before the commissioners, and that such attorney neglected to do so.—*Indianapolis, D. & W. R. Co. v. Hood*, 130 Ind. 594, 30 N. E. 705.

[j] (Sup. 1892)

On appeal in a proceeding to establish a road, the appellants cannot complain of insufficient descriptions of lands not belonging to them.—*Fulton v. Cummings*, 30 N. E. 949, 132 Ind. 453.

[k] (Sup. 1902)

In a proceeding for the opening of a highway, the circuit court's refusal to open the issues and permit a motion made on the trial of a remonstrance for damages to be filed after one trial of the appeal had been had, and after the case had been sent to another county for retrial, and a large amount of costs had been accumulated, was a proper exercise of discretion, and not reviewable.—*Fifer v. Ritter*, 64 N. E. 463, 159 Ind. 8.

[l] (App. 1902)

Where, on an appeal from an order establishing a highway, the issue was as to public utility, and the evidence was conflicting, the questions as to credibility and weight of evidence were for the jury; and its conclusion, when approved by the trial court, will not be disturbed on appeal.—*Raab v. Roberts*, 64 N. E. 618, 65 N. E. 191, 30 Ind. App. 6.

[m] (App. 1904)

Though a verified motion was filed in the circuit court to strike out the report of highway viewers for want of a sufficient description of the highway, and alleged that the description

in the report was written after the report was filed, without the viewers' consent, an order overruling such motion would be presumed correct on appeal in the absence of a bill of exceptions showing what evidence was introduced in support of the motion.—*Merom Gravel Co. v. Pearson*, 69 N. E. 694, 71 N. E. 54, 33 Ind. App. 174.

[n] (Sup. 1909)

In highway proceedings, remonstrators have no right to complain of instructions concerning questions and issues to which they were not parties.—*Ætna Life Ins. Co. v. Jones*, 89 N. E. 871.

FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. HIGH. §§ 177-198, 200-203.

§ 58 (10). *Dismissal of appeal.*

[a] (Sup. 1875)

It is not a sufficient ground for dismissing the case in the circuit court that one who filed a petition before a county board to lay out and establish a highway, in whose name, with the names of other petitioners, the case was conducted before such board and in the circuit court on appeal, did not sign the petition.—*Hays v. Parrish*, 52 Ind. 132.

[b] (Sup. 1877)

A motion to dismiss an appeal to the circuit court from an order of a highway board need not be made in writing. If causes therefor are so presented, additional ones may still be assigned orally.—*Scotten v. Divilbiss*, 60 Ind. 37.

[c] (Sup. 1893)

The want of jurisdiction of the board clearly appearing by the record, a motion to dismiss the case on an appeal from the action of the board in approving the report of the commissioners was properly granted.—*Millisor v. Wagner*, 133 Ind. 400, 32 N. E. 927.

[d] (Sup. 1908)

Where appellees signed only their surnames and initials to a petition for highway improvements, they may not require the appeal to be dismissed because the assignment of errors describes them in the same manner and does not set out their full names, as required by the Supreme Court rules.—*Hall v. McDonald*, 171 Ind. 9, 85 N. E. 707.

[e] (Sup. 1909)

Though a bond for costs should have been filed before any action by the county board on the second petition for the establishment of a highway over a route previously found not to be of public utility (*Burns' Ann. St. 1901*, § 6753; *Acts 1879*, p. 148, c. 57), where the bond is filed while the proceedings are before the board, the circuit court on appeal should refuse to dismiss for failure to file the bond at the proper time.—*McKaig v. Jordan*, 172 Ind. 84, 87 N. E. 974.

[f] (Sup. 1909)

Before a motion to dismiss an appeal in highway proceedings on the ground that no appeal bond was filed was heard, appellants filed an affidavit showing that an appeal bond had been filed with the county auditor, and that such bond was lost or destroyed, and also filed a written request for permission to file a substituted bond. *Held*, that as there is no statute prescribing the kind of evidence necessary to establish the filing and approval of an appeal bond in similar cases, nor the manner of proving such filing or approval, the same may be established by affidavit, and appellants were not required to prove the same by affidavit of the county auditor or the surety on the bond, but appellees could show by the affidavit of the county auditor that no such bond was ever approved by him.—*Fowler v. Newsom*, 90 N. E. 9.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 177-198, 200-203.

§ 58 (11). *Determination and disposition of cause.*

[a] (Sup. 1864)

An order for the location and opening of a highway should specify the width thereof; but where such a defect exists in an order, and does not conflict with the rights of an appellant to this court, it will not be made the ground of a reversal, but the cause will be remanded to the lower court for the correction of its order in that respect.—*Sidener v. Esser*, 22 Ind. 201.

[b] (Sup. 1867)

The circuit court must try an appeal from the board of commissioners, in a proceeding for the location of a highway, as an original cause, and may either execute its own judgment, or send the case down to the board with directions to execute the judgment.—*McPherson v. Leathers*, 29 Ind. 65.

[c] (Sup. 1870)

On appeal by petitioners for the establishment of a highway from an order of the board of county commissioners refusing to pay the damages assessed by viewers to one through whose land the road would run, the entire proceeding goes to the appellate court, which has full power to make a final disposition thereof.—*Smith v. Scearce*, 34 Ind. 285.

[d] (Sup. 1877)

Where, on appeal of highway proceedings to the circuit court, there is a finding that the proposed highway is of public utility, and damages are assessed in favor of a remonstrant, it is not error in the court to leave it to the option of the board of commissioners to pay such assessment.—*Jamieson v. Board of Com'rs of Cass County*, 56 Ind. 466.

[e] (Sup. 1877)

On appeal to the circuit court from the decision of the board of county commissioners locating a highway, the verdict of the jury or

decision of the court must embrace a finding of all the facts which the board would have required to find to entitle the petitioner to a highway.—*Scraper v. Pipes*, 59 Ind. 13.

[f] (Sup. 1883)

Where an order is made establishing a highway, and, on the refusal of the county commissioners to pay damages, a remonstrant appeals to the circuit court, which finds the remonstrant is entitled to damages, and refers the case back to the commissioners to make the road, if they should deem the road of sufficient importance, the commissioners, by refusing to open the road and pay the damages out of the county treasury, do not lose the validity of the proceeding, so as to be precluded from entertaining a subsequent petition to open the road on the payment by the petitioners of the damages.—*Wilkinson v. Bixler*, 88 Ind. 13.

[g] (Sup. 1886)

In a special finding made by the circuit court on an appeal in a highway case, it is not necessary to state in detail the proceedings taken before the board of commissioners, if, indeed, it is proper to state them.—*Lowe v. Brannan*, 105 Ind. 247, 4 N. E. 184.

[h] (Sup. 1886)

Where the board of commissioners has properly acquired jurisdiction, no irregularity in their subsequent proceedings is caused by the missing the petition in the circuit court, if such irregular proceedings are vacated on appeal.—*Black v. Thomson*, 107 Ind. 13, 4 N. E. 184.

[i] (Sup. 1888)

A motion to the circuit court, pending the proceedings therein, for an order to compel the board of commissioners to correct its record, is not overruled, as an appellate court has no power to compel an inferior court to correct its record on appeal; the remedy being by application to the board of commissioners for that purpose to the board of commissioners.—*Wells v. Rhodes*, 114 Ind. 467, 4 N. E. 830.

[j] (Sup. 1891)

Where in a proceeding to establish a highway before commissioners a remonstrant alleges the ground that the highway would be of no public utility is dismissed, and on appeal the remonstrant alleges the same objection, a general verdict finding that the proposed highway would be of public utility, and that the remonstrant is sufficient.—*Potter v. McCormack*, 124 Ind. 439, 26 N. E. 883.

[k] (App. 1901)

On appeal from an order of the board of commissioners establishing a highway, the circuit court has power to make a final disposition of the case, or send it back to the board with an order how to proceed.—*Woods v. Brown*, 61 N. E. 946, 27 Ind. App. 63.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 177-198, 200-203.

**§ 59. — Hearing de novo.**

[a] On appeal to the circuit court from the decision of the county board locating a highway, there must be a trial de novo.—(Sup. 1848) *Malone v. Hardesty*, 1 Ind. 79, Smith, 53; (1855) *Moore v. Smock*, 6 Ind. 392; (1877) *Scraper v. Pipes*, 59 Ind. 158; (1879) *Bowers v. Snyder*, 66 Ind. 340; (1880) *Schmied v. Keeney*, 72 Ind. 309; (1886) *Black v. Thomson*, 107 Ind. 162, 7 N. E. 184.

[b] (Sup. 1868)

Proof of the posting up of notice of a petition for the location of a highway may be made before the board of commissioners by affidavit, and the same mode of proof is admissible on appeal.—*Wright v. Wells*, 29 Ind. 354.

[c] (Sup. 1876)

In proceedings to locate a highway on the trial in the circuit court after appeal by remonstrants from the order of the county board, the jury may be allowed to view the premises, under 2 Rev. St. p. 169, § 328.—*Coyner v. Boyd*, 55 Ind. 166.

[d] (Sup. 1876)

Where, from the order of a board of commissioners locating a highway, a remonstrant has appealed to the circuit court, the cause there stands for trial de novo; and neither the reports of the viewers and reviewers appointed by such board to view the location of the proposed highway nor certified copies thereof are competent evidence on such trial.—*Coyner v. Boyd*, 55 Ind. 166; *Freck v. Christian*, Id. 320.

[e] (Sup. 1878)

Where a remonstrant against the opening and establishing of a highway is not allowed damages on appeal from the decision of the board of county commissioners, such board is not a necessary or proper party, the petitioners for the highway are the proper plaintiffs, and the remonstrants, or those who oppose the petition, are the proper defendants.—*Board of Com'rs of Grant County v. Small*, 61 Ind. 318.

[f] (Sup. 1881)

On an appeal from the decision of the commissioners of the circuit court by the express requirement of the law, the case is to "be heard, tried and determined as an original cause," (1 R. S. 1876, p. 357, § 36), and, on such hearing, the previous orders of the board and the reports of viewers have no significance.—*Grimwood v. Macke*, 79 Ind. 100.

[g] (Sup. 1882)

On appeal to the circuit court from proceedings of the board of county commissioners establishing a highway, it is not required that the proceedings and proof be the same as before the county board, but the matter to be tried de novo is the matter which was in controversy before the county board, unless the issues be amended in the circuit court, and hence the petitioners are not required to prove in the circuit court matters upon which no issue was made below, or matters the regularity of which

was either expressly or impliedly admitted in the hearing before the commissioners.—*Green v. Elliott*, 86 Ind. 53.

[h] (Sup. 1883)

On an appeal from the location of a highway, the case is tried de novo in the circuit court, and the report of the reviewers is not in issue.—*Clift v. Brown*, 95 Ind. 53; *Fleming v. Hight*, Id. 78.

[i] (Sup. 1884)

Where, in proceedings for the opening of a highway, an owner introduced witnesses who testified to the value of his land that would be taken for the highway, together with the cost of constructing additional fences, together with the fact that the market value of his land would not be increased by the proposed highway, it was not reversible error to permit evidence showing that a specified number of acres of the owner's land would be increased in market value by reason of the proposed road.—*Lowe v. Ryan*, 94 Ind. 450.

[j] (Sup. 1885)

A verdict in the circuit court, on trial of proceedings to locate a highway, finding that it will be of public utility to have the proposed highway established and opened "as prayed for by the plaintiffs in their petition," sufficiently describes the proposed highway. Even if defective, the defect is cured by a judgment.—*Thayer v. Burger*, 100 Ind. 262.

Where the proceeding to locate a highway is tried on its merits in the circuit court on appeal from the board of commissioners, and the verdict is defective in form, the proper method of reaching the defect is by motion for a venire de novo.—Id.

[k, l] (Sup. 1885)

An appeal to the circuit court in a proceeding to establish a highway brings up the case for trial de novo, and the reports of the viewers and reviewers cease to be affected.—*Burns v. Simmons*, 1 N. E. 72, 101 Ind. 557.

[m] (Sup. 1898)

In proceedings to establish a highway, the ultimate fact of utility on appeal of the proceedings to the circuit court is to be determined by the court or jury trying the issue from all the evidence relative thereto, including legitimate inferences from facts and circumstances in evidence.—*Fritch v. Patterson*, 49 N. E. 380, 149 Ind. 455.

[n] (Sup. 1902)

A motion made on a trial of a remonstrance for damages in proceedings for the opening of a highway is not open to review, where not renewed on appeal to the circuit court; the cause being there triable de novo.—*Fifer v. Ritter*, 64 N. E. 463, 159 Ind. 8.

[o] (App. 1902)

On an appeal in the circuit court from an order of the board of commissioners establishing a highway, the case stands for trial as other

causes; the petition and report of reviewers being considered the complaint, and the remonstrance as the answer; and the facts therein controverted are the issues to be tried.—*Raab v. Roberts*, 64 N. E. 618, 65 N. E. 191, 30 Ind. App. 6.

[p] (*App.* 1904)

Where, in proceedings for the establishment of a highway, objector moved to strike the finding and report of viewers that the proposed highway would be of public utility, etc., and from an order establishing the highway objector appealed, and in the circuit court renewed its motion to strike out the report, which motion was again overruled, whereupon it filed an answer, which denied only the public utility of the proposed highway, the refusal of the court to submit any other question than that of public utility was proper.—*Merom Gravel Co. v. Pearson*, 69 N. E. 694, 71 N. E. 54, 33 Ind. App. 174.

[q] (*Sup.* 1905)

On appeal to the circuit court from the order of the board of commissioners establishing a highway, the burden is on the petitioners to establish that the proposed highway will be of public utility, and upon each of the remonstrators to prove his individual damages.—*Heath v. Sheetz*, 74 N. E. 505, 164 Ind. 665.

[r] (*Sup.* 1903)

No question of former adjudication having been properly put in issue before the board of commissioners, so that such question could not be raised on appeal to the circuit court, the striking out of answers filed in such court attempting to raise such question was a proper way of disposing of them.—*Kinzer v. Brown*, 170 Ind. 81, 83 N. E. 618

[s] (*Sup.* 1908)

Under Acts 1905, p. 524, c. 167, § 10, amending Rev. St. 1881, § 5024, by adding a proviso allowing an appeal to the circuit court from an order dismissing a petition to establish a highway, an adverse report of the viewers is not binding upon the circuit court, but on appeal the cause is there heard de novo and determined on its merits on all the issues raised before the commissioners.—*Kelley v. Augsperger*, 171 Ind. 155, 85 N. E. 1004.

[t] (*Sup.* 1909)

Since, under Acts 1905, p. 579, c. 167, on retrial in the circuit court on appeal from a decision of the commissioners as to a highway, reports by the reviewers may be considered as evidence, it was proper to instruct that the reviewers found for the utility of a highway and assessed damages to a remonstrator, though the amount of damages was stated.—*Sterling v. Frick*, 171 Ind. 710, 86 N. E. 65, 87 N. E. 237.

[u] (*Sup.* 1909)

Under Highway Act 1905, § 123 (Laws 1905, p. 579, c. 167), providing that the appeal in highway proceedings shall be tried de novo, and that every report of viewers or of any com-

mittee "shall be considered in evidence on appeal," on the trial of a highway proceeding on appeal the reports of the viewers to the county board could be taken to the jury.—*McKaig v. Jordan*, 172 Ind. 84, 87 N. E. 871.

[v] (*Sup.* 1909)

Acts 1905, p. 579, c. 167, § 123 (Laws 1905, p. 579, c. 167, § 123) (Laws 1908, § 7793), providing that the reports of viewers in highway proceedings shall be considered in evidence on appeal, does not require such reports to be given in evidence if they are in evidence, whether formally introduced or not.—*Etna Life Ins. Co. v. Jones*, 172 Ind. 84, 87 N. E. 871.

[w] (*Sup.* 1909)

Under Burns' Ann. St. § 7793, providing that, on an appeal to the circuit court in highway proceedings, every report made to the board of commissioners by viewers or reviewers or by any commissioner or officer under the provisions of this act shall be considered in evidence on such appeal, the report need not be formally introduced in evidence.—*Fowler v. Newsom*, 90 N. E. 871.

[x] (*Sup.* 1910)

Burns' Ann. St. 1908, § 7663, providing that no highways shall be laid out less than 30 feet wide, and requires the order laying out a highway to specify its width. On appeal from the order of a board of commissioners establishing a highway, the verdict of the jury was that the petitioners signed by 12 freeholders, 6 of whom resided within the immediate neighborhood of the proposed highway, and that it would be a public utility, and that neither of the remonstrators had sustained any damages. Held, that the verdict sufficiently covered the issues, the proposed route of the proposed road having been given in the petition, and the same having been laid out 30 feet in width by the viewers, and the provisions of the statute having been fully complied with in the order and judgment of the court.—*Glendenning v. Stahley*, 91 Ind. 234.

On proceedings for the establishment of a highway, an instruction that property appropriated and used for a public highway was not subject to taxation was not erroneous; taxation being prohibited by Burns' Ann. St. 1908, § 10,257.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. § 199.

## § 60. Certiorari to review proceedings

[a] (*Sup.* 1908)

Under the gravel road law (Burns' Rev. St. 1894, §§ 6879-6889) certiorari will not lie to review the determination of the board of commissioners that the petition is signed by a majority of the property holders within two miles of the proposed road.—*Gifford v. Board of Commissioners*, 67 N. E. 509, 160 Ind. 65.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 204-210.

**§ 61. Costs and expenses of proceedings.****[a] (Sup. 1858)**

In an appeal from the decision of the board ordering a road to be laid out and damages paid from the treasury, the county, through the board, who are defendants in the court of appeal, is liable for costs, as any other defendant, and not those who petitioned for the road.—*Board of Com'rs of Switzerland County v. Hedges*, 11 Ind. 291.

**[b] (Sup. 1877)**

Where, on the trial of a highway appeal, there is a finding establishing such highway, but allowing damages therefor to such remonstrant, the costs accruing from the trial of the former issue should be assessed against such remonstrant, and that accruing upon the latter against the petitioners.—*Jamieson v. Board of Com'rs of Cass County*, 56 Ind. 466.

**[c] (Sup. 1882)**

A remonstrant against the establishment of a highway, who, on appeals from the county commissioners, obtains a dismissal for want of jurisdiction, is entitled to judgment against petitioner for the costs accrued in the circuit court on appeal, as well as before the board.—*Dyer v. Board of Com'rs of Steuben County*, 84 Ind. 542.

**[d] (Sup. 1885)**

Under Rev. St. 1881, §§ 5091, 5092, providing that on petition for a gravel road, "and the filing of a bond \* \* \* conditioned for the payment of expenses of preliminary survey and report if the proposed improvement shall not finally be ordered," the commissioners shall order a survey, *held*, that where, pending proceedings, the commissioners have, for good cause, revoked an order establishing the road, the signers of the bond are as liable as if no such order was made.—*Scott v. Board of Com'rs of Vermillion County*, 101 Ind. 42.

**[e] (App. 1891)**

Rev. St. 1881, § 5096, concerning the proceeding to secure free gravel roads, which provides that "the cost and expense of the preliminary survey, proceedings, and report of said improvement shall be paid out of the county treasury, and be refunded, as well as all other amounts advanced by the county for the preliminary expenses of such improvement," does not empower the county commissioners to order the payment of attorney's fees for services rendered to the petitioners.—*Board of Com'rs of Rush County v. Cole*, 2 Ind. App. 475, 28 N. E. 772.

**[f] (App. 1898)**

*Burns' Rev. St. 1894*, § 6924 et seq., provides for the construction of roads by county commissioners on a petition, and after the report of the appraisers, and notice that the question is to be voted on at a certain election, have been published in some newspaper, on the order of the commissioners. The petitioners are required to pay all costs of the election. The ninth section provides for a certain compensa-

tion for persons employed under the act (naming surveyors, etc.) to be payable out of a county fund. *Held*, that the expense of publishing the notice of election was not chargeable to the county under the ninth section, but was chargeable to the petitioners.—*Walker v. Board of Com'rs of Hamilton County*, 49 N. E. 1078, 19 Ind. App. 668.

**[g] (Sup. 1909)**

Under *Burns' Ann. St. 1901*, § 6753 (Acts 1879, p. 148, c. 57), providing that, where viewers shall report that the proposed location of a highway would not be of public utility, no second petition for the location on the same route shall be acted on unless petitioners file a bond for costs, it is within the discretion of the board to allow such bond to be filed after approval of the report of the viewers on a second petition.—*McKaig v. Jordan*, 172 Ind. 84, 87 N. E. 974.

**FOR CASES FROM OTHER STATES.**

SEE 25 CENT. DIG. High. §§ 107, 214-221.

**§ 62. Conclusiveness of decision.****[a] (Sup. 1878)**

Upon a report of the viewers that a highway will be of public utility, etc., and a remonstrance and review, with like result, the order of the board, if no appeal was seasonably taken, can only be impeached by showing it to be void.—*Suits v. Murdock*, 63 Ind. 73.

**[b] (Sup. 1884)**

A judgment directing the establishment of a new and the vacation of an old highway is not one that the board of commissioners can set aside or grant at their pleasure, and, when an order has been made establishing the new one, the authority of the commissioners is exhausted, and they have no right to change or vacate it nor to ignore it.—*Kyle v. Board of Com'rs of Kosciusko County*, 94 Ind. 115.

**[c] (Sup. 1885)**

A decision of the county board that public utility did not require the board to open a new highway is not a bar to a subsequent proceeding to have a road entered of record on the same line as an existing highway by reason of a 20 years' user.—*Washington Ice Co. v. Lay*, 103 Ind. 48, 2 N. E. 222.

**[d] (Sup. 1906)**

The board of commissioners being the only judge created by the Legislature to determine whether its right to proceed on a petition to establish a gravel road, as provided by Acts 1903, p. 255, c. 145, has attached by having presented to it such a petition and notice thereof as the act requires as a prerequisite to its jurisdiction, the finding of the board that jurisdiction existed in a particular case is conclusive.—*Todd v. Crail*, 77 N. E. 402, 167 Ind. 48.

**[e] (Sup. 1908)**

No question of former adjudication was properly put in issue before the board of com-

missioners in proceedings to open a highway, the matter, when the answer of former adjudication was filed before the board, being pending on the petition and the proof of notice, at which time the board, having found in favor of petitioners on the jurisdictional facts, had, under Burns' Ann. St. 1901, § 6742, in that connection but one duty to perform—the appointment of viewers—making proper the action of the board in striking the answer from the files as containing matter wholly impertinent to the step about to be taken, and, after the coming in of the viewers' report, at which time only could such an answer have been considered by the board, the remonstrators having submitted no such issue, but praying that reviewers be appointed to assess the damages.—*Kinzer v. Brown*, 170 Ind. 81, 83 N. E. 618.

The answer, in the nature of a plea of former adjudication, in a proceeding to locate a highway, that on the hearing of a former petition for the establishment of a highway along the same line the board of commissioners, after the coming in of the report of the reviewers, had assessed remonstrators' damages, and had ordered that the highway be opened as soon as such damages were paid, is insufficient, as the board had no power, in anticipation that the damages would be paid, to order that on such payment the highway be opened, and therefore, the highway not having been established, so that remonstrators were not bound by the award, the matter was not adjudicated as to the public, as estoppels must be mutual.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 166, 167.

### § 63. Collateral attack.

[a] (Sup. 1880)

The fact that in the petition and notice the Christian names of landowners were not given, but only initial letters, and the owners of one of the tracts were described as the "Bryant heirs," *held* not to render the order establishing the highway void when attacked collaterally.—*Miller v. Porter*, 71 Ind. 521.

The existence or nonexistence of a highway which, in pursuance of a valid order of the county board for its establishment, has been actually opened and put into use as such, should not be brought into question collaterally on account of any alleged irregularity of conduct on the part of the supervisor in the opening thereof.—*Id.*

[b] (Sup. 1880)

A defect in a petition for opening a highway in that it describes some of the owners of lands by the initials of their Christian names and others as "W.'s heirs," and "B.'s heirs," etc., is not such as to invalidate the proceedings on collateral attack.—*Porter v. Stout*, 73 Ind. 3.

[c] (Sup. 1883)

Where the board of commissioners acquired and held complete jurisdiction of proceedings in the establishment of a highway, the same liberal presumptions must be held in favor of the regularity and legality of the proceedings and order as are in favor of judgments and proceedings of general jurisdiction. Such orders, when held final and conclusive, even though afterwards, when attacked collaterally.—*McIntyre v. Board of Com'rs of Carroll County*, 8 Ind. 534.

[d] (Sup. 1883)

It cannot be alleged, by way of defense, to an attack on the proceedings of a board of commissioners in opening a highway, that no notice was given as provided by statute, when the board's record shows that notice was given.—*Heagy v. Black*, 90 Ind. 534.

Rev. St. 1881, § 5015, providing that whenever 12 freeholders, etc., shall petition the board for the location, vacation, or change of any highway, such board, if it shall be satisfied that due notice of such application has been given by publication, etc., shall appoint three persons to view such highway, and that the giving of the notice of presentation of the petition is a jurisdictional fact, *held*, if the board finds that due notice was given as provided by the statute, and has proceeded by appointing viewers, the decision in regard to notice is conclusive.—*Id.*

Rev. St. 1881, § 5016, relating to the location of a highway, provides that if the viewers shall find that a highway is to be located, or the character of a highway of public utility, they shall lay out the same on the best ground, and mark the same on the best ground, and that no proceeding through any person's inclosure for a year standing without the owner's consent, unless, on examination, a good way can be had." *Held*, that the one-year standing of the passing of the road through the inclosure of one-year standing without the owner's consent cannot be raised in a collateral attack on the proceedings of the board.—*Id.*

[e] A judgment of the county board of commissioners establishing a highway cannot be successfully attacked collaterally unless it is absolutely void.—(Sup. 1884) *McIntyre v. Rine*, 93 Ind. 193; (1892) *Rassier v. Rine*, 28 N. E. 866, 29 N. E. 918, 130 Ind. 193; (1900) *Helms v. Bell*, 58 N. E. 707, 130 Ind. 502.

[f] (Sup. 1884)

A landowner cannot collaterally attack the proceedings of commissioners establishing a highway over his land on the ground that the owner's or occupant's name was not in the petition or notice, when the description of the route was such that one reading the petition could know the location.—*McIntyre v. McIntyre*, 93 Ind. 193.

[g] (Sup. 1884)

Where the petition in a proceeding to establish a highway is shown to be

as invoked exercise of the jurisdiction of the board of commissioners, and there was notice, the judgment of the board was rendered in a case where it had jurisdiction, and its judgment cannot be collaterally impeached.—*Rutherford v. Davis*, 95 Ind. 245.

[h] (Sup. 1887)

Proceedings and orders of county boards establishing a free gravel road, over which they have jurisdiction, cannot be collaterally impeached unless absolutely void.—*Strieb v. Cox*, 111 Ind. 209, 12 N. E. 481; *Burton v. State ex rel. Baker*, 111 Ind. 600, 12 N. E. 486.

[i] (Sup. 1887)

The presentation to the board of county commissioners of a petition for a free gravel road, not showing want of jurisdiction on its face, calls into exercise the jurisdiction of such board, and their decision cannot be collaterally impeached on the ground that the petition was not signed by the requisite number of competent landholders.—*Ely v. Board of Com'rs of Morgan County*, 112 Ind. 361, 14 N. E. 236.

[j] (Sup. 1887)

A description defining in general terms the line of road, so that a surveyor can trace it, is specific enough to resist a collateral attack.—*Adams v. Harrington*, 114 Ind. 66, 14 N. E. 603.

[k] (Sup. 1892)

Where a collateral attack is made on proceedings of the commissioners' court in highway proceedings, the presumption is in favor of the jurisdiction of such court and of the regularity of such proceedings.—*Ryder v. Horsting*, 29 N. E. 567, 130 Ind. 104, 16 L. R. A. 186; *Chicago & A. Ry. Co. v. Sutton*, 30 N. E. 291, 130 Ind. 405.

[l] (Sup. 1892)

The board of county commissioners assuming jurisdiction over proceedings for the establishment of a highway impliedly affirms the sufficiency of both the petition and notice, and the decision thus made cannot be collaterally attacked.—*Chicago & A. R. Co. v. Sutton*, 30 N. E. 291, 130 Ind. 405.

[m] (Sup. 1892)

Under Rev. St. 1881, § 5092, providing for notice of the time and place of meeting of the viewers in proceedings for the establishment of a highway, it will be presumed in a collateral attack on such proceeding that such notice was given, so that parties interested had an opportunity to appeal to the circuit court.—*Board of Com'rs of Carroll County v. Justice*, 30 N. E. 1085, 133 Ind. 89, 36 Am. St. Rep. 528.

[n] (Sup. 1894)

The regularity of proceedings under Rev. St. 1894, § 6855 (Rev. St. 1881, § 5091), to establish a free gravel road, cannot be collaterally attacked after an order directing the improvement to be made, unless such proceedings were

wholly void.—*Evans v. West*, 138 Ind. 621, 38 N. E. 65.

[o] (Sup. 1896)

The record of the board of commissioners of proceedings before them to establish a highway cannot be collaterally attacked.—*Bowen v. Hester*, 41 N. E. 330, 143 Ind. 511.

[p] (App. 1905)

The establishment of a highway by a board of county commissioners cannot be attacked collaterally because of an irregularity in the proceedings before it, consisting of the withdrawal of the adverse report of viewers, its change by part of them to a favorable report, and its subsequent refile.—*Phillips v. Hutchinson*, 73 N. E. 159, 34 Ind. App. 486.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. § 168.

See, also, 30 Cyc. p. 1380.

## § 64. Restraining opening of road.

[a] (Sup. 1877)

One not a citizen or taxpayer of a town cannot enjoin a supervisor from opening a highway established within the limits of the town by the board of commissioners.—*Sparling v. Dwenger*, 60 Ind. 72.

[b] (Sup. 1883)

In an action to enjoin the location of a gravel road on a line different from that ordered by the county board, the answer did not deny the allegation of the complaint that the road was being opened entirely south of the line prescribed by the order, and did not specifically aver that plaintiff consented to setting the stakes on a line different from that designated in the order, but merely that he consented to the location of the road. *Held*, that the facts alleged did not constitute an estoppel.—*Stewart v. Beck*, 90 Ind. 458.

[c] (Sup. 1884)

Where the description of a highway in the petition and notice therefor and the description of a landowner's land showed that such land was located at the east terminus and on the south side of a highway, and that a 20-foot strip was taken off the north end, there being no averment to the contrary in such land owner's complaint for an injunction to restrain the laying out of a highway, it might be presumed that both the owner and occupant of the land knew its description and that the notice was sufficient to inform them of the highway and of the manner in which it would affect the land.—*McIntyre v. Marine*, 93 Ind. 193.

[d] (Sup. 1884)

A complaint alleging that, under an order of commissioners which was void, the supervisor was about to open a new road cutting plaintiff's farm into irregular tracts, cutting in two his orchard, changing the frontage of his buildings, and necessitating much new fence, shows more than an ordinary trespass, and en-

titles plaintiff to an injunction.—*Erwin v. Fulk*, 94 Ind. 235.

[e] (Sup. 1887)

Where notice of the presentation of a petition for a highway has been given according to law, all parties interested must at their peril give attention to the proceedings which ensue, and if, in the ordinary course of events, any such party fails to receive actual notice of the petition, no cause is thereby afforded for the stay of proceedings by injunction.—*Adams v. Harrington*, 14 N. E. 603, 114 Ind. 66.

No injunction will lie to the establishment of a highway over which the board of commissioners has taken jurisdiction, unless the proceedings are void, or so defective as to be an absolute nullity, and especially where there is an adequate remedy by appeal.—*Id.*.

[f] (Sup. 1888)

Where landowners have opened and dedicated a road which the public authorities have accepted, strangers who have stood by until after such dedication and expenditure by the landowners of money to make it passable cannot enjoin its maintenance on the ground that the supervisor has called out the road labor of the district to make further improvements thereon.—*Sunderland v. Martin*, 113 Ind. 411, 15 N. E. 680.

[g] (Sup. 1888)

An injunction will not lie to restrain the opening of a proposed highway, where the proceedings are not void or so defective as not to afford the information as to the effect the proposed highway would have upon those interested.—*McDonald v. Payne*, 114 Ind. 359, 16 N. E. 795.

[h] (Sup. 1892)

In an action to enjoin the opening of a highway across plaintiff's land, an allegation in the complaint that the county board appointed viewers to appraise the damages that would result to plaintiff from the opening of the highway, and that their report was subsequently approved by the board, gives rise to the presumption that the usual procedure was followed, and that the viewers were not appointed until after plaintiff had appeared and filed his remonstrance; and, as the complaint thus shows that the board had acquired jurisdiction of plaintiff's person, and as it had also jurisdiction of the subject-matter, the injunction must be denied, since the judgment of the board of commissioners cannot be collaterally attacked for any error or irregularity, the remedy being by appeal.—*Rassier v. Grimmer*, 130 Ind. 219, 28 N. E. 866, 29 N. E. 918.

[i] (Sup. 1892)

Although Rev. St. 1881, § 5028, provides that "no county road shall be less than 30 feet wide," the enforcement of an order establishing a road will not be enjoined because the proposed road is to be only 20 feet wide where it borders the boundary of a city, since the order

cannot be collaterally attacked; and it will be presumed, in the absence of allegations to the contrary, that it was intended to make a road of the proper width by co-operating with the city authorities.—*Chicago & A. R. Co. v. Sutton*, 130 Ind. 405, 30 N. E. 291.

[j] (Sup. 1892)

The fact that supervisors of roads may be punished for contempt in disobeying a mandate to open up a highway established on a section line does not preclude a person from enjoining them from opening up the road across his land instead of along the section line.—*Kern v. Isgrigg*, 132 Ind. 4, 31 N. E. 455.

[k] (Sup. 1893)

Where an order for laying out a highway is void, all proceedings thereunder can be enjoined.—*Hudson v. Voreis*, 134 Ind. 642, 34 N. E. 503.

[l] (Sup. 1899)

Under Burns' Rev. St. 1894, § 6746 (Hornor's Rev. St. 1897, § 5019), authorizing a person aggrieved by the location of a highway through his lands to remonstrate against its location, setting forth his grievance, and section 6750 (5023), authorizing persons residing near a proposed highway to remonstrate against its location because it will not be of public utility, and section 6754 (5027), authorizing an appeal to the circuit court from an order locating a highway, a railroad company cannot question the right to locate a highway across its right of way and tracks, collaterally, by enjoining its opening on the ground that the appropriation of the lands occupied by the tracks and right of way for a highway is for a public use inconsistent with, and destructive of, the prior appropriation of such lands by the railroad company for another public use, as such objection could have been raised by remonstrance.—*Gold v. Pittsburgh, C., C. & St. L. R. Co.*, 53 N. E. 285, 153 Ind. 232.

FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. High. §§ 165, 334.

§ 65. Operation and effect.

Abandonment of highway, see post, § 79.

Alteration of highway, see post, § 78.

Title and rights of abutting owners, see post, §§ 80-89.

FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. High. §§ 222-225.

§ 66. — In general.

[a] (Sup. 1893)

On the entry of an order establishing a highway, the easement thereby created vests in the public and the petitioners cease to have any interest beyond that possessed by the public in general; the judgment being in rem, and not in favor of the petitioners, but in favor of the public.—*Limming v. Barnett*, 33 N. E. 1098, 134 Ind. 332.

App. 1908)

public only secures an easement by appropriation of lands for highway purpose right to use the surface for legitimate purposes of travel and the incidental right the highway in good condition.—*Terre I. R. Co. v. Zehner*, 166 Ind. 149, 76 9, 3 L. R. A. (N. S.) 277.

CASES FROM OTHER STATES,

25 CENT. DIG. High. §§ 222-224.

### Character and use of highway.

use highway, see post, §§ 167-169.

App. 1870)

neighborhood road established by the commissioners on petition of citizens of township to furnish access to a burial lot not a private road, but a public highway.—*Hanselman v. Hanselman*, 33 Ind. 80.

CASES FROM OTHER STATES,

25 CENT. DIG. High. § 225.

### Leading and evidence as to existence of highway.

App. 1854)

Rev. St. 1843, p. 182, § 9, a transcript of the proceedings of a board of county commissioners establishing a road and directing it to be opened was admissible in evidence to prove the existence of the road.—*Epler v. Nind*, 459.

App. 1883)

it is alleged that a road is a public highway it will be implied from such allegation that every citizen has a right to pass or go and to carry the products of his farm and other commodities upon it.—*Powell v. Bungard*, 64.

App. 1884)

a complaint to enjoin the erection of a building and answer that the locus in quo was a highway, a reply showing a lawful use to vacate that part of the way and use it elsewhere, notice thereof, and an order of the board granting the prayer on the petition of the viewers, and that the new way was made with proper authority and made as good as the old; and the facts recited entitle to injunction, as injunction will restrain an entry on land under claim of right which might, by lapse of time, grow into a right.—*Kyle v. Board of Com'rs of Kosciusko Co.*, 94 Ind. 115.

App. 1892)

road supervisor who pleads, in justification, an alleged wrongful entry upon the land of another, that he was acting in obedience to an order of the board of county supervisors in laying out a highway, need not file with his petition a transcript of the board's proceedings, when it has jurisdiction, its proceedings

are attended with the same presumption of regularity as are those of a court of general jurisdiction, and are not susceptible of collateral attack; and it is immaterial whether it is shown that notices were posted as required by Rev. St. 1881, § 5015, since their sufficiency will be presumed from the board's assuming jurisdiction.—*Chicago & A. R. Co. v. Sutton*, 130 Ind. 405, 30 N. E. 291.

[e] (App. 1892)

On a prosecution for obstructing a public highway, the condition of a road is not evidence as to whether or not it is a highway.—*Zimmerman v. State*, 4 Ind. App. 583, 31 N. E. 550.

[f] (Sup. 1894)

A complaint alleged a location and marking by viewers of a highway upon the line of plaintiff's fence, as the section line, and that the highway so located was opened, and the fence removed to its boundary, and prayed for an injunction restraining its further removal. Held, that an answer pleading the legal proceedings by which the highway was viewed, located, and marked is sufficient.—*Hawkins v. Stanford*, 138 Ind. 267, 37 N. E. 794.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 226-233.

### (C) ALTERATION, VACATION, OR ABANDONMENT.

Private roads, see PRIVATE ROADS, § 3.

Streets in cities, see MUNICIPAL CORPORATIONS, §§ 655-657.

### § 69. Alteration of course, width, or grade.

Alteration of grade as ground for compensation to abutting owners, see EMINENT DOMAIN, § 101.

Alteration of highway for purpose of railroad crossing, see RAILROADS, § 94.

Streets in cities, see MUNICIPAL CORPORATIONS, §§ 655, 656.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 234-233.

### § 70. — In general.

[a] (App. 1902)

Where a road has been used as a public highway for 20 years or more, though it has never been petitioned for, nor laid out or located as a public highway by any judicial proceeding, nor entered of record by the board of commissioners, as authorized by Burns' Rev. St. 1901, § 6762, its location may be changed, under section 6774 et seq., providing that any person or persons through whose land "any public highway" may run may petition the county commissioners to change the location of the highway on their own land, or on the land of any other person consenting thereto.—*Houl-*

ton v. Carpenter, 64 N. E. 939, 29 Ind. App. 643.

FOR CASES FROM OTHER STATES,  
SEE 25 CENT. DIG. High. §§ 234, 235, 238.

### § 71. — Power to alter.

[a] (Sup. 1862)

Township trustees have jurisdiction to change the route of a highway in their own township, though it should pass through several other townships, or even counties.—Jackson v. Smiley, 18 Ind. 247.

[b] (Sup. 1865)

No owner of land over which a road passes has any right to make any change in it but in the manner prescribed by law.—Holcraft v. King, 25 Ind. 352.

[c] (Sup. 1881)

Act June 17, 1852, authorizes highways to be changed to gateways, exclusive jurisdiction being vested in the township trustees. March 5, 1859, an act was passed repealing the act of 1852 on this subject, with a saving clause as follows: Save all suits and proceedings heretofore commenced and now pending under such section before the officers and boards of township trustees within this state, and such suits and proceedings are hereby transferred to the boards of commissioners and officers of counties where the same are pending, and said boards of commissioners shall have jurisdiction thereof. *Held*, that this clause did not save proceedings theretofore commenced and pending before the commissioners because they had no jurisdiction of the subject-matter.—Webb v. Carr, 78 Ind. 455.

[d] (Sup. 1889)

Under Rev. St. § 5046, providing that any person or persons through whose lands a public highway runs may petition the board of county commissioners to change the location of the highway onto their own lands, or the lands of any other person consenting thereto, it does not affect the jurisdiction of the commissioners, nor prevent them from granting such a petition, that there is already a highway of insufficient width over the petitioners' lands at the point to which they desire to have the change made. The fact does not bring the case within section 5015, relating to the location, vacation, and alteration of highways.—Patton v. Cresswell, 120 Ind. 147, 21 N. E. 663.

[e] (App. 1907)

Where a fence had been maintained along a highway so long that "the mind of man runneth not to the contrary," the county commissioners could not declare that the highway existed beyond the fence line, and appropriate sufficient land from the adjoining property owners to widen the road, without legal proceedings or process.—Anderson v. City of Huntington, 40 Ind. App. 130, 81 N. E. 223.

FOR CASES FROM OTHER STATES,  
SEE 25 CENT. DIG. High. §§ 236, 237.

### § 72. — Proceedings.

[a] (Sup. 1836)

A change in a part of the Territorial state road was made and marked by a signer under the act of 1833. *Held*, that part of the road as thus changed must be opened, though the commissioner's report had not been filed in the clerk's office, etc., as required.—White v. Morris, 4 Blackf. 100.

[b] (Sup. 1841)

The persons appointed by the board of commissioners to view part of the state road, etc., reported in favor of a change in the route, and at the same time remonstrances against the change were presented to the board and read. The report was admitted to record. *Held*, that an appeal would lie from the circuit court in such case, and that it must be prosecuted by persons who had appeared before the board and objected to the change of the road.—Beeler v. Hantsch, 5 Blackf. 100.

On appeal from the decision of the board of commissioners respecting a change in the route of a road, the court must try the cause on its merits, and not as a court of error.—Id.

[c] (Sup. 1846)

The circuit court, in trying an appeal from an order of the board of county commissioners directing the change of a road, acts as a court of original jurisdiction, and should have the original papers.—Reddington v. Taylor, 8 Blackf. 62.

[d] (Sup. 1846)

The petitioners for a change of a public road, under section 12 of the act of 1836, petitioning to public roads and highways, must show the land through which the part of the road proposed to be changed runs.—Taylor v. Reddington, 8 Blackf. 239.

The circuit court, on an appeal from an order of the board of county commissioners directing a change of road, tries the cause as a court of original jurisdiction, and should have before it the original petition.—Id.

[e] (Sup. 1852)

The board of commissioners made an order establishing a change of road. There was no proof that, before application for the change, a list of viewers, the public had been notified of the application, as required by statute. That failure of such proof was a sufficient reason for dismissing the application.—Pease v. Sweet, 3 Ind. 514.

Upon an appeal from an order of the board of county commissioners to change a certain part of the county, the circuit court set aside the order of the viewers; but no bill of exceptions was taken, nor did it appear on what grounds the court acted. *Held*, that it must be presumed that the report was rightly set aside.—Id.

Sup. 1862)

certainty in the description of the interchange occurring in an order directing the location of a highway may be by motion before the commissioners, making this, at the final order of the commissioners; but it is not ground for a dismissal.—*Daggy v. Coats*, 19 Ind.

appeal from the action of a board of commissioners of highways in proceeding to an alteration of a road, the petitions, plans, reports, etc., constituting the papers in which the case must be tried, need not be in evidence on the trial in the appellate court, but should be judicially noticed by the court, and read or stated to the jury.—Id.

Sup. 1862)

where viewers upon review ordered by the commissioners report that a proposed change or new location of a way will not be of public utility, such change or new location may be made by the appellate court.—*Shafer v. Bener*, 19 Ind. 294.

Sup. 1865)

viewers appointed to review a proposed change in a highway against which a remonstrance had been filed had no authority to make a report in favor of the proposed change, but that the petitioners would at their option put the new road in as good condition as the old and otherwise against the change.—*Whitsell*, 24 Ind. 306.

Sup. 1874)

where the bond on appeal from an order of county commissioners directing a change in a highway is not approved by the county court, the defect cannot be cured by filing a new bond in the circuit court.—*Scotten v. Divilbiss*, 301.

where an appeal is taken to the circuit court by remonstrants from an order of the county commissioners directing a change in a highway, the appeal bond must be approved by the county auditor; and, if not so, the appeal may be dismissed.—Id.

Sup. 1875)

proceeding that a person petitioning for a change in the location of a highway, and asking to be located on a line between himself and an adjoining owner, may offer to give all the land for the highway, or may offer to give the greater part thereof, the petition will be uncertain, if it offers to give the land on one half of the highway, or a certain number of acres, or that it may be located wholly on the land of the petitioner; and the report of the commissioners in such case will be too uncertain, unless it shows the amount of land of the petitioner upon which the road is located.—*Decker*, 51 Ind. 241.

The description of a highway, in a petition for its change, as beginning at the state line, in a certain section, is too indefinite, where the section lies a mile in extent on the state line; but if the point in the road where the proposed change is to commence is definitely pointed out, and the line of the change designated, it will be sufficient.—Id.

Defects in a petition for a change in the location of a highway may be made the ground of a motion in arrest of judgment, in the circuit court, on appeal.—Id.

[k] (Sup. 1876)

A report of viewers appointed to pass on the advisability of a change in a highway is inadmissible in evidence on an appeal from an order entered on their report directing the change.—*Freck v. Christian*, 55 Ind. 320.

[l] (Sup. 1880)

On the trial of a petition for changes in a county highway, it is a matter of defense, and not a cause for dismissing the action, that the evidence shows that the names of all the owners, occupants, and agents of the lands through which the road would pass were not set forth in the petition.—*Schmied v. Keeney*, 72 Ind. 309.

[m] (Sup. 1882)

A petition to change a highway need not state the length of the change, nor that it will be of public utility.—*Bowers v. Snyder*, 88 Ind. 302.

[n] (Sup. 1882)

Where one of the petitioners for change of a public highway appealed to the circuit court from an order dismissing the petition, he alone is liable for the costs.—*Reader v. Smith*, 88 Ind. 440.

[o] (Sup. 1883)

Rev. St. 1881, § 550, provides that whenever any person shall procure the establishment of a highway, private or public, by a change of one already established on or across his land, before the same shall be received by the proper superintendent as such it shall be made as passable as the old highway, or as nearly so as the nature of the case will admit, of which fact the trustee of such township shall be duly satisfied before such superintendent shall be required to keep it in repair. *Held*, that the location of a new road was not invalid because the board ordered that the old road should be vacated when the new one should be made as passable as the old by the petitioners, to the acceptance of the proper township trustee.—*Heagy v. Black*, 90 Ind. 534.

[p] (Sup. 1884)

Under Rev. St. 1881, § 5015, a petition to a board of commissioners of a county to change and relocate a highway must show that six of the petitioners are freeholders residing in the immediate neighborhood of the proposed high-

way; and without such an allegation it cannot be known that there is any right in the petitioners to set the machinery of the law in motion.—*Conaway v. Ascherman*, 94 Ind. 187.

A petition for a change of location of a highway should state the names of the property owners over whose lands the proposed way is to be located, where the change will vacate an existing way running over the lands of more than one person, and relocate it upon the lands held by two or more different owners.—*Id.*

[q] (Sup. 1885)

Where it nowhere appears in a transcript of proceedings by a board of trustees to have a highway changed and relocated as provided under Rev. St. 1852, p. 313, etc., how wide the highway was which it was sought to effect, nor how wide was the highway the trustees sought to establish, the final order of the trustees was absolutely void, and the transcript was not competent evidence.—*Strong v. Makeever*, 1 N. E. 502, 4 N. E. 11, 102 Ind. 578.

[r] (Sup. 1886)

Under a petition professing to describe an existing highway, but in fact describing a highway as it will exist if the improvement is made, the court cannot order the straightening of an existing highway not described.—*Lowe v. Brannan*, 105 Ind. 247, 4 N. E. 580.

[s] (App. 1902)

Where the remonstrance to a change of location of a highway referred to the highway as having been used as a road for 20 years, such statement will be assumed as true, the contrary not being alleged.—*Houlton v. Carpenter*, 64 N. E. 939, 29 Ind. App. 643.

[t] (App. 1902)

On a proceeding to change the location of a highway, the issue being whether the proposed change is of public utility, the cost and damages incident to the change are pertinent, so that the width of the strip proposed to be taken, its proximity to a dwelling, and the character of the building affected thereby, may be shown.—*Raab v. Roberts*, 64 N. E. 618, 65 N. E. 191, 30 Ind. App. 6.

[u] (App. 1904)

Under Burns' Ann. St. § 6742, providing for the location, vacation, or change of highways on petition to the county commissioners, and the publication of a prescribed notice prior to the meeting of the board, the failure of persons opposing the proceedings to appear before the county commissioners after having been duly notified does not preclude them from contesting the proceedings on appeal to the circuit court.—*Scherer v. Bailey*, 72 N. E. 472, 34 Ind. App. 172.

A petition for the change of route of an existing highway under Burns' Ann. St. 1901, § 6742, should describe both the existing road and the route of the proposed road; and a

petition failing to describe the old road is fatally defective, notwithstanding a description of the proposed change.—*Id.*

[v] (Sup. 1906)

Where the report of the viewers, in proceedings under Acts 1903, p. 255, c. 145, for the improvement of a public highway, contained plans and specifications for the improvement and was made a part of the order of the board of commissioners directing the improvement, the order sufficiently stated the kind of improvement to be made, and the width and extent thereof, within section 5 of the act, declaring that an order for an improvement shall state the kind of improvement to be made and the width and extent thereof.—*Spaulding v. Mott*, 76 N. E. 620, 167 Ind. 58.

Acts 1903, p. 255, c. 145, authorizing the improvement of highways, empowering the viewers to examine, lay out, or straighten the highway as in their judgment public utility requires, and specifying what the report of the viewers shall contain, without requiring it to show the necessity of widening the highway, does not require the report of the viewers to contain a statement of the necessity for widening the highway.—*Id.*

[w] (App. 1907)

Where lands along a highway inside a highway fence, which had been maintained from time immemorial, were sought to be taken to widen the highway to the extent that it was claimed it was originally established, it was error to permit witnesses to testify to their understanding as to how wide the road originally was; the question at issue being limited to the question of the extent of the public right of use, and not the intended or supposed width of the road.—*Anderson v. City of Huntington*, 40 Ind. App. 130, 81 N. E. 223.

[x] (Sup. 1908)

A petition under Act March 8, 1905 (Acts 1905, p. 521, c. 167), providing for the location, vacation, and change of highways, is not double because it seeks to have a part of an old highway vacated and a new one established, in lieu thereof, as a change of highway implies a departure from the road already established and the opening of a new road, and the petition in such case should describe that part of the old road to be vacated, as well as the proposed new part.—*Kelley v. Augsperger*, 171 Ind. 155, 85 N. E. 1004.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 239-252.

§ 74. Vacation.

Laws relating to an encroachment by Legislature on judiciary, see CONSTITUTIONAL LAW, § 55.

Secondary evidence of contents of order for, see EVIDENCE, § 102.

n cities, see MUNICIPAL CORPORA-  
§ 657.

ES FROM OTHER STATES.

5 CENT. DIG. High. §§ 254-278.

Also, note, 26 L. R. A. 821.

### In general.

p. 1875)

for the statute on the subject of opening  
ing highways, a party through whose  
established highway is sought to be  
s entitled to such damages as he may  
y the vacation, to be paid as dam-  
the establishment of a highway are  
tterworth v. Bartlett, 50 Ind. 537.

p. 1888)

an issue as to the utility of vacating a  
a witness should not be allowed to  
opinion.—Hughes v. Beggs, 114 Ind.  
E. 817.

p. 1891)

the evidence is undisputed that the  
nt would sustain substantial damage  
cation of the highway, he is entitled  
es.—Cook v. Quick, 127 Ind. 477, 20  
7.

ES FROM OTHER STATES.

5 CENT. DIG. High. §§ 254, 255, 257-  
278.

### Power to vacate.

p. 1869)

the corporate limits of a certain  
ended to and along the middle of a  
ad 30 feet in width, located before the  
laid out, the board of trustees of the  
not power under the ninth clause of  
of the act for the incorporation of  
Gav. & II. Rev. St. p. 624) to vacate  
of said highway as was within the  
limits.—Debolt v. Carter, 31 Ind. 355.

p. 1888)

St. §§ 5015-5017, providing that on  
12 freeholders for the location, vaca-  
change of any highway, three persons  
appointed to view such highway, and  
ers shall make a report of their pro-  
describing such location, change, or  
by metes and bounds, "except that  
the vacation of a road, or any part  
uch description only as will designate  
shall be required," etc., authorizes  
on of part of a highway.—Hughes v.  
Ind. 427, 16 N. E. 817.

S FROM OTHER STATES,

5 CENT. DIG. High. § 256.

### Proceedings.

secondary evidence as to order, see  
E, § 158.

p. 1857)

appeal from an order vacating a road,  
a person who was not an original

party to the proceeding, nor had made himself  
so by affidavit that he was aggrieved by the  
decision, was dismissed.—Odell v. Jenkins, 8  
Ind. 522.

[b] (Sup. 1860)

On appeal from the decision of the town-  
ship trustees relating to the vacation of part  
of a road, a bond was taken which, upon ob-  
jection thereto, was amended at the hearing  
before the county commissioners. *Held*, that  
there was no error in the proceedings.—Lingen-  
felter v. Dodson, 15 Ind. 222.

[c] (Sup. 1864)

An appeal to the circuit court from an  
order of the board of commissioners dismissing  
petition to vacate a road is properly dismissed  
where there are no papers on file; nothing be-  
ing before the circuit court, except a tran-  
script of the record of the commissioners' court.  
—Wheatley v. Hanna, 23 Ind. 518.

[d] (Sup. 1869)

Where, in a proceeding to vacate a high-  
way on the ground that the same is not of pub-  
lic utility, viewers are appointed who report  
in favor of the petition on the ground stated  
therein, and, upon objection being made to the  
vacation, other viewers are appointed who re-  
port against the public utility of the vacation,  
no appeal lies to the circuit court from the  
decision of the board of county commissioners  
overruling a motion made by one of the peti-  
tioners to set aside the appointment of the lat-  
ter viewers.—Green v. Ayers, 31 Ind. 248.

[e] (Sup. 1875)

A person through whose land it may be  
proposed to vacate a highway may remonstrate  
on the ground that the highway is of public  
utility, and in the same remonstrance claim  
damages in consequence of the proposed vaca-  
tion.—Butterworth v. Bartlett, 50 Ind. 537.

[f] (Sup. 1881)

On petition to vacate a public highway, a  
remonstrance or answer was filed by certain  
persons, alleging that the same question had  
been previously passed upon. The board dis-  
missed the petition, and, on appeal to the cir-  
cuit court, said answer was, on motion, stricken  
out. *Held* no error, as said answer did not  
allege that any of the remonstrants were free-  
holders of the county, or that they resided along  
the highway in question.—Early v. Hamilton,  
75 Ind. 376.

[g] (Sup. 1885)

In a petition for the vacation of a highway,  
the fact that the petitioners aver that they  
believe a certain fact, the averment of which  
is necessary to be true, is equivalent to an as-  
sertion that it is true.—Thayer v. Burger, 100  
Ind. 262.

[h] (Sup. 1887)

It is not competent to permit petitioners  
for the vacation of a highway to prove the offer  
of individuals to maintain private ways or

bridges.—*Whetton v. Clayton*, 111 Ind. 360, 12 N. E. 513.

[hh] (*Sup.* 1888)

On appeal to the circuit court from the decision of commissioners of a county vacating a highway, the court does not sit merely for the correction of errors, but as a trial court to determine the case on its merits; and irregularities in the proceedings before the board do not invalidate them.—*Hughes v. Beggs*, 114 Ind. 427, 16 N. E. 817.

[i] (*Sup.* 1891)

Where the circuit court, without the intervention of a jury, finds that a highway should be vacated, and there is evidence tending to support the finding, it will not be disturbed.—*Cook v. Quick*, 127 Ind. 477, 26 N. E. 1007.

Where proceedings are begun before a board of commissioners to vacate a highway, and viewers are appointed who report in favor of the vacation, and, upon remonstrance, reviewers are appointed who report against the vacation, the board's order approving the latter report is such a final judgment that an appeal will lie to the circuit court.—*Id.*

[j] (*Sup.* 1893)

A highway cannot be vacated in an action against the petitioners alone, commenced nearly a year after its establishment, as the title thereto is in the public.—*Limming v. Barnett*, 134 Ind. 332, 33 N. E. 1098.

Persons who, after having claimed to have discovered fraud in the establishment of a highway, seek to have the way vacated on the ground that it is not of public utility, and prosecute the matter to final determination, must be deemed to have waived the fraud by their delay, and cannot afterwards, on being defeated, institute another proceeding to have the way vacated for the fraud.—*Id.*

[k] (*App.* 1896)

Where a landowner remonstrates against the vacation of a highway, as authorized by Burns' Rev. St. 1894, § 6746 (*Horner's Ann. St.* 1897, § 5019), it must appear on the face of the remonstrance that he is an abutting owner, as required by such statute.—*Brandenburg v. Hittel*, 45 N. E. 45, 16 Ind. App. 224.

That a highway proposed to be vacated intersects with another highway, on which an owner's lands abut, does not make him an abutting owner, within the meaning of Burns' Rev. St. 1894, § 6746 (*Horner's Ann. St.* 1897, § 5019), which provides that any person through whose land a highway passes may remonstrate against the action of the board of commissioners in vacating or changing it.—*Id.*

[l] (*Sup.* 1907)

Acts 1905, p. 523, c. 167, § 5 (*Burns' Ann. St. Supp.* 1905, § 6730), relating to proceedings before the board of commissioners for the location, vacation, etc., of highways, provides for the filing by a landowner, etc., of an application

for damages with the board at any time before it has taken final action. Section 9 (page 524) provides that, if any resident freeholder shall remonstrate against the public utility of the highway, reviewers may be appointed. Section 10 (page 524) provides for appeals from orders of the commissioners to the circuit court. *Held*, that a landowner who did not appear before the commissioners cannot present an application for damages or a remonstrance that the proposed vacation is not of public utility for the first time in the circuit court on appeal.—*Williamson v. Houser*, 169 Ind. 397, 82 N. E. 771.

[m] (*Sup.* 1908)

Under the act of 1905 concerning highways (Acts 1905, p. 523, c. 167, § 5), authorizing a remonstrance for damages against a vacation of a highway by any person through whose land such highway may pass, one on whose land is part of such highway may remonstrate, though the part to be vacated comes only to his land.—*Haupt v. Dutton*, 170 Ind. 69, 83 N. E. 634.

Though, if a petition to vacate a highway fails to give the name of an owner or occupant of lands through which the highway passes, the proceedings are void as to him. If he does not otherwise receive notice, yet if it purports to give the names of all such persons, and it is not apparent on the face of the record that any such name was omitted, it cannot be said the court erred in overruling a motion to dismiss the petition on the ground of such an omission, as it could not take judicial notice that the highway passes through the land of others than those named in the petition, nor assume the truth of the recital in the motion, contradicting the averment of the petition.—*Id.*

[n] (*Sup.* 1909)

Proceedings commenced prior to the enactment of Highway Act 1905 (Acts 1905, p. 521, c. 167), are governed by the highway laws in force at the commencement of the proceeding, and not by the act of 1905, section 123 (page 579), providing that the act shall not affect any pending litigation, but that it shall be concluded as if the act had not been passed.—*Butt v. Iffert*, 171 Ind. 554, 86 N. E. 961.

In a proceeding to vacate a highway, where there was a remonstrance on the ground that the vacation would not be of public utility, if the jury, on appeal to the circuit court, found that the road proposed to be vacated was not of public utility, petitioners were entitled to recover.—*Id.*

[o] (*Sup.* 1909)

In a proceeding to vacate a highway, evidence held sufficient to sustain a judgment for petitioners.—*Thompson v. Beatty*, 171 Ind. 579, 86 N. E. 961.

[p] (*Sup.* 1909)

Acts 1905, p. 579, c. 167, § 123 (*Burns' Ann. St.* 1908, § 7793), provides that any per-

son aggrieved by any decision of the county commissioners in any proceeding relating to highways may appeal therefrom, etc., and that such appeal shall be tried de novo, and may be had as to any issue tried, "or that might have been tried, before the county board." *Held*, that the last clause only authorizes the trial of such issues on appeal as might have been tried under issues made before the board, and does not authorize the trial of issues not presented to the board.—*Ætna Life Ins. Co. v. Jones*, 89 N. E. 871.

The circuit court may properly permit the amendment of the petition in highway cases pending on appeal, even to the changing of the route or as to jurisdictional matter; and hence the amendment of the petition for the location of a new highway, and the vacation of an old highway, so as to more definitely describe that part of the highway sought to be vacated, was proper.—*Id.*

Where the petition does not show that it does not contain the names of all the owners, occupants, or agents of the lands through which the highway to be vacated passes, it is not insufficient for failing to show that the persons named are all the owners, etc.—*Id.*

While, under Burns' Ann. St. 1908, § 7649, the petition for the vacation of a highway must be signed by 12 freeholders of the county, 6 of whom reside in the immediate neighborhood of the highway proposed to be vacated, as required by said section, it is not necessary to the sufficiency of the petition that such facts be alleged therein.—*Id.*

Acts 1905, p. 579, c. 167, § 123 (Burns' Ann. St. 1908, § 7793), providing that the reports of viewers in highway proceedings shall be considered in evidence on appeal, does not require such reports to be given in evidence, but they are in evidence, whether formally introduced or not.—*Id.*

Remonstrators have no right to complain of instructions concerning questions and issues to which they were not parties.—*Id.*

Objections to facts on which the jurisdiction of the county commissioners depends, not apparent on the face of the record, can only be taken by making such objections before the board when the petition is presented, and before the appointment of viewers.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 263-276.

#### § 78. — Operation and effect.

[a] (Sup. 1884)

Where an old highway is vacated according to law, the owner of the fee is reinvested with an absolute right of dominion, and an unauthorized entry of the land formerly occupied as a highway constitutes a cause of action.—*Kyle v. Board of Com'rs of Kosciusko County*, 94 Ind. 115.

#### FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. § 277.

#### § 79. Abandonment.

Affecting duty of railroad company to fence tracks at highway crossings, see RAILROADS, § 411.

Streets in cities, see MUNICIPAL CORPORATIONS, § 657.

[a] (Sup. 1871)

Where a highway has not been in a condition for use by the public, and has not been used for 36 years, the presumption of abandonment is justified.—*Jeffersonville, M. & I. R. Co. v. O'Connor*, 37 Ind. 95.

[b] (Sup. 1874)

Where an abandoned portion of the highway ran through the lands of different persons, such abandonment could not operate as a vacation of the highway, although the statute was in other respects complied with, and all the owners of the land consented to the abandonment.—*State v. Huggins*, 47 Ind. 586.

[c] (Sup. 1881)

A highway is not vacated because temporarily obstructed, thereby compelling the public to go around the obstruction.—*Davis v. Nicholson*, 81 Ind. 183.

[d] (Sup. 1884)

Evidence of 30 years' occupation of a highway by a railroad company with the assent of the county commissioners shows an abandonment.—*Louisville, N. A. & C. R. Co. v. Shanklin*, 98 Ind. 573.

[e] (App. 1896)

That adjoining landowners for a time obstruct a highway with their fences does not establish an abandonment of it by the county authorities.—*Brown v. Hiatt*, 45 N. E. 481, 16 Ind. App. 340.

The failure to grade and use a highway to its full width does not constitute an abandonment of the part not used.—*Id.*

[f] (App. 1906)

An ancient road, having existed and been used since 1860, was a public highway, and could only be vacated by a complete abandonment, or by proceedings specified by Burns' Ann. St. 1901, § 6759.—*Small v. Binford*, 41 Ind. App. 440, 83 N. E. 507, 84 N. E. 19.

The building of a new turnpike is ineffective to work an abandonment of an ancient highway, where the turnpike is a new and separate road.—*Id.*

Abandonment of an ancient highway would not be presumed, where it would leave certain landowners without means of egress or ingress.—*Id.*

Where an ancient highway had been established by user, subsequent deviations from the line of way did not affect the existence of the easement under the rule that, where a way across land is changed with the consent of all

parties, a dedication of the new way is presumed.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 279-287.

See, also, note, 26 L. R. A. 449, 659; note, 14 Am. St. Rep. 278.

(D) TITLE TO FEE AND RIGHTS OF  
ABUTTING OWNERS.

Title on vacation on abandonment, see ante, § 78.

§ 80. Title to fee in general.

[a] The laying out of a highway gives to the public a mere right of passage; and the owner of the soil is not thereby divested of his title to the land.—(Sup. 1861) *Vaughn v. Stuzaker*, 16 Ind. 338; (1882) *Hagaman v. Moore*, 84 Ind. 496.

[b] (Sup. 1861)

Where one grants land for the purpose of a public highway, adding also "the reversion and remainder," his reversionary right vests in his grantee.—*Vaughn v. Stuzaker*, 16 Ind. 338.

[c] (App. 1899)

An owner of land abutting a public highway has such a proprietary right to its center that the refusal of a person unlawfully on such part to depart at the owner's direction renders him liable for trespass.—*Huffman v. State*, 52 N. E. 713, 21 Ind. App. 449, 69 Am. St. Rep. 368.

[d] (App. 1902)

Demurrer to complaint of abutting owner against telegraph company, merely alleging that defendant's servants wrongfully cut trees in the highway, and not alleging what business defendant was engaged in at the time, does not raise the question of the right of a telegraph company to cut trees interfering with construction of its line.—*Western Union Tel. Co. v. Krueger*, 64 N. E. 635, 30 Ind. App. 28.

Complaint of abutting owner for cutting trees in highway should allege plaintiff is the owner of the fee of the highway, and that the trees were on his side of it.—*Id.*

[e] (App. 1905)

The treaty with the Pottawatomie Indians of February 7, 1827 (Indian Treaties, 7 Stat. 295), by article 2, ceded to the United States a strip of land commencing at Lake Michigan and running to the Wabash river for a road, and also a section of land contiguous to the road for each mile of it. Act Cong. March 2, 1827 (4 Stat. 234, c. 52), authorized the state of Indiana to locate and make the road agreeably to the treaty, and to apply the strip of land and the section ceded to the United States or the proceeds to the making of the road. Act Jan. 24, 1828 (Acts 1828, p. 87, c. 70), and Act Jan. 13, 1830 (Acts 1830, p. 111, c. 69), provided for commissioners to survey the road agreeably to the treaty and the act of Congress, and establish it as located. Act Jan.

29, 1831 (Acts 1831, p. 189, c. 148), as a right the privilege of locating the most suitable route, and applying on which to locate it, as well as the contiguous land, from lands on the lying contiguous thereto. Act Feb. (Acts 1832, p. 122, c. 127), provided for the commissioner of the Michigan road lands authorized him to make such alterations with the consent of the owners of the land which it passed, and receive relinquishment to the state for the use of the the directed him to make such alterations in Michigan City at the termination so as to enter the Michigan street and pass along it and Wabash to the termination. *Held*, that by the of the strip for the road and its estate the state acquired no greater interest than a public easement, leaving the fee in a private owner holding a conveyance of lots in Michigan City described by metes and bounds adjoining to and along the road.—*Western Telegraph Co. v. Krueger*, 74 N. E. 23, 24 Ind. App. 348.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 288,

See, also, note, 60 Am. Rep. 451.

§ 83. Rights as to use of soil of highway.

Use for construction or repair of highway, post, § 109.

[a] (Sup. 1880)

Where land had been condemned for a highway which was subsequently appropriated by a gravel-road company, such company required an easement to use the highway on the condition it was at the time of acquisition, and hence had no authority to remove earth opposite the land of the abutting owner without rendering compensation therefor.—*Turner v. Rising Sun & Pike Co.*, 71 Ind. 547.

[b] (App. 1895)

To justify a road supervisor in removing gravel from a highway, to be deposited in places on the same highway, the removal must be for the improvement of the highway, not merely the replacing of the material at a remote point.—*Anderson v. Bement*, 10 Ind. App. 248, 41 N. E. 547; *Same v. State*, 10 Ind. App. 699, 41 N. E. 548.

An answer, in an action for damages and carrying away gravel, alleging that the defendant was road supervisor, and that the gravel was dug from within the limits of the road, and placed on another part of the road within his road district, for its repair, raises the question as to whether defendant has the right to grade off the high places and deposit the dirt in the low places, on said road.—*Id.*

[c] (App. 1905)

By the civil law the soil of a public highway is declared to be public property.—

Union Telegraph Co. v. Krueger, 36 Ind. App. 348, 74 N. E. 25.

[d] (Sup. 1906)

All special proprietary rights in the soil of a public highway belong to the abutting owners and not to the public, and the owner may use the land as he chooses, provided he does not obstruct its use as a highway.—Terrie Haute & I. R. Co. v. Zehner, 166 Ind. 149, 76 N. E. 169, 3 L. R. A. (N. S.) 277.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 292, 293.

See, also, note, 20 Am. St. Rep. 537.

## § 86. Right to use of road.

[a] (Sup. 1881)

One may have a private easement in a public highway.—Ross v. Thompson, 78 Ind. 90.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. § 296.

## § 87. Rights and remedies as to obstructions and injuries to road.

[a] (Sup. 1881)

An abutting owner who has erected costly buildings on his land for a particular manufacturing purpose is not bound to wait until his buildings are rendered valueless by the blocking up of the highway which gives him the only means of access thereto, but may proceed at once by injunction.—Ross v. Thompson, 78 Ind. 90.

[b] (Sup. 1887)

In an action to recover damages for an obstruction of an abutting lot owner's rights in a highway, where the character of the injury is permanent, and the complaint recognizes the right of the defendant to continue in the use of the property wrongfully appropriated, and to acquire, as a result of the suit, the title thereto, the damages should be assessed on the basis of the permanent depreciation in value of the property injured; but where the action is in trespass, to recover for a past injury, without recognizing the legality of the obstruction, or the defendant's right to continue as a result of the suit, only such damages can be recovered as accrued up to the time of the commencement of the action.—Indiana, B. & W. R. Co. v. Eberle, 110 Ind. 542, 11 N. E. 467, 59 Am. Rep. 225.

An abutting lot owner, whose title extends only to the middle of a highway 40 feet in width, cannot maintain an action for damages for an unlawful obstruction 11 feet wide, caused by the construction of a railroad embankment on the opposite side, the only effect of which is to render access to his property more difficult and inconvenient, and to force the travel nearer to his lot; no physical invasion of his rights or peculiar damage being shown.—Id.

[c] (Sup. 1894)

Where the access to a lot is substantially impaired by an obstruction in a street, there is such an invasion of the property right of the owner as to entitle him to recover.—Dantzer v. Indianapolis Union R. Co., 141 Ind. 604, 39 N. E. 223, 34 L. R. A. 769, 50 Am. St. Rep. 343.

[d] (Sup. 1897)

An abutting owner, who owns the fee in no part of the highway, cannot recover for obstruction of the highway, unless he has sustained an injury not common to all who use the highway.—Pittsburgh, C. C. & St. L. R. Co. v. Noftzger, 47 N. E. 332, 148 Ind. 101.

In a suit by an abutter against a railroad company for damages for obstruction of a highway by the construction of a switch therein, where plaintiff does not own the fee in any part of the highway, it is error to charge that the jury may take into consideration the injury to the property naturally resulting from building the switch, whether it rendered the same less suitable for use, and the decreased rental value of the property, together with all the facts proven which show a natural and necessary decrease in the value of the property, since it ignores the principle that plaintiff is entitled to such damages alone as are different from those suffered by the community in general.—Id.

Plaintiff in a suit to recover damages for the obstruction of a highway on which her property abutted, but in the fee of which she owned no interest, by the construction of a railroad track thefeon, could not recover damages for the increased danger from fire emitted from locomotives that passed over the highway.—Id.

The interruption of access to property by the obstruction of a highway constitutes a cause of action for damages in favor of the owner of the property, who owns the fee in no part of the highway.—Id.

[e] (Sup. 1900)

In a suit to enjoin the obstruction of a highway by a fence, conflicting evidence showed that in driving into the highway through a gate from abutting lands horses were not disposed to approach the obstructing fence; that a wagon had to be driven carefully, and backed at the gate, to avoid cramping; that in hauling posts and corn plaintiff could hardly get in and out; that in driving through with loaded hay ladders, the hind wheels or ladders would generally catch on the posts; that they generally had trouble getting out, and broke corners off the hay ladders going in, and often had to lift the end of the wagon over to get in; that an engine, clover huller, and attached wagon went in and out at the gate on lifting the wagon around; that before the obstruction plaintiffs had a turning way of 40 feet at the gate, but since had only about 24 feet. Held, that a finding that on account of the obstruction access to plaintiffs' premises was difficult and dangerous, and required more time and care than formerly, and was attended with more

danger of breakage and other loss, was sustained by the evidence.—*Martin v. Marks*, 57 N. E. 249, 154 Ind. 549.

In a suit by an abutting landowner to compel the removal of an obstruction in a highway, it is not necessary that plaintiff show that he has been entirely deprived of means of access to his property, but it is sufficient if his means of access thereto have been materially impaired or interfered with.—*Id.*

Where suit is instituted to compel the removal of a fence alleged to be an obstruction to a highway in front of plaintiff's lands, and also to recover damage for the maintenance of such fence to date, it is not necessary or proper for the court to find the amount of damage to plaintiff's lands should the fence become permanent, the complaint not recognizing a right to the permanent obstruction of the highway.—*Id.*

Burns' Rev. St. 1894, § 6837 (Horner's Rev. St. 1897, § 5087), provides penalties for obstructing a highway, and section 6838 (section 5088) declares that a supervisor who neglects to enforce the penalty or to keep the highway unobstructed shall be liable, etc. Section 2043 (section 1964) makes it an indictable offense to obstruct a highway, and section 2148 (section 2061), also makes it an offense for a road supervisor to neglect his duties in that regard. *Held*, that none of these statutes afford an adequate remedy at law to an abutting owner injured by the maintenance of a fence obstructing a highway, so as to preclude his resort to a mandatory injunction to effect its removal.—*Id.*

Where one defendant to a suit for a mandatory injunction to effect the removal of a fence obstructing a highway has built and maintained such fence by force, and the other defendant, as road supervisor, has neglected and refused to remove the fence, or enforce against his codefendant the penalty provided for obstructing highways, neither is in a position to urge that, before bringing injunction, plaintiff, as an abutting property owner, should have endeavored to remove the fence, under Burns' Rev. St. § 6831 (Horner's Rev. St. 1897, § 5080), providing that, where a highway is obstructed, the owner of abutting real estate shall remove the obstruction, since this is merely urging that plaintiff should have performed defendants' duty for them, and since plaintiff could not be required to act under this section where the obstruction was forcibly maintained.—*Id.*

A private person may maintain suit for injunction to effect the removal of a fence as an obstruction of a public highway, though a public nuisance, where such person is an owner of abutting real estate, access to which is materially impaired thereby to his damage, though he has not been wholly deprived of such access, and though the fence is not on his own land, since abutting landowners have a peculiar and distinct interest, not common to the public, in keeping a highway free from obstructions

interfering with the ordinary means of access to and egress to and from their lands.—*Id.*

A finding of fact, in a suit of an abutting landowner to enjoin the obstruction of a highway by a fence, that, after the obstruction was built, plaintiff placed a gate in his own land bordering the highway, which was one or more than the average farm gates in the neighborhood, and so partially obstructed access to his farm, is not ground for an objection to the conclusion of law that plaintiff is entitled to the relief asked, it appearing that such gate would have afforded plaintiff sufficient access to his property had the highway not been obstructed, and he having the same right to erect such gate after the obstruction was erected as before.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 297, 298.

See, also, 30 Cyc. p. 1381; note 1; 1 R. A. 787.

## § 89. Use of highway for other purposes by abutting owner.

[a] (Sup. 1857)

Landholders cannot put up gates across highway unless the trustees prescribe regulations. 1 Rev. St. p. 314, § 35.—*Id.* Trustees of Ripley Tp., 10 Ind. 45.

[b] (Sup. 1906)

The erection of a dam to back up water through a culvert under a highway across the flow lands of other proprietors, when not necessary to the use of the highway, does not constitute a public nor violate any of its rights. *Haute & I. R. Co. v. Zehner*, 166 Ind. 176 N. E. 169, 3 L. R. A. (N. S.) 277.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 294, 295.

## II. HIGHWAY DISTRICTS AND OFFICERS.

Consent of highway officers to use of a street for a street railroad, see STREET RAILROADS. Extortion by, see EXTORTION, § 4. Incompatibility of offices of township clerk and supervisor of ways, see OFFICERS. Injunctions against highway officers, see INJUNCTION, § 79.

Laws relating to as conferring on executive officers judicial power, see CONSTITUTION, LAW, § 80.

Subjects and titles of acts, see STATUTES, 123, 125.

## § 90. Creation and existence of districts.

[a] (Sup. 1866)

A road district is not a corporation, but a part of the township corporation.—*See* Fall Creek Tp. of Madison County, 27

[b] (Sup. 1889)

In an action against a township for changing road districts in his town

alleged that such changes were made in the interests of economy and for the benefit of public highways, and were deemed necessary by him. *Held*, that the allegations show changes to be such as he had the right to make under Acts 1885, p. 202, authorizing trustees, whenever they shall deem it proper, to make such changes in road districts as will subserve public interests, and are not demurrable.—*Lyon v. Kee*, 120 Ind. N. E. 128.

FOR CASES FROM OTHER STATES,  
SEE 25 CENT. DIG. High. §§ 301, 302.

#### Appointment, qualification, and tenure of officers.

(*Sup.* 1909)  
Acts 1905, p. 569, c. 167, § 93 (*Burns'* Ann. St. 1908, § 7762), authorizing the township trustee to appoint a road supervisor upon election, and also in case of vacancy in office, was not impliedly repealed by Acts 1907, p. 371, c. 210, which only purported to amend sections 92 and 94 of such act, but did not recognize the continued existence of the act.—*State ex rel. May v. Hall*, 89 N. E.

Acts 1908, art. 15, § 3 (*Burns'* Ann. St. 1908, art. 15, § 3), provides that public officers, except those of the General Assembly, shall hold office for a specified term prescribed by law and their successors are elected and qualified. Acts 1908, art. 6, § 3 (*Burns'* Ann. St. 1908, art. 6, § 3), enumerates certain offices, not including the office of road supervisor, and provides that such county and township officers shall be elected or appointed as prescribed by law. Acts 1905, p. 569, c. 167, § 93 (*Burns'* Ann. St. 1908, § 7762), authorizing the township trustee to appoint a road supervisor in case of failure to elect or of a vacancy in office, was valid.—*Id.*

Acts 1905, p. 569, c. 167, § 93 (*Burns'* Ann. St. 1908, § 7762), providing that in case of failure to elect a road supervisor, and also in case of a vacancy in the office, the township trustee shall appoint a supervisor, who shall continue until the biennial election, upon failure to elect a road supervisor, because of a tie in the election, the township trustee could not appoint a supervisor.—*Id.*

FOR CASES FROM OTHER STATES,  
SEE 25 CENT. DIG. High. §§ 304-307.

#### Compensation and expenses.

(*Sup.* 1889)  
Act 1883, prescribing the duties of the county auditor, does not provide that he shall receive compensation in gravel-road cases, the amount of compensation to him by the county commissioners was proper, under Acts 1868, § 16, providing that the compensation of persons employed in such cases shall be fixed by the commissioners, provided that

the county auditor shall receive such compensation as is now fixed by law for like services in other cases.—*Board of Com'rs of Montgomery County v. Fullen*, 118 Ind. 158, 20 N. E. 771.

FOR CASES FROM OTHER STATES,  
SEE 25 CENT. DIG. High. §§ 308, 351, 353.

#### § 95. Authority, powers, and proceedings.

Construction, improvement, and repair of highways, see post, §§ 97-120.

Contracts, see post, § 113.

Power to alter highway, see ante, § 71.

Power to vacate highway, see ante, § 76.

Removal of obstruction of highway, see post, § 157.

Taxes and assessments, see post, §§ 121-151.

[a] (*App.* 1908)

The duties of road supervisors are confined to the territorial limits of the township, and they do not represent the township as a corporation, nor have they power to bind the town by contract for any purpose.—*Posey Tp. of Franklin County v. Senour*, 42 Ind. App. 580, 86 N. E. 440.

The duties of town supervisors relate, not to township property or business, but to the public highways within the township, which belong, not to the township, but to the general public.—*Id.*

FOR CASES FROM OTHER STATES,  
SEE 25 CENT. DIG. High. §§ 309-312.

#### § 96. Duties and liabilities.

Criminal responsibility for failure to maintain or repair highway, see post, § 108.

Expenses and damages, see post, §§ 117-119.

Liability for damages caused by drainage, see post, § 120.

[a] (*Sup.* 1821)

An indictment of a supervisor for failing to keep in repair a certain described road, which appears to lie in two counties, is not sufficiently certain where it is not alleged in which county that part of the road lay over which defendant was supervisor.—*Spear v. State*, 1 Blackf. 517.

[b] (*Sup.* 1839)

On trial of indictment of a supervisor of a highway for not keeping the same in repair, if, through the default of the county commissioners, the defendant could not keep the road in repair, he may avail himself of the matter by special plea, or by evidence under the general issue.—*Tate v. State*, 5 Blackf. 73.

An indictment against the supervisor of a highway for not repairing the same alleged the existence of the road, stated in general terms the liability which the law imposed on the defendant, and charged him with unlawfully and willfully violating his duty. *Held*, that the indictment was not objectionable for not alleging

that the road had been established by law, or for omitting to aver that the board of county commissioners had allotted hands to the defendants, etc.—*Id.*

[c] (*Sup.* 1842)

An indictment charged that the defendant was supervisor of the highways in road district No. 1, in the township, etc., county, etc., and that he willfully suffered that part of the road running from S., in said county, in the direction of G., in said county, situate in said road district, to be obstructed, etc. *Held*, that the termini of the road need not be stated in the indictment, and that the description of the road was sufficient.—*State v. Harsh*, 6 Blackf. 346.

An indictment charging the supervisor of the highways with willfully suffering a part of the road to be obstructed need not aver that the defendant had the means to keep the road in repair, his not having such means being matter of defense.—*Id.*

[d] (*Sup.* 1846)

An indictment against a supervisor for not keeping a road in repair need not aver that he did not keep it in as good repair as the available labor or means enabled him to do.—*State v. Brown*, 8 Blackf. 69.

Such an averment, however, is substantially contained in an indictment alleging the road to be so obstructed by trees, etc., as to be nearly impassable, etc.—*Id.*

[e] (*Sup.* 1846)

An indictment against a supervisor of highways alleged that the defendant, on, etc., at, etc., having then and there collected a certain fine of one, etc., unlawfully and corruptly failed to make return thereof, or to expend the same, or to pay the same over to the party entitled to receive it, against the statute, etc. *Held*, that no offense was charged in the indictment.—*State v. Shields*, 8 Blackf. 151.

[f] (*Sup.* 1848)

An indictment against the supervisor of a road district, charging that he neglected to keep the roads in his district in good repair, without describing the particular roads or parts thereof suffered to be out of repair, is bad for uncertainty.—*State v. McMurrin*, 1 Ind. 44.

[g] (*Sup.* 1853)

When the supervisor of a road district acts without the scope of his authority, and private injury is thereby sustained, the law will not protect him.—*Conwell v. Emrie*, 4 Ind. 209.

[h] (*Sup.* 1854)

2 Rev. St. 1852, p. 445, § 69, providing that penalties may be recovered from supervisors for failing to use due diligence in repairing highways, or to call out hands for the same purpose, or to bring suits for forfeitures, is cumulative, and does not prevent a prosecution for failure to keep a highway in repair.—*State v. Hogg*, 5 Ind. 515.

Though 1 Rev. St. p. 468, § 31, requires that all moneys, etc., for the improvement of highways shall be expended by the 15th of September in each year, still the supervisor is not liable to prosecution, when he has mortgaged his hands and the highway of his district for repairs, for delaying expenditures until the 15th of September in each year.—*Id.*

[i] (*Sup.* 1857)

Where parties open a road under the order of commissioners void on its face, proceedings before them are inadmissible to measure damages in an action of trespass for such opening.—*Barnard v. Haworth*, 9 Ind. 103.

[j] (*Sup.* 1858)

1 Rev. St. p. 467, § 26, provides that if the road supervisor shall fail to use due diligence in keeping the highways of his district in good repair, etc., or shall fail to perform any other duty enjoined upon him by this act, for every such offense he shall forfeit the sum of, etc., to be recovered before any justice of the county in the name of the township trustees by the treasurer of such township. Such treasurer shall bring such suit within three days after the bringing of any information of such forfeiture. *Held*, that an owner cannot bring suit against the supervisor on his own volition in the name of the township by the treasurer. Such suit must be brought by the treasurer, and the suit, when brought, is under his control, and may be dismissed at his pleasure.—*Trustees of White River Tp. v. Conwell*, 11 Ind. 216.

1 Rev. St. p. 467, § 26, which provides that, if a supervisor shall fail to use due diligence to keep the highways of his district in good repair, he shall forfeit a specified sum, to be recovered in the name of township trustees by the treasurer of the township, and such treasurer shall bring such suit within three days after receiving any information of such forfeiture, does not contemplate that suit may be brought against a supervisor on request of any one, and the last clause of the statute is directory to the township treasurer.—*Id.*

[k] (*Sup.* 1878)

A party whose lands have been injured by the act of a supervisor of highways, in good faith and in the proper discharge of his duties, must proceed by petition to the township trustee for damages, and not by an action against the supervisor personally.—*Spitzer v. Ward*, 64 Ind. 30.

[l] (*App.* 1891)

Under Acts 1883, p. 62, as amended by Acts 1885, p. 202, dividing townships into districts, providing for the election of a supervisor for each district, and defining his duties, a township is not liable for damages to property owners by the negligent maintenance of a ditch along a highway is constructed by the road supervisor of the road district since the supervisor, in constructing a road

strict, is not the agent or servant of the ship.—Union Civil Tp. of Montgomery v. Berryman, 3 Ind. App. 344, 28 N. E. 4.

(App. 1898)  
A superintendent of construction of a gravel road constructed under Act March 11, 1889, is liable on an order on him given by the contractor to the materialman, he having made written acceptance, even though he had failed to retain part of the contract price to pay for material on orders of the contractor, and told the payee that the order was good and would be paid, where all the money had been paid out on estimates and orders duly approved before action was instituted on said order.—Bartindale v. Lewis, 49 N. E. 462, 19 Ind. App. 289.

(Sup. 1906)  
One appointed by the board of commissioners as superintendent of construction of a highway, as authorized by Burns' Rev. St. 1901, § 49 (Acts 1901, p. 439, § 2), is a public officer, whose duty it is to protect the public's interest in the construction of the highway.—Hoy v. Unroe, 166 Ind. 550, 77 N. E. 1041, 10 Am. St. Rep. 391.

#### CASES FROM OTHER STATES.

SEE 25 CENT. DIG. High. §§ 313-317, 319-322, 356.  
See, also, note, 22 L. R. A. 824.

### CONSTRUCTION, IMPROVEMENT, AND REPAIR.

Repeal of statute by act relating to the subject, see STATUTES, § 161.  
Of bonds for by county, see COUNTIES, §§ 150, 174.  
Relating to as class legislation, see CONSTITUTIONAL LAW, § 208.  
And special laws, see STATUTES, § 93.  
Bridges, see BRIDGES, §§ 20-22.  
Turnpikes and toll roads, see TURNPIKES AND TOLL ROADS, §§ 17-21.  
Contracts invalid as depriving of property without due process of law, see CONSTITUTIONAL LAW, § 291.

#### Authority and duty to construct.

(Sup. 1880)  
There is no statute which expressly, or by implication, authorizes a board of county commissioners to appropriate money of the county for the working, improvement, or repair of the gravel highways of the county.—Driftwood Turnpike Co. v. Board of Com'rs of Barren County, 72 Ind. 226.

(Sup. 1906)  
A township trustee is not justified in refusing to cause a road which has been adjudged to be of public utility to be opened because he has not sufficient funds on hand at any one time to make all the necessary or desirable im-

provements.—Welch v. State ex rel. Beauchamp, 72 N. E. 1043, 164 Ind. 104.

#### [c] (Sup. 1907)

Under Acts 1893, p. 196, c. 112, as amended by Acts 1895, p. 143, c. 63, providing for the improvement of highways, on petition of freeholders of townships, etc., and directing that the board of county commissioners shall proceed with the construction of such roads, etc., the board is the agency of the law to carry into effect its provisions, but it is not the agent of the particular township constituting the taxing district.—Board of Com'rs of Jackson County v. Branaman, 169 Ind. 80, 82 N. E. 65.

#### [d] (Sup. 1908)

Gravel and macadamized roads, and those built of other material, may be constructed and kept in repair by the state, or under state authority by municipal subdivisions of the state, or taxing districts created by the Legislature for that purpose.—State ex rel. Board of Com'rs of Hendrick County v. Board of Com'rs of Marion County, 170 Ind. 595, 85 N. E. 513.

The construction and repair of public highways by the state is the exercise of a state function.—Id.

Act March 7, 1905 (Acts 1905, pp. 493-496, c. 164; Burns' Ann. St. Supp. 1905, §§ 6816-6822), provides for the improvement of unimproved highways on the boundary line between two counties on the petition of 50 freeholders, voters of any township or townships abutting such highway, the same to be considered and determined after notice given by the commissioners of either county. Complete jurisdiction is given the commissioners of the county before which the proceedings are commenced to order the road constructed, let the contract, etc., and the other county is required to issue its bonds for the amount apportioned to the abutting townships in said county, and levy the amount of the bonds on the taxable property in the abutting townships, etc. Held, that the act is not unconstitutional, as a deprivation of the right to local self-government.—Id.

#### FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. High. §§ 323-330.

### § 101. Proceedings to open in general.

#### [a] (Sup. 1881)

The provisions of section 12 of the act of March 3, 1877, relating to the construction of gravel roads, providing that no advantage shall be taken of any error, informality, or defect in the proceedings, except as therein provided, are sufficient to prevent a loss of jurisdiction by the board of commissioners by its failure to act upon the report of the viewers and the engineer appointed by it, or to enter a formal continuance of the matter at its regular session.—Stoddard v. Johnson, 75 Ind. 20.

Proceedings for the construction of a gravel road, under Act March 3, 1877, cannot be assailed on account of errors or irregularities not affecting the jurisdiction of the commissioners, and by which the complainant's rights were not directly or injuriously affected.—*Id.*

Under Act March 3, 1877, in relation to the construction of gravel roads, the petition to the county board cannot include more than one improvement, but may ask for an improvement, whether it be a single continuous line, or a line with branches, so long as all the parts are connected. A statement in the petition that it is for a gravel road is a sufficient description of the kind of improvement prayed for.—*Id.*

[b] (Sup. 1882)

An appeal will lie from the decision of county commissioners vacating an order, made at a former term, granting the right to construct a gravel road on the county highway.—*Board of Com'rs of Cass County v. Logansport & R. O. Gravel Road Co.*, 88 Ind. 199.

[c] (Sup. 1883)

The decisions and orders of boards of county commissioners in proceedings instituted under Act March 3, 1877, authorizing the construction of gravel, macadamized, and paved roads, are conclusive, except upon appeal, and may not be attacked collaterally.—*Million v. Board of Com'rs of Carroll County*, 89 Ind. 5.

[d] (Sup. 1884)

In establishing free turnpikes, under Rev. St. 1881, § 5091 et seq., the line of the old road may be departed from for the purpose of straightening and improving the road as public utility and convenience may require; and in such case, for these purposes, the change of line may be made even for a long distance.—*Gipson v. Heath*, 98 Ind. 100.

[e] (Sup. 1885)

Under Rev. St. 1881, § 5095, providing that an order for the construction of a gravel road "shall not be made until a majority of the resident landowners" shall have signed the petition for the improvement, *held*, that the burden was on the petitioners to show that the petition had been signed by the requisite number.—*Fleming v. Hight*, 101 Ind. 466.

[f] (Sup. 1908)

Where the commissioners of one county ordered the improvement of a highway under the act, and thereafter met in joint session the commissioners of the adjoining county, whereupon the cost of the improvement was apportioned, etc., all orders of the commissioners of the latter county attempting to vacate its own proceedings, or the proceeding of the boards of the two counties, were void.—*State ex rel. Board of Com'rs of Hendricks County v. Board of Com'rs of Marion County*, 170 Ind. 595, 85 N. E. 513.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 339-345.

## § 102. Removal of fences and buildings.

[a] (Sup. 1880)

Notice to remove fences from land taken for a highway is sufficient if given either to owner or occupant.—*Porter v. Stout*, 73 Ind. 3.

[b] (Sup. 1884)

In a suit for trespass in laying out a highway, defendant may justify as road supervisor acting under a regular order of the commissioners, but he must show that he gave the notice to the occupant to remove his fence, as required by Rev. St. 1881, § 5030, or he will be held a trespasser ab initio.—*Rutherford v. Davis*, 95 Ind. 245.

[c] (Sup. 1890)

Under Rev. St. 1881, § 5030, which provides that, "whenever any public highway shall have been laid out through any inclosed land, the township superintendent shall give the occupant of such land (or the owner, if a resident of the road district) sixty days' notice in writing to remove his fence; but such owner or occupant shall not be compelled to remove such fence between the first day of April and the first day of November; and, if such fence be not removed pursuant to such notice, such township superintendent shall cause the same to be done,"—in an action to restrain a supervisor from removing a fence on the ground that no notice was served on the owners, there must be an averment in the complaint that the owner is a resident of the road district.—*Conley v. Grove*, 124 Ind. 208, 24 N. E. 731.

Rev. St. 1881, § 5030, provides that, whenever any public highway shall have been laid out through inclosed land, the township superintendent shall give the occupant or the owner, if a resident of the district, 60 days' notice in writing to remove his fence, but that such owner or occupant shall not be compelled to remove the fence between the 1st day of April and the 1st day of November, and that, if the fence be not removed pursuant to the notice, the township superintendent shall cause it to be removed. *Held*, that injunction will lie to prevent the superintendent from consummating a threatened removal of a fence on November 1st pursuant to a notice given on March 21st previously, the effect of the exception in the statute being to exclude from the operation thereof the time between April 1st and November 1st, and to require notice covering a period of 60 days when the person is required to act.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 337, 338.

## § 105. Authority and duty to maintain and repair.

Mandamus to compel collection of fine for failure to repair, see *MANDAMUS*, § 94.

[a] (Sup. 1888)

Rev. St. 1881, § 5071, providing that all work of certain kinds on public highways shall be done in particular months, is directory, and is not a limitation on the power of the road

superintendent to make repairs and improvements.—*Clark Civil Tp. v. Brookshire*, 114 Ind. 437, 16 N. E. 132.

[b] (Sup. 1898)

Burns' Rev. St. 1804, § 6818 (Horner's Rev. St. 1897, § 5068), provides that the road supervisor shall carry into effect all orders of the trustee of the township in which the road district is situated, touching the highways and bridges therein, and keep them in good order. Section 6828 (5077) provides that such supervisor shall, within 10 days after the receipt of any money, proceed to employ laborers to repair the highways in his district, and attend to and not neglect such repairs, and, if the tax assessed shall be insufficient therefor, he shall call out the hands in his district to complete such repairing. Section 6838 (5088) provides that, where a supervisor shall fail to use due diligence in keeping the highways in good repair, he shall forfeit the sum of \$10 for every offense, to be recovered by the township trustees. *Held*, that it is the imperative duty of the supervisors to keep the highways in good repair.—*State ex rel. Cutter v. Kamman*, 51 N. E. 483, 151 Ind. 407.

[c] (Sup. 1904)

Under Acts 1895, p. 174, c. 82, granting the board of county commissioners power to purchase toll roads, and declaring that, when conveyed, the roads shall thenceforth be free, and shall be kept in repair as provided by law for the repair of other roads, the phrase "other roads" means other free roads of the class to which those purchased under the act would belong when conveyed to the county, in the absence of anything to indicate that the Legislature intended the contrary.—*State ex rel. Shanks v. Board of Com'rs of Carroll County*, 70 N. E. 138, 162 Ind. 183.

Under Acts 1901, p. 439, c. 202, § 1, declaring that by virtue of their office the commissioners of each county are thereby constituted a board of directors for all free gravel, macadam, and turnpike roads in their county, and vesting the management and control of such roads exclusively in the board, it is the duty of the board to take charge of and repair toll roads purchased pursuant to Acts 1895, p. 174, c. 82, granting the board of county commissioners power to purchase toll roads.—*Id.*

[d] (Sup. 1906)

Under Burns' Ann. St. 1901, p. 6848, providing how roads located on township lines shall be divided, after county commissioners have ordered the opening of such a road, the neighboring trustees have no discretion to refuse to take charge of and keep in repair their respective parts of such roads as designated by the statute.—*Rodenbarger v. State ex rel. Stephenson*, 76 N. E. 398, 165 Ind. 685.

Where a north and south highway was located on a line dividing two townships, the north half thereof fell to the township on the west, and it was the duty of the highway super-

visor of such township in whose district the highway lay to keep the same in repair independent of the commands of his township trustee, under the express provisions of Burns' Ann. St. 1901, §§ 6818, 6828.—*Id.*

[e] (Sup. 1910)

The fact that incorporated towns and cities have a local system for the improvement of their streets does not deprive the Legislature of the power to invest the county commissioners with jurisdiction to authorize their improvement, under the provisions of Acts 1905, c. 167, §§ 62-83 (Burns' Ann. St. 1908, § 7711 et seq.), as parts of the general system of thoroughfares.—*Smith v. Board of Com'rs of Hamilton County*, 90 N. E. 881; *Moore v. Bible*, *Id.* 892; *Hutton v. Boze*, *Id.* 893.

[f] (Sup. 1910)

The Legislature, under the police power of the state, is authorized to provide for the repair, improvement, and maintenance of public highways, in any manner in its discretion, subject only to constitutional restrictions.—*Harmon v. Gephart*, 90 N. E. 890; *Moore v. Bible*, *Id.* 892; *Hutton v. Boze*, *Id.* 893.

[g] (Sup. 1910)

All public highways are "state highways," and the state is the sole arbiter of the manner and conditions of their improvement, except as limited by the Constitution.—*Cummins v. Pence*, 91 N. E. 529.

FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. High. §§ 323, 325, 330.

§ 106. **Compelling improvement or repair.**

Mandamus to compel, see MANDAMUS, §§ 31, 90, 94.

FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. High. § 331.

§ 107. **Proceedings for improvement of highways and for construction of free gravel roads or turnpikes.**

Impeachment of testimony of witness in contest of election for building gravel road, see WITNESSES, § 396.

Jurisdiction of justices of the peace in proceedings to assess damages where title to real property is involved, see JUSTICES OF THE PEACE, § 36.

§ 107 (1). *In general.*

[a] (Sup. 1881)

Under section 12 of the law relative to the improvement and repair of highways, declaring that no person shall be permitted to take advantage of any error connected in any proceeding to lay out, construct, or improve any road, nor of any informality, error, or defect appearing in the record of such proceeding unless the party complaining is affected thereby, etc., the board of commissioners cannot be re-

garded as having lost jurisdiction of a proceeding for the improvement of a highway by letting the matter lie over at one regular session after the filing of the petition without taking any action thereon, or entering formal continuance of the matter.—*Stoddard v. Johnson*, 75 Ind. 20.

[b] (*Sup.* 1881)

Where separate petitions for the graveling of a continuous road described the routes so that the road overlapped for a mile or so, it was proper for the board of commissioners to act upon the petitions simultaneously, and enter a single order for the construction of a road between the remote termini as set forth in the petitions.—*Ricketts v. Spraker*, 77 Ind. 371.

[c] (*Sup.* 1884)

In a proceeding for the location and construction of a free gravel road, a notice showing that the petition was for a free gravel road was a sufficient statement of the kind of improvement asked for.—*Gipson v. Heath*, 98 Ind. 100.

[d] (*Sup.* 1885)

Under Rev. St. 1881, §§ 5091, 5092, providing for the construction of gravel roads, the board of commissioners have no authority or power to act or take any steps in a proceeding for the establishment and construction of a free gravel road until a bond as required is first executed and filed.—*Scott v. Board of Com'rs of Vermillion County*, 101 Ind. 42.

[e] (*Sup.* 1885)

Rev. St. 1881, § 5095, requiring that the commissioners shall not make an order for the improvement of a road until a majority of the resident landholders of the county whose lands are reported as benefited and ought to be assessed shall have subscribed the petition for the improvement, is mandatory, and expressly prohibits from making such order until the petition is so assigned.—*Fleming v. Hight*, 101 Ind. 466.

[f] (*Sup.* 1885)

Delay in acting on a petition for a free gravel road did not render the proceedings void.—*Hobbs v. Board of Com'rs of Tipton County*, 3 N. E. 263, 103 Ind. 575.

[g] (*Sup.* 1886)

On a petition for the improvement of a public road, the court has no authority to order a different improvement from that described in the petition.—*Lowe v. Brannan*, 105 Ind. 247, 4 N. E. 580.

[h] (*Sup.* 1886)

The rule that, where a judicial tribunal has a general power to designate a time within which an act shall be done, it may extend the time in the exercise of reasonable discretion, is applicable in a proceeding to construct a gravel road, and the time for meeting of viewers and engineer may be extended by the board of county commissioners.—*Black v. Thomson*, 7 N. E. 184, 107 Ind. 162.

[i] (*Sup.* 1886)

Where jurisdiction over a proceeding to establish a gravel road is once acquired by the board of commissioners, it is not lost by the omission to enter an order continuing the proceedings.—*Osborn v. Sutton*, 108 Ind. 443, 9 N. E. 410.

It is not necessary for the board of county commissioners to enter a formal order declaring that it has jurisdiction of a proceeding to establish a gravel road, as the assumption of authority is a declaration that jurisdiction exists.—*Id.*

[j] (*Sup.* 1887)

Under Rev. St. 1881, § 5095, providing that a majority of landowners to be assessed shall sign the petition for the construction of a free gravel road before the order therefor shall be made, the question remains an open one until the board of county commissioners proceeds to act upon the report, and until that time the names of petitioners may be added or withdrawn by leave of the board.—*Black v. Campbell*, 112 Ind. 122, 13 N. E. 409.

[k] The board of county commissioners may at a special session receive and act upon a petition for a free turnpike road.—(*Sup.* 1888) *White v. Fleming*, 114 Ind. 560, 16 N. E. 487; (1890) *Stipp v. Claman*, 123 Ind. 532, 24 N. E. 131; (1890) *Anderson v. Same*, 123 Ind. 471, 24 N. E. 175; (1890) *Fleener v. Same*, 126 Ind. 166, 25 N. E. 900.

[l] The county board, while in legal special session called for the purpose of settling with the outgoing trustees of the several townships, was presented with a petition to improve a certain highway. *Held*, that the board could take immediate cognizance of the petition, and appoint viewers, under Rev. St. 1881, § 5092, providing that, on the presentation of a petition to improve a highway, the county board may appoint viewers to examine, view, or straighten said highway.—(*Sup.* 1888) *White v. Fleming*, 114 Ind. 560, 16 N. E. 487; (1891) *Loesnitz v. Seelinger*, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887.

[m] (*Sup.* 1890)

The act of 1885 (*Elliott's Supp.* 1889, §§ 1518-1522), which authorizes the board of county commissioners to construct a free turnpike instead of a bridge, if, in its opinion, the turnpike will be of the same public convenience, does not confine the board, in the construction of the turnpike, to the route of an existing road. The board has power to order the construction of a bridge at any point, and the act was intended to give it the same power as to a turnpike intended to take the place of the bridge.—*McClure v. Board of Com'rs of Franklin County*, 124 Ind. 154, 24 N. E. 741.

Where the board of county commissioners, in constructing a turnpike, proceeds under Act March 7, 1885 (*Elliott's Supp.* 1889, §§ 1518-1522), which authorizes the board to construct a free turnpike if in its opinion the turnpike

can be so constructed as to avoid the necessity of a bridge, and be of the same public convenience, it is not necessary that the petition and bond provided for by Rev. St. 1881, § 5002, regulating the construction of free turnpikes, be filed in order to give the board jurisdiction of the subject-matter and of the persons of the landowners; the provision in section 3 of the act of 1885, that the board, in constructing such turnpike, shall be governed by Rev. St. 1881, §§ 5001-5114, being sufficiently complied with by the appointment of viewers and engineers to locate the road and assess the damages.—Id.

[n] (Sup. 1892)

In proceedings to establish a free gravel road where there is notice provided for by law, and notice is assumed to be given under the law, there is jurisdiction, although such notice is defective.—Tucker v. Sellers, 30 N. E. 531, 130 Ind. 514; Same v. O'Neal, 30 N. E. 533, 130 Ind. 597.

Jurisdiction in proceedings for the establishment of a free gravel road cannot be obtained without notice.—Id.

[o] (Sup. 1892)

Where the circuit court set aside the order of the board for improvement as to one of the parties for want of notice, and after the cause was certified back to the board the original petition was refiled, there was no error in the reappointment of the old viewers.—Fulton v. Cummings, 132 Ind. 453, 30 N. E. 949.

[p] (Sup. 1892)

Rev. St. 1881, §§ 5002, 5006, relating to the construction of free gravel roads provide that the board of commissioners shall appoint viewers to estimate the expense, etc., and apportion it on the land benefited. The auditor is required to notify those interested, and the board is required to hear objections, and, if no sufficient reason is shown, to approve the report of the viewers and order an assessment. *Held*, that a joint action by several interested landowners will not lie to set aside the proceedings of the board, and enjoin the assessment on their lands for such road, because one of the acting commissioners was also one of the petitioners, and personally interested in the result, where such landowners, having knowledge of the situation, made no objection to such commissioner acting, and failed to appeal from the judgment.—Board of Com'rs of Carroll County v. Justice, 133 Ind. 89, 30 N. E. 1085, 36 Am. St. Rep. 528.

The approval of a freeholder's bond securing the expense of the preliminary survey and report, filed with the petition for establishing a free gravel road, is a ministerial act; and the fact that one of the acting commissioners was one of the petitioners, and personally interested in establishing the road, did not vitiate the proceedings of the commissioners.—Id.

[q] (Sup. 1892)

Where a petition for a free gravel road was presented to the board of county commis-

sioners for final action, under Rev. St. 1881, § 5005, and the board found that all the statutory requirements had been complied with, and that such road was necessary, the petitioners were entitled to an order that the improvement be made; and an order that "said report be continued for further action at such time as the board may deem expedient" was not proper.—Ralston v. Beall, 171 Ind. 719, 30 N. E. 1095.

Where no proper order, under Rev. St. 1881, § 5005, for making a gravel road, was made, and no further action was taken, and such postponement of action was acquiesced in by all the petitioners for six years, after which a remonstrance was filed against the construction of the road, and a number of petitioners asked leave to withdraw their names from the petition, the board was warranted in ignoring the original finding, and in again taking up the matter de novo on the petition and viewer's report; it being inferable that the lapse of time may have brought such change as to render the improvement no longer necessary.—Id.

A petition for a free gravel road was presented to the board of county commissioners for final action, under Rev. St. 1881, § 5005, giving the board jurisdiction to make the necessary finding and order for the desired improvement, whereupon the board found that all the statutory requirements had been complied with, and that such gravel road was necessary, and "that said report be continued for further action at such time as the board may deem expedient." *Held* that, such finding being in the nature of a verdict of a jury or a finding by a court, the right of a petitioner to withdraw his name from the petition is thereafter at an end.—Id.

[r] (Sup. 1894)

Proceedings under Rev. St. 1894, § 6855 (Rev. St. 1881, § 5001), to establish a free gravel road, are not void on the ground that the petition asks for two improvements instead of one, because the work contemplated includes part of a road already constructed.—Evans v. West, 138 Ind. 621, 38 N. E. 65.

In a proceeding to establish a free gravel road, the petition of the road was presented to the board of commissioners, and was granted by them. Viewers and an engineer were appointed to locate and define the work, and notice of their meeting was given. They met and made their report, laying out and specifying the work to be done. The report was confirmed, and the road ordered constructed. *Held*, that the board acquired jurisdiction both of the subject-matter and of the persons liable for the cost of the improvement, and a remonstrance presented by such persons subsequent to the confirmation of the report of the viewers and the engineer, and the entering of the order directing the construction of the road, was a collateral attack on the prior proceeding to which no exception had been made, and such remonstrance could not be entertained.—Id.

[s] (Sup. 1894)

Rev. St. 1881, § 5015 (Rev. St. 1894, § 6742), defining the method by which public highways may be opened and established is not superseded by Rev. St. 1894, §§ 6855, 6856, which provided for the establishment and construction of free gravel roads; and therefore the board of county commissioners has no power, in a proceeding under the latter sections, to order the construction of a gravel road over a route where no highway exists, where it does not appear that such new road is for the purpose of straightening or altering an existing road.—*Crow v. Judy*, 139 Ind. 562, 38 N. E. 415.

[t] (Sup. 1896)

Burns' Ann. St. 1894, § 6858, providing for the construction of macadamized roads declares that the viewers and engineer shall report to the board of commissioners showing the lands that would be benefited by or ought to be assessed for the expense of the improvement, and section 6859 provides that on the return of such report, if in their opinion public utility requires it, the commissioners shall enter an order of record that the improvement be made, which shall state the lands which shall be assessed for the expense of the improvement; and section 6860 declares that the commissioner shall immediately appoint three freeholders a committee to apportion the estimated expense of such improvement on the real property embraced in the order aforesaid, and report the same to the county auditor. *Held* that, where a petition for a free macadamized road was duly presented to the county commissioners under such act, the board had jurisdiction to proceed.—*Bowen v. Hester*, 41 N. E. 330, 143 Ind. 511.

[tt] (Sup. 1896)

An objection that the petition for the improvement of a highway under the gravel-road act of 1885, as amended (Rev. St. 1894, §§ 6879-6899), was not signed by the requisite number of landholders, must be raised before the report of the viewers is made.—*Miller v. Burks*, 146 Ind. 219, 43 N. E. 930.

[u] (Sup. 1897)

Act March 3, 1893, as amended by Act March 7, 1895, relative to construction of free gravel roads, confers on a board of county commissioners judicial power; so that, the board having jurisdiction of the subject and parties, mere errors and irregularities in the proceedings are not ground for enjoining the construction.—*Board of Com'rs of Switzerland County v. Reeves*, 46 N. E. 995, 148 Ind. 467.

[uu] (Sup. 1902)

Where an original petition for a free gravel road was sufficient on its face, and the board of commissioners, after notice to landowners and without remonstrance by them, adjudged the petition sufficient, such landowners were bound thereby.—*Smyth v. State ex rel. Braun*, 62 N. E. 449, 158 Ind. 332.

[v] (Sup. 1904)

The three copies of a petition filed for improvement of a highway, each stating, "This petition is written in triplicate, and all three of said copies are to be presented together and considered as a single petition," are properly treated as one petition.—*Brown v. Miller*, 71 N. E. 122, 162 Ind. 684.

Under Acts 1899, pp. 128-130, c. 97, providing for the viewing, location, and determination of the width of roads and their improvement, and that, "if any part of the road or roads is to be new road or roads, they shall be described with definiteness as will enable any practical land surveyor to locate them," in connection with the improvement of roads already established, new roads, if of public utility, may be established and improved.—*Id.*

[vv] (Sup. 1906)

The presentation to a board of commissioners of a petition praying for the construction of a gravel road, containing the requisites prescribed by Acts 1903, p. 255, c. 145, § 2, praying for such improvement and accompanied by proof that notice of the presentation had been given as required by such section, confers jurisdiction of the subject-matter on the commissioners.—*Todd v. Crail*, 77 N. E. 402, 167 Ind. 48.

[w] (App. 1906)

It is the duty of boards, of county commissioners to defend, as the enforced agent of the taxpayers, all actions concerning the construction of free gravel roads.—*Board of Com'rs of Jackson County v. Branaman*, 39 Ind. App. 193, 76 N. E. 1030, 78 N. E. 356.

[ww] (Sup. 1907)

The word "land" primarily denotes ground, soil, earth, woods, water, or the like, and secondarily the character of the interest a tenant may have in land, and hence Acts 1903, p. 255, § 2, requiring a majority of the "resident landowners of the county whose lands abut on the proposed improvement" to sign a petition for such improvement, refers to the ground forming the earth's surface contiguous to such improvement.—*Kemp v. Goodnight*, 168 Ind. 174, 80 N. E. 160.

Where Acts 1903, p. 255, c. 145, expressly declare that the decision of the board of county commissioners in cases of remonstrance shall be final and no appeal allowed therefrom, it was not error to refuse to allow plaintiffs to file amended remonstrances in the circuit court.—*Id.*

Acts 1903, p. 255, c. 145, relating to improvement of gravel and macadamized roads, contemplates as "resident landholders of the county, whose lands abut upon the proposed improvement," who are entitled to sign a petition for an improvement, only the holder of the fee and not mere life tenants.—*Id.*

Where the question of the jurisdiction has been finally adjudicated, it cannot be again raised by the insertion of new averments.—*Id.*

Evidence in a proceeding for a highway improvement under an act concerning gravel and macadamized roads (Acts 1903, p. 255, c. 155), examined, and *held* to show that certain land owned by L. abutted upon the proposed improvement.—Id.

[x] (Sup. 1907)

The decision of a board of commissioners on the sufficiency of a highway petition is a judicial act.—*Ross v. Becker*, 169 Ind. 166, 81 N. E. 473.

Under Acts 1903, p. 255, regulating the construction of gravel roads, a petition must be signed by a majority of abutting landowners to give the commissioners jurisdiction to proceed.—Id.

[xx] (Sup. 1908)

Acts 1905, p. 494, c. 164, relating to the construction of free gravel roads on county lines, etc., provides in section 3 that, if the board of commissioners before whom the petition is pending shall find that it is sufficient and in compliance with the provisions of the act, they shall establish the improvement and order it to be constructed, and that the status of the improvement shall be exactly the same as any proposed improvement that had been regularly petitioned for and voted on at an election regularly held under the provisions of Act March 3, 1893, and the amendments thereto, or under Act March 11, 1901 (Acts 1901, p. 449, c. 205), and returns regularly made by the proper election officers. *Held*, that this was not an attempt to adopt the acts mentioned as a part of the act of 1905, but to furnish means of determining the status of the proceeding under the act of 1905, when the board ordered the improvement to be constructed; that since the status of the proceeding, after the return of the proper election officers showing that the election carried in favor of the improvement, is the same under Act March 11, 1901, as it is under Act March 3, 1893, and the amendments thereof, and the status thereof could be determined from an examination of either one of the acts, and that since, even if the reference to the act of 1893 and its amendments were eliminated from section 3 of the act of 1905, the status of the proceedings could be determined from the act of 1901, the repeal of the act of March 3, 1893, and its amendments, prior to the enactment of the act of 1905, could not affect the validity of the latter act.—*State ex rel. Board of Com'rs of Hendricks County v. Board of Com'rs of Marion County*, 170 Ind. 595, 85 N. E. 513.

[y] (Sup. 1908)

In proceedings under Acts 1905, pp. 550, 551, c. 167, §§ 62, 63, et seq., for the improvement of highways, a notice given by the auditor, which contains enough of the petition to notify the taxpayers of the taxing district that a proceeding has been commenced before the county

commissioners, the highways to be improved, the character of the improvement, and under what statute, and the date when the petition will be presented to the board, is sufficient, within *Burns' Ann. St. 1908*, §§ 321, 7705, 7712, 7714.—*Conrad v. Hausen*, 171 Ind. 43, 85 N. E. 710.

The allegation in a petition in a proceeding for the improvement of highways as authorized by Acts 1905, pp. 550, 551, c. 167, §§ 62, 63, et seq., that there are fewer than 75 freehold voters in the township, is mere surplusage, and will be disregarded; the petition having been signed by 50 freehold voters of the township as required by the act.—Id.

Under Acts 1905, p. 548, c. 167, § 57, providing that no one shall take advantage of any error committed in any proceedings to improve any highway, etc., persons filing a remonstrance in proceedings for the improvement of a highway cannot take advantage of the error committed by the auditor in not including in the notice the names of the persons signing the petition, where they are not injuriously affected thereby.—Id.

The highway act (Acts 1905, p. 521, c. 167) does not require that two or more persons, owning lands as tenants in common or as joint tenants, who sign a petition for the improvement of highways under the act, should be counted as one freeholder.—Id.

[yy] Where the petition for the improvement of a road, partially in one township and partially in another, is signed by the required number of 50 freeholders within the district to be taxed, it is immaterial whether such petitioners reside in one township or the other.—(Sup. 1910) *Smith v. Board of Com'rs of Hamilton County*, 90 N. E. 881; (1910) *Moore v. Bible*, 90 N. E. 892; (1910) *Hutton v. Boze*, Id. 893.

[z] (Sup. 1910)

The question of the improvement of an existing highway, as authorized by *Burns' Ann. St. 1908*, § 7711 et seq., authorizing the construction of gravel roads by taxation, does not involve a question of public utility, which is merged in the existing highway, by virtue of its existence.—*Cummins v. Pence*, 91 N. E. 529.

[zz] (Sup. 1910)

*Burns' Ann. St. 1908*, § 7711 et seq., providing for proceedings before county boards of commissioners for the improvement of highways, is constitutional.—*Isanogle v. Russey*, 91 N. E. 938.

In proceedings before a board of county commissioners for the improvement of a highway, the application of petitioners to withdraw from the petition after the order of the board for the construction of the work had been announced did not oust the jurisdiction of the board, though the withdrawal would have reduced the number of petitioners to less than 50, the number required by *Burns' Ann. St. 1908*, § 7712.—Id.

Even if the board of county commissioners erred in not dismissing a proceeding for the improvement of a highway after an application therefor to withdraw from the petition, the order of the board that the improvement be constructed was not void, but was conclusive unless corrected on an appeal to the circuit court.—Id.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 339-345.

§ 107 (2). *Submission of question to vote.*

[a] (Sup. 1900)

The board is authorized to go behind the votes as returned by the election officers, and inquire into its validity, and any person may appear before the board at the proper time, and present any proper objections to the result as returned.—Board of Com'rs of Monroe County v. Conner, 58 N. E. 828, 155 Ind. 484.

[b] (Sup. 1900)

Horne's Rev. St. 1897, § 5114ddd (Burns' Supp. Rev. St. 1897, § 6925), declares that, if two or more petitions for road improvements are pending at the same time, they shall be voted on at the same election, the ballots for each election clearly designating the road for which the voter intends to vote. *Held*, that where a petition was filed with the board of county commissioners for the improvement of certain roads, and a second petition was filed for the improvement of such roads and others, and the first petitioners ask that the improvements be submitted as a unit, which was denied by the board, and the second petition alone presented to the voters, such action on the part of the board could not be regarded as an amendment of the first petition, the board not having authority to make an amendment.—Pruden v. Board of Com'rs of Jackson County, 58 N. E. 437, 156 Ind. 325.

It was not necessary that the first petitioners should object to the order consolidating the proceedings, in order that the erroneous action of the board might be reviewed on appeal, since such order did not injure them.—Id.

[c] (Sup. 1901)

Under Burns' Rev. St. 1894, §§ 6924-6934, providing that the county commissioners, on petition of 50 freeholders of a township, may submit the question of improving designated roads in the township, including incorporated towns of less than 30,000 inhabitants, to the voters of the township, the fact that the improvement of a designated road was extended through an incorporated town of 1,700 inhabitants without obtaining the consent of the board of trustees of such town did not invalidate an election and order for the improvement, or deprive the commissioners of jurisdiction.—Lowe v. Board of Com'rs of White County, 59 N. E. 466, 156 Ind. 163.

[d] (Sup. 1904)

Under Acts 1899, p. 128, c. 97, § 1, providing that the county commissioners of any

county, when petitioned therefor by 50 freeholders, voters of any township or townships contiguous to each other, inhabitants in such county, where such road is to be improved, shall submit to the voters of said township or townships the question of improvement, it is sufficient if the petition be signed by 50 freeholders of the taxing district, whether it is composed of one township or more.—Brown v. Miller, 71 N. E. 122, 162 Ind. 684.

[e] (Sup. 1904)

In a contest of an election for the construction of free gravel roads, an instruction enumerating certain acts of the election officers, who testified as witnesses, tending to show their feelings and interest, and informing the jury that, if such matters were established, they might consider them, with the other evidence, in determining whether a majority of the legal votes cast at such election was for or against the building of the road, was not misleading, as to the purpose for which the evidence should be considered.—Strebin v. Lavengood, 71 N. E. 494, 163 Ind. 478.

Where, in the contest of an election for the building of gravel roads, the gravamen of the petition was that more legal votes were cast for the road than against it, and not an alleged conspiracy, proof of the conspiracy was unnecessary.—Id.

The Constitution does not require gravel road elections to be by ballot, and voters at such elections may be compelled to testify whether they voted for or against building a free gravel road, in the absence of a contrary statutory provision.—Id.

Where the issue in a contest of an election in a gravel road proceeding was whether a majority of the votes cast was for or against the building of free gravel roads, the admission in evidence of the original petition for the construction of gravel roads and the proceedings of the board of commissioners was harmless.—Id.

Burns' Ann. St. 1901, §§ 6198, 6262, permitting grounds of contest only as to the ballots protested and preserved, has no application to contests of gravel road elections, and a petition in a contest of a gravel road election is not demurrable because it does not allege that any of the ballots were protested and preserved.—Id.

A petition to contest an election for the building of free gravel roads filed before the board of commissioners, is amendable.—Id.

Where taxpayers moved to dismiss the appeal in a proceeding for the construction of free gravel roads and, before the motion to strike the amended petition from the files, the petition, with leave of court, was verified and refiled, the verification, when objection was made, was a sufficient compliance with the statute requiring the pleading to be verified.—Id.

[f] (App. 1904)

Where under Acts 1899, p. 128, relating to improvements of roads and highways, an agree-

gate of 50 freeholders and voters, citizens of the townships interested, petitioned for an election to decide as to the construction of roads for such townships, and an election was held, the taxing district, for the purpose of paying for such construction, is formed when a majority of the votes cast in the townships in the aggregate are in favor of such construction; it not being necessary for a majority of each township to be in favor thereof.—*Davern v. Board of Com'rs of Decatur County*, 34 Ind. App. 44, 72 N. E. 268.

Acts 1899, p. 128, c. 97, provides that the county commissioners, when petitioned therefor by 50 freeholders, voters of any township or townships contiguous to each other, and inhabitants of the county where the roads petitioned for are to be improved, shall submit to the voters thereof the question of such improvement, etc. *Held*, that such act did not require that a petition for the improvement of roads in a district containing two or more contiguous townships should be signed by 50 or more voters in each township, but that it was sufficient if it was signed by 50 petitioners in all, some of whom resided in each township.—*Id.*

[g] (Sup. 1910)

Under the direct provisions of Acts 1905, c. 167, § 70, as amended by Acts 1907, c. 46 (*Burns' Ann. St. 1908, § 7719*), where the highway proposed to be improved is less than three miles in length, and joins at one end a free gravel or macadamized road, and the other a boundary line of the township without reference to whether it joins a gravel or other road at a boundary point, the commissioners have power to authorize the construction of a gravel road without a vote of the township, and to proceed with the same in all respects as if an affirmative vote of the township had been had.—*Smith v. Board of Com'rs of Hamilton County*, 90 N. E. 881; *Moore v. Bible*, *Id.* 892; *Hutton v. Boze*, *Id.* 893.

A road which lies two miles in one township and extends across the boundary one-eighth of a mile into another township is a road on a boundary line within Acts 1905, c. 167, § 70, as amended by Acts 1907, c. 46 (*Burns' Ann. St. 1908, § 7719*), authorizing the commissioners to improve such road when less than three miles in length without submitting the question to an election.—*Id.*

Under Acts 1905, c. 167, § 70, as amended by Acts 1907, c. 46 (*Burns' Ann. St. 1908, § 7719*), authorizing the commissioners, without an election of the voters of the township, to direct the improvement of a road less than three miles in length, connecting other improved roads it is immaterial that a portion of the road to be improved runs at right angles to another portion, or that the several portions are sections or parts of two unimproved roads established at different times under different proceedings.—*Id.*

[h] (Sup. 1910)

*Burns' Ann. St. 1908, § 7719*, providing that, on a proper petition for the improvement of a highway less than three miles in length, connected at each end with an improved road, and showing the existence of a rural mail route over any part of the system, the board of commissioners may cause such improvement to be made without submitting the question to an election, violates no provisions of the Constitution.—*Harmon v. Gephart*, 90 N. E. 890; *Moore v. Bible*, *Id.* 892; *Hutton v. Boze*, *Id.* 893.

FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. High. §§ 339-345.

### § 107 (3). Appeal.

[a] (Sup. 1883)

Act March 3, 1877 (*Rev. St. 1881, § 5102*) § 12, relating to the construction of gravel roads, provides that no person shall be permitted to take advantage of any error committed in any proceeding to lay out, construct, or improve any road under and by virtue of the act, nor of any error committed by the county commissioners or by the county auditor or by the engineer or surveyor or other person or persons in the proceedings to lay out, construct, or improve any such road nor of any informality, error, or defect appearing in the record of such proceeding, unless the party complaining is affected thereby. *Held*, that it is not enough for the complaining party to show that he is affected by the proceeding, but he must show that he is injuriously affected, and in what respect, by the informality, error, or defect of which he complains in any such proceeding, and that the same cannot be corrected by the county board, before he can be permitted to take advantage thereof by an action in the circuit court.—*Million v. Board of Com'rs of Carroll County*, 89 Ind. 5.

[b] (Sup. 1884)

Where, within the time limited for appeals in proceedings for the establishment of a highway, certain persons present an affidavit stating that they were aggrieved by the decision of the board ordering a gravel road, and explicitly state the nature of that interest in the subject-matter of the proceedings and present a sufficient appeal bond, they are entitled to an appeal.—*Fleming v. Hight*, 95 Ind. 78.

[c] (Sup. 1885)

Where an order for the improvement of a highway was revoked at the instance of the petitioners, if there was any error committed in the revocation, the petitioners cannot complain of such error.—*Scott v. Board of Com'rs of Vermillion County*, 101 Ind. 42.

[d] (Sup. 1886)

In a proceeding to establish a gravel road, the court will not, on appeal, reverse the order of the board of county commissioners establishing it, on the ground that the county, being indebted beyond the statutory limit, has no

power to issue bonds to pay for the proposed road, where it does not appear that the board intends to pay for the improvement in bonds, or otherwise than with the proceeds of the tax as it may be collected.—*Osborn v. Sutton*, 108 Ind. 443, 9 N. E. 410.

[e] (Sup. 1887)

Under Rev. St. 1881, § 5005, providing that, in a proceeding for the construction of a free gravel road, the majority of landowners to be assessed shall sign the petition before the order shall be made, a motion for permission to withdraw the name of a petitioner, if made in due season, may be treated as pending on appeal to the circuit court, or the motion may there be made de novo.—*Black v. Campbell*, 112 Ind. 122, 13 N. E. 409.

[f] (Sup. 1890)

The statute authorizing appeals from the decisions of the board of commissioners is applicable to and authorizes an appeal in proceedings under Act March 3, 1877 (Rev. St. 1881, § 5102) § 12, relating to free turnpike roads.—*Hight v. Claman*, 23 N. E. 279, 121 Ind. 447.

[g] (Sup. 1890)

The settled rule in proceedings for the construction of a free gravel road is that nothing can be tried on appeal from the board of commissioners except such matters as were in issue before the board, or as may, by leave of court, be put in issue by the amended pleadings.—*Wilkinson v. Lemasters*, 23 N. E. 688, 122 Ind. 82.

[h] (Sup. 1890)

Under the statutes for the establishment of free turnpike roads, which provide that no person shall take advantage of any error in the proceedings unless the party complaining is affected thereby, an appeal from an order establishing such a road, by some of the persons whose property is affected by its construction, does not suspend the proceedings as to those who do not appeal.—*Stipp v. Claman*, 123 Ind. 532, 24 N. E. 131; *Fleener v. Claman*, 126 Ind. 166, 25 N. E. 900.

[i] (Sup. 1893)

When remonstrators have appealed to the circuit court from the county commissioners' final order for the construction of a free gravel road, on the ground that the petition therefor was not signed by a majority of the resident landholders, whose lands were reported as benefited and subject to assessment, and by the owners of a majority of the whole number of acres so reported, as required by Rev. St. 1881, § 5005, and have obtained a reversal as to themselves, the proceedings of the board are not avoided, as regards a remonstrator who failed to appeal, and he cannot enjoin the county treasurer from collecting the sums assessed against him for benefits.—*Cason v. Harrison*, 35 N. E. 268, 135 Ind. 330.

[j] (Sup. 1899)

In gravel-road proceedings before commissioners, objectors claimed that the petition was not signed by a majority of the landowners or by the owners of a majority of the acres, when acted on by the commissioners, and that the viewers fraudulently omitted landowners from an apparent majority of acres. On appeal, the claims were found to be true. *Held*, that the fact that the appeal was ex parte and that there was no averment or proof that the facts were untrue.—*Kirsch v. Braun*, 108 Ind. 153, 247.

Under Acts 1877, p. 82, § 7 (B. & O. R. Co. v. State, 1894, §§ 6861-6867; Rev. St. 1881, § 5103; Horner's Rev. St. 1897, §§ 5114dd-5114dd), providing for the establishment of free gravel roads, the order of the commissioners establishing the improvement is not final, but is appealable, since at this stage the landowners have no opportunity to appear and object, and their lands should not be assessed; but the proceedings remain open and under the jurisdiction of the commissioners until their final order confirming the report of the three freeholders appointed to apportion the expense, and the report, when so confirmed after notice to the interested parties and a hearing, and when the lien is created, creates a lien on the land,—such hearing is the only day in court provided by the statute for the landowners.—*Id.*

The fact that the appeals of three out of four objectors from the action of the commissioners in gravel-road proceedings, who made the same objections in the circuit court as they urged below, were consolidated, and that the adversaries before the commissioners offered no resistance in the circuit court, does not warrant the conclusion that the proceedings on appeal were ex parte and collusive.—*Id.*

Rev. St. 1881, §§ 5772-5778; Rev. St. 1897, §§ 5772-5778; Burns' Rev. St. 1894, §§ 7859-7865), providing for appeals generally from decisions of the commissioners for jurisdiction on the circuit court to sustain an appeal from gravel-road proceedings before the commissioners, though the statute relating to such proceedings do not provide for appeal.—*Id.*

[k] (Sup. 1900)

Horner's Rev. St. 1897, § 5114dd (Supp. Rev. St. 1897, § 6025), declaring that two or more petitions for road improvements are pending at the same time, they were voted on at the same election, the board of each election designating the road to be improved, the voter intends to vote. *Held*, that a petition was filed for improvements on gravel roads, and a second petition was filed for improvement of the same roads and on the same day the first petitioners asked that the question of the improvement they asked for be decided as a unit, which the board refused, and that the question of the second petition

to the voters, such order was a denial of the first petition, from which the first petitioner had a right to appeal.—*Pruden v. Board of Commissioners of Jackson County*, 58 N. E. 437, 325.

**Sup. 1904)**

Under Burns' Ann. St. 1901, § 7859, relating to a person not a party to a proceeding before the board of commissioners to file an appeal showing his interest, before he can sue persons who are parties to proceedings in contest of a gravel road election before the commissioners need not comply with such requirement.—*Strebin v. Lavengood*, 71 N. E. 3 Ind. 478.

Under Acts 1901, p. 449, c. 205, relating to construction of free gravel roads, and providing that if a majority of those voting on the petition are in favor of building the road, the commissioners shall at once proceed to the construction, and, if the election fails, the petitioners shall pay all costs, and, if it carries, the petitioners shall be included in the expense, where the commissioners rejected the petition disputing the result of the election, and approved the petition, its effect was a final judgment that the petitioners had failed to carry for the improvement from which an appeal would lie.—*Id.*

Questions which are not properly presented to the board of commissioners by remonstrance, or otherwise, except such as go to the merits of the subject-matter, cannot be taken to the circuit court on appeal.—*Id.*

Under Burns' Ann. St. 1901, § 7861, providing that the auditor shall make a complete transcript of the proceedings of the board of commissioners relating to the proceedings upon the appeal, and deliver them to the clerk of the circuit court to which the appeal is taken, where a petition is made in the motion to dismiss the appeal or to reject an amended petition, and the auditor's transcript did not contain all the proceedings of the board in a gravel road election, such imperfection of the transcript may be ground for the dismissal of the appeal, but does not affect the court's jurisdiction over the subject-matter or the parties.—*Id.*

A person interested as a taxpayer or otherwise may appear before the commissioners to contest the result of a gravel road election, and be aggrieved by the decision, may appeal to the circuit court.—*Id.*

**Sup. 1906)**

A decision of the board of commissioners that a gravel road is a public utility is conclusive on appeal to the circuit court.—*Spauld v. Tott*, 137 Ind. 58, 76 N. E. 620.

**App. 1909)**

The duty of a board of commissioners to determine whether a contract to construct a gravel road has been completed, and, if so, to accept the same and order payment, is judicial in character, and from a decision of the board an appeal is given the contractor to the

circuit court.—*Donaldson v. State ex rel. Ripley County Com'rs*, 90 N. E. 132.

**[c] (Sup. 1910)**

Burns' Ann. St. 1908, § 7793, provides that any person aggrieved by any decision of the board of commissioners, in any proceeding in relation to highways may appeal therefrom to the circuit court, and that such appeal shall be tried de novo, and may be had as to any issue. *Held*, that it was error to dismiss an appeal of a landowner claiming damages, though he did not seasonably assail the petition before the commissioners or was not entitled to damages.—*Coles v. Woods*, 92 N. E. 163.

FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. High. §§ 339-345.

### § 107 (4). Collateral attack.

**[a] (Sup. 1875)**

In an action to enjoin the collection of a gravel road assessment, it cannot be objected that one terminus of the road was not stated in the articles of association, or that the company had not a valid subscription of three-fifths of the estimated cost of construction. Such questions must be passed upon by the board of commissioners before an assessment is ordered, and in a collateral proceeding it will be presumed that the board decided correctly, unless the contrary appears by the record.—*Evans v. Clermont & S. Gravel Road Co.*, 51 Ind. 160.

**[b] (Sup. 1881)**

Under the statute relative to proceedings for the construction and improvement of free gravel roads, requiring a petition signed by a certain number of landowners to be presented to the board of county commissioners, etc., the fact that the board has acted upon a petition presented to it will in a collateral attack upon the action of the board justify a presumption that the board found that the petition was sufficient, was signed by the necessary number of landowners, etc., and it is not necessary that the record of the board shall show an express finding upon these matters.—*Stoddard v. Johnson*, 75 Ind. 20; *Ricketts v. Spraker*, 77 Ind. 371.

**[c] (Sup. 1891)**

The rule which renders the judgments of a court of competent jurisdiction impervious to collateral attacks applies as well where there is no appeal as to cases where appeals are allowable, and the question as to whether an appeal lies from a proceeding to establish a free gravel road is wholly immaterial where judgments of the board of commissioners are attacked collaterally.—*Loesnitz v. Seelinger*, 25 N. E. 1037, 26 N. E. 887, 127 Ind. 422.

**[d] (Sup. 1892)**

Where the board of county commissioners has jurisdiction of the general subject, its order that the petition for a free gravel road is sufficient, and is signed by the proper num-

ber of freeholders, is conclusive as against a collateral attack.—*Tucker v. Sellers*, 30 N. E. 531, 130 Ind. 514; *Same v. O'Neal*, 30 N. E. 533, 130 Ind. 597.

Where notice of proceedings for the establishment of a free gravel road is sufficient to call into exercise the authority of the board of county commissioners and invoke its judgment on the jurisdictional facts, the decision of the court that notice was given cannot be held void and its judgment collaterally attacked on that ground.—*Id.*

[e] (Sup. 1892)

While the action of a board of county commissioners in acting on a petition for the establishment of a gravel road was a judicial one, the fact that one of the commissioners who took part in the proceedings was interested did not render their decision a mere nullity, but voidable only by direct attack.—*Board of Com'rs of Carroll County v. Justice*, 30 N. E. 1085, 133 Ind. 89, 36 Am. St. Rep. 528.

[f] (Sup. 1897)

An order of the county commissioners for an election for the establishment of two out of three gravel roads, sought for in one petition, cannot be collaterally attacked, though in violation of Acts 1895, p. 145, § 2, requiring all roads included in one petition to be voted on as a unit.—*Board of Com'rs of Monroe County v. Harrell*, 46 N. E. 124, 147 Ind. 500.

[g] (Sup. 1900)

*Burns' Supp. Rev. St. 1897, §§ 6924-6933*, authorizes the board of county commissioners to construct free gravel roads, if a majority of the voters voting on the question at a special election called by the board are in favor of such construction on petition of 50 freeholders. *Held*, that an injunction will not lie to restrain the letting of a contract for such construction because of the illegality of the election, since, as the board acts judicially, plaintiff has a remedy by appeal to the circuit court from its action, under *Burns' Rev. St. 1894, § 7859*, allowing an appeal from any decision of the county commissioners by any person aggrieved.—*Board of Com'rs of Monroe Co. v. Conner*, 58 N. E. 828, 155 Ind. 484.

*Burns' Supp. Rev. St. 1897, §§ 6924-6933*, authorize the board of county commissioners to construct gravel roads, if a majority of the voters voting at a special election, called on petition of 50 freeholders by the board for such purpose, favor the building of the roads. *Held*, that the regularity of such election cannot be investigated in injunction proceedings to restrain the commissioners from making a contract for construction, since such questions were adjudicated by the board before ordering the construction.—*Id.*

[h] (Sup. 1906)

Where it appeared from the record that a board of commissioners in proceedings to es-

tablish a gravel road acquired jurisdiction of the subject-matter and the parties in person provided by statute, the board's orders, and judgments were invulnerable to collateral attack for error or irregularity in the proceedings.—*Todd v. Crail*, 77 N. E. 100, 138 Ind. 48.

Where the record of a board of county commissioners in proceedings to establish a gravel road was properly dated and numbered, and the filing of a proof of notice, the filing of a petition signed by a majority of the abutting owners of the county, that the petition was granted as prayed, and the appointment of persons as viewers and a surveyor, etc., and the record, though insufficient of itself to establish jurisdiction, was sufficient, as a memorandum of the judgment of the board establishing on collateral attack, to warrant a refusal to set aside the files in the case and to the papers on file by law to contain the missing facts for the purpose of establishing jurisdiction.—

Where jurisdiction did not duly appear on the face of the record of county commissioners in proceedings to establish a gravel road, jurisdiction might be proved by extrinsic evidence either in a direct or collateral proceeding.

Under Acts 1903, p. 255, c. 145, requiring county commissioners to construct a gravel road on the filing of a petition containing verified facts and proof of notice, it will be presumed, in aid of the proceedings in a collateral attack thereon, that all the requirements have been complied with.—*Id.*

Proceedings by a board of county commissioners for the construction of a gravel road cannot be collaterally attacked by injunction unless they are absolutely void.—*Id.*

[i] Acts 1905, c. 167, § 70, as amended by Acts 1907, c. 46 (*Burns' Ann. St. 1908, § 7*), provides that, where the road proposed to be constructed is less than three miles in length, it shall be connected at each end with an improved road, either within the township or at the boundary thereof, or connecting an improved road with the boundary of the township, the commissioners may, in their discretion, authorize the construction of the road without submitting the question to an election of the voters. *Held*, that the fact that a road improvement, on the ground that the taxpayers had combined together for the purpose of avoiding a submission of the question of improvement as a unit, to the voters, by presentation of petitions for the improvement in divisions of less than three miles in length, should be raised by a direct appeal, if the petition was before the commissioners, and not be raised in a collateral attack by injunction.—(*Sup. 1910*) *Smith v. Board of Commissioners of Hamilton County*, 90 N. E. 881; (*1910*) *Smith v. Bible*, 90 N. E. 892; (*1910*) *Hutton v. Bible*, 90 N. E. 893.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 339-340.

### § 108. Criminal responsibility for failure to maintain or repair.

Liability of highway officers, see ante, § 96.

[a] (Sup. 1909)

An affidavit before a justice of the peace, charging defendant with refusing, in violation of Act March 9, 1903 (Acts 1903, p. 223, c. 124), as amended by Laws 1907, p. 298, c. 180 (Burns' Ann. St. 1908, § 7779), to repair a highway over which a rural mail route was being maintained, defendant "having received notice" that the highway was defective, and "being the duly elected," etc., trustee of the township, was insufficient for failure to aver positively that defendant had received notice, or that he was a town trustee.—*State v. Collier*, 171 Ind. 606, 86 N. E. 1015.

An averment that a highway was one over which a rural mail route was maintained does not show that it was one on which a mail route had been "established and maintained," within Act March 9, 1903 (Acts 1903, p. 223, c. 124), as amended by Laws 1907, p. 298, c. 180 (Burns' Ann. St. 1908, § 7779), making it an offense for certain officers to refuse, after due notice, to repair such a highway.—Id.

Act March 9, 1903 (Acts 1903, p. 223, c. 124), as amended by Laws 1907, p. 298, c. 180 (Burns' Ann. St. 1908, § 7779), makes it the duty of boards of commissioners, town trustees, etc., to keep in repair highways on which rural mail routes have been established, giving preference to such highways, provides that in making such repairs the board may repair bridges or culverts wherever necessary, though there may be no appropriation therefor, and makes it an offense for any of the officers named to fail, after notice, to make such repairs. Laws 1905, p. 574, c. 167, § 109 (Burns' Ann. St. 1908, § 7778), makes it the duty of boards of commissioners, on notice from town trustees, to repair or erect bridges or culverts if they deem them necessary. *Held*, that it is not the duty of a town trustee to erect bridges, and he is not guilty of an offense under section 7779, where the repair required is the erection of a bridge.—Id.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 332, 333.

### § 109. Materials for construction or repair.

[a] (App. 1902)

Since Burns' Rev. St. 1901, § 6872, relating to the repair of free gravel roads by the county commissioners, makes provision for obtaining materials for repairs outside of the road, the board has no authority to cut down an established grade in one place to obtain necessary material for repairing another place.—*Board of Com'rs of Warren County v. Mankey*, 63 N. E. 864, 29 Ind. App. 55.

Under Burns' Rev. St. 1901, §§ 6868, 6873, placing the management of free gravel roads

in the county commissioners, and giving them authority to employ such labor and purchase such materials as are necessary for repairs, and providing a fund for repairs, the board has no power to practically reconstruct a portion of a road by making a cut in a hill of about six feet, and substantially changing the established grade.—Id.

[b] (Sup. 1910)

Burns' Ann. St. 1908, § 7711, providing that boards of commissioners may establish highways and cause them to be paved with stone, gravel, or other road paving material, did not prohibit the paving of a country road with brick.—*Strange v. Board of Com'rs of Grant County*, 91 N. E. 242, 506.

Acts 1909, c. 148, charging the cost of extra improvement in towns or cities to those corporations, and providing that the materials used in road construction outside of cities and towns shall be such as are usually employed in the construction of country roads, such as gravel, and broken stone, and that street paving materials shall not be used except in cities and towns, amounts to a recognition of the right of prior unrestricted use of materials, and an intent to restrict the right thereafter.—Id.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. § 336.

### § 111. Work of construction or repair.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 346-355.

### § 112. — In general.

[a] (Sup. 1853)

A supervisor, for the purpose of keeping the highways of his district in order, might, under Rev. St. 1843, enter upon any lands adjoining or near to any highway in his district, and thereupon construct such ditches, etc., as might be necessary for the construction, repair, etc., of such highway.—*Conwell v. Emrie*, 4 Ind. 200.

[b] (Sup. 1871)

To render a county liable for the improvement of a street, around a public square, made by order of the board of trustees of a town duly authorized by statute (Act April 27, 1869, p. 35, § 8), it is not necessary that a petition for such improvement be filed.—*Board of Com'rs of Blackford County v. Shrader*, 36 Ind. 87.

[c] (Sup. 1881)

The sufficiency of the petition filed with the commissioners, asking for the issuance of bonds to aid the construction of a gravel road, under the provision of Act March 3, 1877, is not open to collateral attack.—*Ricketts v. Spraker*, 77 Ind. 371.

[d] (App. 1893)

Rev. St. 1881, § 5104, provides that the board of turnpike directors may enter on any lands in the county and take gravel for the

repair of the free gravel roads, and shall give a certificate to the owner of the land, stating the value thereof, together with the amount of damages to the land by the removal of the gravel; and, if the owner is not satisfied with the value so certified by the board, he may appeal to the circuit court. *Held*, that it is not necessary that a landowner file with the board any claim for the gravel.—*Bell v. Pavey*, 7 Ind. App. 19, 33 N. E. 1011.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. HIGH. §§ 340, 347, 351–355.

**§ 113. — Contracts.**

Construction of amendatory or amended acts, see **STATUTES**, § 230.

Mandamus by contractor to compel acceptance of road, see **MANDAMUS**, § 3.

Mandamus to compel payment to contractor, see **MANDAMUS**, § 106.

Restraining breach of contract, see **INJUNCTION**, § 59.

Subjects and titles of acts, see **STATUTES**, § 123.

**[a] (Sup. 1880)**

1 Rev. St. 1876, p. 655, § 4 (Gravel Road Act), does not empower the board of county commissioners to enter into a contract on its own part in relation to the road.—*Driftwood Val. Turnpike Co. v. Board of Com'rs of Bartholomew County*, 72 Ind. 226.

**[b] (Sup. 1881)**

Act March 3, 1877, authorizes county commissioners to lay out, construct, and improve gravel roads, and requires them to cause proper contracts to be made for the performance of the work, and to appoint some suitable person to superintend the work, and see that it is completed according to contract. Act March 24, 1875, constitutes county commissioners directors of free gravel roads of their respective counties, and vests them with the exclusive management and control of such roads. Act March 14, 1877, provides that "no bid for the building or repairing of any \* \* \* county building or work" shall be received unless such bid be accompanied by a bond guarantying the performance of the work, etc. *Held*, that the construction of a gravel road under order of the county commissioners is a "county work" for the performing of which a bond is authorized.—*State ex rel. Stingley v. Sullivan*, 74 Ind. 121.

Until the commissioners of a county have acquired jurisdiction over a gravel or other similar road, and ordered either its construction or improvement, they are wholly without authority either to let a contract for work upon such a road, or to take a bond from the contractor for the performance of the work. *Held*, therefore, in a suit on such bond, where there was no allegation that the county commissioners had ordered either the construction or improvement of the road in question, that the omission was fatal.—*Id.*

When the county commissioners take charge of the construction or improvement of a free gravel road, such construction or improvement becomes at once a county work within the meaning of Act March 14, 1877, requiring any one bidding for such work to offer a bond to secure its faithful performance.—*Id.*

**[c] (Sup. 1883)**

Under Rev. St. 1881, § 5102, providing that no person shall take advantage of any error, informality, or defect appearing in the record of proceedings for the construction or improvement of a highway, unless such party is affected thereby, a contract for the grading and graveling of a free gravel road cannot be impeached, for want of the engineer's signature thereto, by one not affected by the omission.—*Dewey v. State ex rel. McCollum*, 91 Ind. 173.

Under Rev. St. 1881, § 5091, providing that the board of county commissioners may "construct or improve by straightening, grading, \* \* \* paving, graveling, or macadamizing" any state or county road, such board has the power to contract for the grading and graveling of a free gravel road.—*Id.*

Rev. St. 1881, § 4246, provides that no bid for any county work shall be received, unless accompanied by a sufficient bond guaranteeing faithful performance and execution of the work, and that the contractor will promptly pay all debts incurred in the prosecution of the work, and by section 4247, if a contractor fails to promptly pay any such debt, there is a right of action against them and their bondsmen. *Held*, that such a right of action cannot be defeated by any act done or omitted to be done by the board of commissioners of the county, and hence, in an action on a bond given by contractors for the graveling of a county road, acts done or omitted to be done by the commissioners in relation to the contract were no defense.—*Id.*

**[d] (Sup. 1884)**

A superintendent of roads is not authorized to contract for extra work on a highway unless he has the money in his hands.—*State ex rel. Brookshire v. Snodgrass*, 98 Ind. 548.

**[e]** The provisions of Rev. St. § 4246, requiring a bond given by a contractor for county work to contain a guaranty that the contractor shall pay all debts incurred in the work for labor, materials, etc., and not those of section 5095, which merely requires in general terms that the contractor for the construction of a turnpike road shall give reasonable security for the performance of his contract, govern a bond given to secure the performance of a contract to construct a gravel road.—(Sup. 1887) *Faurote v. State ex rel. Gordon*, 110 Ind. 463, 11 N. E. 472; (1887) *Faurote v. State ex rel. Miles*, 111 Ind. 73, 11 N. E. 476; (1889) *Faurote v. State ex rel. Black*, 119 Ind. 600, 21 N. E. 663.

The liability on a bond given for the completion of a gravel road, guarantying the faithful performance of the work, and that the con-

tractor should pay all debts incurred by him in the prosecution thereof, does not extend to debts incurred by a subcontractor.—Id.

[f] A bond given by a contractor for building a gravel road, being required by statute, is an official bond, within the meaning of Rev. St. 1881, § 1221, which makes the obligors on any official bond liable, notwithstanding any defect of form or substance; and such a bond, when payable to the county commissioners instead of to the state, as it should be, and conditioned merely for the faithful performance of the contract, will yet render the obligors liable to the full extent contemplated by section 4246, which requires such bonds to be conditioned for the faithful performance of the work, and the prompt payment of all debts incurred in its prosecution.—(Sup. 1887) *Faurote v. State ex rel. Gordon*, 110 Ind. 463, 11 N. E. 472; (1890) *Faurote v. State ex rel. Swain*, 123 Ind. 6, 23 N. E. 971.

[g] A complaint, on a bond given by a contractor for building a gravel road, averred that the commissioners being about to authorize the engineer and superintendent of the work to contract for the construction of the road, as the statute provides that they may do, with A. and B., the principals in the bond, the bond was executed, and A. and B. constructed the road. The bond annexed to the complaint recited that A. and B. had been awarded the contract, and had entered into a written agreement for the construction of the road. *Held*, that the complaint need not in terms aver that A. and B. entered into a contract with a proper person to construct the road.—(Sup. 1887) *Faurote v. State ex rel. Gordon*, 11 N. E. 472, 110 Ind. 463; (1887) *Same v. State ex rel. Miles*, 11 N. E. 476, 111 Ind. 73; (1889) *Same v. State ex rel. Black*, 21 N. E. 663, 119 Ind. 600.

[h] (Sup. 1888)

In an action against a township by a road superintendent to recover sums advanced by him for repairing roads, an allegation in the petition that plaintiff as superintendent expended the amount received by him from the county treasurer on the highways, and accounted for the same in a settlement with the county board, the statute authorizing such settlement, sufficiently accounts for such sums.—*Clark Civil Tp. v. Brookshire*, 114 Ind. 437, 16 N. E. 132.

In an action against a township by a road superintendent to recover money advanced by him for road improvement, an instruction that, if plaintiff as road superintendent contributed no more than would have been necessary to put a certain highway in good ordinary repair, he could recover that amount, though by the contributions of landowners the improvements were carried further than was necessary, is correct.—Id.

Rev. St. 1881, § 5069, provides that road superintendents shall in certain months first

put all the roads in their respective townships in "good ordinary repair," and then, with such other means as may be in their hands, proceed to do work denominated "extraordinary," and by ditching and grading construct smooth roads. *Held* that, in an action against a township by a road superintendent to recover certain sums advanced for constructing roads, a complaint alleging that the money in his hands was expended in repairing and improving the highways by ditching, grading, graveling, and constructing culverts, and that such repairs, and improvements were necessary, is not sufficiently defective to require a reversal of judgment; the difference between the classes of work spoken of as "ordinary" and "extraordinary" being more in degree than character.—Id.

[i] (Sup. 1888)

In an action by a county on a bond and contract made pursuant to Laws 1877, 1885, regarding the construction of free gravel roads, providing that the county shall not be liable on account of the construction of any such road, or for any failure or omission to act by the county board or engineer, a cross complaint setting up damages for failure of the engineer to make proper estimates on work done, and of the county board to allow defendant to complete the work, is demurrable.—*Board of Com'rs of Ripley County v. Hill*, 115 Ind. 316, 16 N. E. 156.

In an action by a county on a bond given to secure the performance of a contract to construct a road, which provided for payment to defendant at the end of every 30 days for work done, the complaint must allege performance, or excuse for nonperformance, on the part of plaintiff, of such condition.—Id.

A complaint in an action by a county, on a bond given to secure the performance of a road building contract by defendant, stating general performance on their part, and abandonment by defendant, and failure by him to complete the work within the time and in the manner agreed, is sufficient on general demurrer, though it contains averments in regard to damages accruing by reason of the reletting of the contract which are objectionable for uncertainty.—Id.

[j] (Sup. 1889)

Where the bond simply obligates the sureties to answer for the contractor's failure to construct and complete certain sections of the designated road according to the provisions of the contract entered into with the engineer and superintendent, the sureties cannot be held bound for debts due laborers and furnishing materials without evidence that they agreed to be so bound.—*Hart v. State ex rel. Rock*, 120 Ind. 83, 21 N. E. 654, 24 N. E. 151.

Rev. St. 1881, § 5065, provides that the county commissioners shall let the contract for the construction of a gravel road to the lowest bidder who shall give such reasonable security for the due performance of his contract as

the commissioners may deem expedient. *Held*, that the commissioners may take a bond which does not contain a condition for the payment of debts incurred by the contractor, and for the payment of laborers and material men.—*Id.*

[k.] (Sup. 1890)

In an action on a bond given by a gravel road contractor under Rev. St. 1881, § 1221, a complaint which states that the debt sued for is for materials furnished by the relators to the defendants at their special instance and request, for the construction of such roads, sufficiently alleges that such materials were used in the construction of the road.—*Faurote v. State ex rel. Swain*, 23 N. E. 971, 123 Ind. 6.

[m] (Sup. 1891)

The fact that in making contracts for the construction of a gravel road the contract for building certain retaining walls was let without competitive bids did not invalidate the whole assessment.—*Loesnitz v. Seelinger*, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887.

[n] (Sup. 1892)

The law confers on the county board the power to accept and settle for gravel roads constructed by contractors, and no action will lie on the bond of such contractor, from whom such a road has been accepted, so long as the settlement between him and the board remains unimpeached.—*Linville v. State ex rel. Board of Com'rs of Delaware County*, 130 Ind. 210, 29 N. E. 1129.

[o] (Sup. 1892)

Where the commissioners of a county award a contract for the construction of a gravel road, the estimates of the county engineer as to the cost of the work, though stipulated to be such in the contract, are not conclusive, but are merely prima facie correct.—*McCoy v. Able*, 131 Ind. 417, 30 N. E. 528, 31 N. E. 453.

Where a contract with county commissioners for the construction of a road submits many things to the discretion and judgment of the engineer, and the property owners make no objection to the work until the contract is completed, it is then too late to object that the engineer made a mistake in accepting and estimating the work done.—*Id.*

[p] (Sup. 1892)

Where contractors construct a free gravel road under a contract with the board of county commissioners, and at the request of the board and engineer perform extra services, the board cannot resist an action for the price of such services on the ground that it had no authority to change the contract.—*Board of Com'rs of Hamilton County v. Newlin*, 132 Ind. 27, 31 N. E. 465.

Where contractors construct a free gravel road under a contract with the board of county commissioners, and the engineer accepts the work, and estimates it, a general verdict for plaintiffs will not be set aside because of a specific answer that appellees did not construct

the road of smooth grade, and of the 12 feet, as required by the contract.—*Id.*

[q] (App. 1892)

Act April 8, 1885, (Elliott, Supp. 1491,) provides for the construction of gravel roads by any county, and requires a contractor to execute a bond. Section 1491 provides that the superintendent of the work may bring suit on the bond for any and all damages thereof. *Held*, that a subcontractor cannot maintain an action on such bond under Rev. St. 1881, §§ 4246, 4247, which provide that in all county work the contractor shall execute a bond stipulating to pay all debts incurred by him in its construction, and giving him a right of action thereon, does not apply to a subcontractor.—*State ex rel. Pyles v. McCray*, App. 350, 32 N. E. 341.

[r] (App. 1893)

Since the board of commissioners has the power to construct free gravel roads, representing the interests of property owners, and do so as agents of the county, proceedings against a contractor to enforce a claim for extra work are not maintainable against them on the ground of representative capacity.—*Little v. Board of Com'rs of Hamilton County*, 7 Ind. App. 34 N. E. 499.

[s] (App. 1896)

A bond given by a contractor to the superintendent appointed by the board of commissioners under the act of 1889 (Rev. St. 1891), for the construction of a free gravel road is a bond to secure the performance of the work, within Rev. St. 1894, § 5592, and the commissioners, in letting any contract for public work, to take a bond conditioned for the payment of all debts, "including labor, materials, and for boarding the laborers."—*Lane v. State ex rel. Taylor*, 14 Ind. App. 573, 43 N. E. 244.

It was not a prerequisite to a suit by the superintendent of the construction of a gravel road under Act 1885 (Rev. St. 1887-1888), on a contractor's bond given under, conditioned for the payment of cost of labor and material, that payment of such claims should have been demanded, where the work was completed, and the contractor received the contract price, and the claims were unpaid, and certificates of indebtedness were issued therefor by the contractor, and no money had been drawn upon other parties for the payment of which had been paid by the holders of the certificates for laborers and material men.—*Id.*

A complaint in an action by a plaintiff for the construction of a free gravel road under Act 1885 (Rev. St. 1894, §§ 687-688) to enforce a contractor's bond conditioned for the payment of claims for labor and material furnished, is sufficiently specific as to the amount of unpaid indebtedness, where the item is based on orders and certificates of indebtedness issued and signed by the contractor.—*Id.*

It is no defense to an action by the superintendent of construction of a free gravel road, under Act 1885 (Rev. St. §§ 6879-6898), on a bond given by a contractor, conditioned for the payment of laborers and material men, that the certificates of indebtedness issued by the contractor to laborers and material men were assigned to third parties, since the latter succeeded to all the rights of the original holders.—Id.

[t] (App. 1896)

Sureties on a gravel-road contractor's bond, taken under Rev. St. 1894, § 5592 (Rev. St. 1881, § 4246), and binding the contractor to pay promptly "all debts incurred by him" in the prosecution of such work, are not liable for the debts of subcontractors.—*Swindle v. State ex rel. Leak*, 15 Ind. App. 415, 44 N. E. 490.

[u] (App. 1900)

Where the evidence showed that plaintiff worked on a highway of defendant township for 13 days at an agreed price of \$5 a day, and that such services were performed over a year prior to the commencement of suit, a judgment for \$68.90 was not excessive.—*Center Tp., Grant County, v. Davis*, 57 N. E. 283, 24 Ind. App. 603.

A complaint in an action against a township, which stated there was a highway in a certain road district which required repairs, and that the township directed the road supervisor to employ labor to repair the same, and that such supervisor employed plaintiff, who performed certain services at an agreed price, states a cause of action.—Id.

[v] (App. 1902)

One who contracts with a county to construct free gravel roads for it, and sublets the work of constructing two of them, is not liable for bridges sold on an independent contract to his subcontractor, nor is the seller entitled to a lien on the balance due him for the work for the price thereof, which his subcontractor had failed to pay, there being no statutory lien on such fund, which is created by Burns' Rev. St. 1901, § 6028, to pay for the construction of such roads and the cost of the proceedings.—*Attica Bridge & Machine Works v. Johnson*, 64 N. E. 474, 20 Ind. App. 257.

[vv] (App. 1903)

Where, under a contract with a township for the improvement of a public highway therein, void by reason of noncompliance with Acts 1899, p. 150 (Burns' Rev. St. 1901, §§ 8083a-8085), establishing a township advisory board, and fixing the duties and powers of its members, and the township trustee, but not prohibited by statute or in violation of public policy, plaintiffs in good faith performed the labor and furnished the materials required by the contract, and the township received the full benefit of the work, it was liable to plaintiffs to the extent of the value of what was received and appropriated.—*Moss v. Sugar Ridge Tp. of Clay County*, 67 N. E. 460.

[w] (App. 1904)

Acts 1803, pp. 198, 199, c. 112, §§ 5, 6, as amended by Acts 1895, p. 147, c. 63, relative to highways, provide that the county treasurer shall sell bonds, and that the proceeds shall be kept as a fund for the construction of the particular road for which they are issued; that the treasurer shall pay the money to the contractor on warrant of the auditor, as directed by the board of commissioners, but that the commissioners shall not order payment in excess of 80 per cent. of the engineer's estimate of the work done, until the road shall have been received as completed by the board of commissioners. *Held*, that the indebtedness created by the construction of a road under the statute is not that of the county, but of the persons assessed for its construction, and hence, where a contract for the construction of a road was performed by the completion of the road, the remedy available to the contractors was not an action against the county, but mandamus to compel the commissioners to bring about final payment; *Burns' Ann. St. 1901, § 1182*, authorizing mandamus to compel the performance of an act specially enjoined by law, or a duty resulting from an office.—*King v. Board of Com'rs of Martin County*, 72 N. E. 616, 34 Ind. App. 231.

[ww] (App. 1905)

Where highway improvement contractors executed a bond conditioned that they would promptly pay all debts incurred by them in prosecution of the work, including labor and materials and for boarding laborers, neither the contractors nor their sureties on such bond were liable for debts incurred for labor and supplies by a subcontractor.—*Miller v. State ex rel. Prather*, 74 N. E. 260, 35 Ind. App. 379.

[x] (Sup. 1906)

The giving of a notice and receiving bids for the construction of a free gravel road is governed by Burns' Ann. St. 1901, § 6901, rather than by section 5594q1, providing that certain specification shall be filed with the auditor and that certain notices be given before boards of commissioners shall let contracts for the construction of any public undertaking.—*State v. Dorsey*, 167 Ind. 199, 78 N. E. 843.

[xx] (App. 1906)

Acts 1895, p. 43, c. 21, § 5, provides that a board of county commissioners shall not make full payment upon a contract for the construction of a road until the road shall have been received as completed. *Held* that, in an action by a contractor for a public road to recover a balance due him, the complaint was insufficient for failing to state that the board of commissioners had received the road.—*Board of Com'rs of Jackson County v. Branaman*, 39 Ind. App. 193, 76 N. E. 1030, 78 N. E. 356.

[y] (Sup. 1907)

A complaint against a county on a gravel road construction contract, failing to allege the acceptance of the road, was fatally defective.—

Board of Com'rs of Jackson County v. Brannan, 169 Ind. 80, 82 N. E. 65.

Under Acts 1893, p. 196, c. 112, as amended by Acts 1895, p. 143, c. 63, authorizing the improvement of highways on the voters of a township demanding it, and providing that no payment shall be made by the county commissioners for more than 80 per cent. of the estimate of the work done by the contractor, nor shall the whole amount be paid until the road shall have been received as completed by the board, etc., contemplates that the proceedings to construct a road shall remain on the docket of the board until the work is completed, and that the board shall fix a time for determining the question of its completion, at which time any interested taxpayer may appear, and a party aggrieved by the decision of the board may appeal to the circuit court.—Id.

Under Acts 1893, p. 196, c. 112, as amended by Acts 1895, p. 143, c. 63, authorizing the paving of highways, and providing that the whole amount of the contract for paving shall not be paid until the road shall have been received as completed by the board of county commissioners, the board may determine when work has been completed, and until it is completed the contractor cannot demand that the road be received by the board, or that he be paid the full price.—Id.

[77] (App. 1909)

A complaint in an action on the bond of a contractor who has abandoned his contract to construct a turnpike need not show that substantial damages have been sustained, nominal damages being sufficient; and it is not necessary to allege in terms that the contractor wrongfully abandoned the contract, as his abandonment of the work is a violation of the contract, and justification thereof is a matter of defense; and it is also unnecessary to allege that the board of commissioners duly ordered the work constructed, it being unnecessary to set out the steps leading up to the making of the order, and jurisdiction being presumed from the order made.—Donaldson v. State ex rel. Ripley County Com'rs, 90 N. E. 132.

In such action, a cross-complaint setting out the contractor's right to abandon his contract on account of failure of the board of commissioners and the engineer or superintendent of the work to properly discharge their duties with reference to the construction of the road, so that upon such abandonment the contractor became entitled to full pay for all work done and to damages, would not lie, since the board in letting the contract do not act in a corporate capacity, but only as the agents of the highway district, and hence are not subject to a civil action in reference thereto, they having no supervision over the performance of the work, and their only duty being to provide funds, to determine whether the road has been completed according to the contract, and to accept or reject the work and order or refuse payment.—Id.

The board of commissioners are not liable for the misfeasance or nonfeasance of the engineer and superintendent, though those officers are appointed by the board, as the instruments to carry into effect the law for the improvement of the state's highways, and commissioners have no power to require the contractor to construct a road different from that fixed by the contract.—Id.

Although the statute authorizing the construction of turnpikes does not expressly authorize the board to relet contracts for the same on the failure of the original contractor to perform, the power to relet is necessarily implied.—Id.

The board having made an estimate of the cost of constructing the turnpike before the original contract was let, the commissioners, in reletting the contract, need not make a new estimate, but the second contract must be made on the original estimated costs.—Id.

The measure of damages recoverable by the action on the first contractor's bond is the difference between the original contract price and what the public would be required to pay on account of the failure of the contractor to perform and the letting of the contract to another contractor, and such damages are not dependent on the actual work actually being performed under the second contract.—Id.

A statute authorizing the recovery of attorney's fees in an action on bonds given by a contractor to build gravel roads under the assessment law (Burns' Ann. St. 1908, § 770) does not authorize attorney's fees in an action on the bond of a contractor for failure to build a turnpike in accordance with the contract.—Id.

[2] (App. 1910)

Under Acts 1901, p. 457, § 13, providing that the board of county commissioners may not act on proof of the completion of a gravel road constructed under the act until the sworn statements of the superintendent and engineer of the road have been filed with the auditor at least 10 days before the first meeting of any regular term of the board, and where a taxpayer in the 10 days any taxpayer files a protest, the commissioners must set a day for hearing the protest of a taxpayer not offered to be filed until the expiration of the 10 days is properly concluded, and the taxpayer may not complain of the overruling by the circuit court of his motion for new trial after adjudging that the road has been constructed according to contract.—Morrison v. Commissioners of Jackson County v. Zollman, 90 N. E. 649.

Where no taxpayer made complaint of the time and in the manner specified by Acts 1901, p. 457, § 13, relating to objections to the acceptance of free gravel roads constructed under the act, neither the county nor the board of commissioners, as its representatives, may maintain a complaint for the taxpayers.—Id.

[22] (App. 1910)

In an action on the bond of a contractor who has abandoned his contract to construct a turnpike, instructions that, to ascertain the amount of recovery, the jury should add the amount paid the contractor and the amount necessary to complete the road, and from the sum thereof subtract the original contract, together with an instruction that the second contract was in evidence only to throw light on the reasonable cost of completing the work, made the question of damages depend, not on the amount of the second contract, but on the reasonable cost of completing the work, and were correct. *Rehearing Donaldson v. State ex rel. Ripley County Com'rs* (1909) 90 N. E. 132, denied.—*Donaldson v. State*, 91 N. E. 748.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. High. §§ 348-352, 355;  
11 CENT. DIG. Contracts, § 1335.

**§ 114. Damages from construction or repair.**

Compensation under law of eminent domain, see EMINENT DOMAIN.

Jurisdiction of justices of the peace in proceedings to assess damages, where title to real property is involved, see JUSTICES OF THE PEACE, § 36.

Right to trial by jury in proceedings to assess damages, see JURY, § 19.

Right to trial by jury in proceedings to assess damages, denial or infringement of right, see JURY, § 35.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. High. §§ 358-373; 18 CENT. DIG. Em. Dom. §§ 164, 172, 180-185, 188-204, 222, 224, 225, 248, 260-270, 274, 316, 321, 387.

See, also 30 Cyc. pp. 1380, 1381.

**§ 115. — In general.**

[a] (Sup. 1859)

1 Rev. St. p. 462, § 16, making it the duty of certain officers to report within 10 days the damages caused in the construction or repair of highways, and providing that payment of such damages shall then be made, is not unconstitutional as failing to afford a reasonably convenient opportunity to the proprietor to obtain compensation for the injury sustained in taking his property.—*Dronberger v. Reed*, 11 Ind. 420.

[b] (Sup. 1864)

When land is alleged to be injured by the location and opening of a highway through it, the measure of damages will be the difference between its market value at the time with the highway and its market value without the highway.—*Sidener v. Essex*, 22 Ind. 201.

[c] (Sup. 1878)

Where, in proceedings to establish a highway, a jury, on appeal to the circuit court, finds in favor of a remonstrant, and that he would be damaged by the opening of the road in a speci-

fied sum, the county board, on the case being remitted to the commissioners to carry out the findings of the jury, may, in their discretion, order the damages to be paid out of the county treasury.—*Board of Com'rs of Grant County v. Small*, 61 Ind. 318.

[d] (Sup. 1884)

A remonstrance for damages dismissed cannot be refiled by a remonstrator on an appeal in which he does not join.—*Denny v. Bush*, 95 Ind. 315.

On appeal to the circuit court by remonstrants for road damages, it is no objection that some of the petitioners signed the petition for the road, induced by the promise of other petitioners to build a fence which would be rendered necessary by the opening of the road.—*Id.*

[e] (Sup. 1888)

Under Act March 3, 1877, and Act July, 1885, a corporate county shall not be subjected to, nor incur, any debt, liability, or damages by reason or on account of the construction of any free gravel road, or by reason of any act done, or for any failure or omission to act by the county board or by the engineer or superintendent in charge of the construction of the road.—*Board of Com'rs of Ripley County v. Hill*, 16 N. E. 156, 115 Ind. 316.

[f] (App. 1905)

It is improper, in an instruction on the question of damage to lands on account of a proposed highway, to include therein facts going to its public utility.—*Pichon v. Martin*, 73 N. E. 1009, 35 Ind. App. 167.

[g] (Sup. 1909)

One filing a remonstrance to the establishment of a highway as authorized by Burns' Ann. St. 1908, § 7653, cannot recover for interference with drains, where damage from that cause was not alleged in the remonstrance.—*Sterling v. Frick*, 171 Ind. 710, 86 N. E. 65, 87 N. E. 237.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. High. §§ 358-370, 372, 373; 18 CENT. DIG. Em. Dom. §§ 164, 172, 180-185, 188-204, 222, 224, 225, 248, 260-270, 274, 316, 321.

See, also, 30 Cyc. pp. 1380, 1381.

**§ 117. Liabilities for expenses or damages.**

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. High. §§ 346-357, 362; 18 CENT. DIG. Em. Dom. § 321.

**§ 118. — In general.**

[a] (Sup. 1883)

Petitioners for the establishment of a highway may pay the damages assessed and such payment is neither improper nor legally wrong.—*Wilkinson v. Bixler*, 88 Ind. 574.

[b] (Sup. 1887)

A county is not liable for the cost of a free gravel road beyond the original estimate

of such cost by reason of the fact that, when constructed, the road becomes public.—*Board of Com'rs of Montgomery County v. Fullen*, 12 N. E. 298, 13 N. E. 574, 111 Ind. 410.

[c] (App. 1893)

The statute conferring on the county commissioners the power to construct free gravel roads does not require that the entire cost shall be collected from the property owners, and it cannot be inferred that it was intended that in any event, or under any circumstances, should the cost of the improvement or any part of it be paid out of the county funds.—*Little v. Board of Com'rs of Hamilton County*, 34 N. E. 499, 7 Ind. App. 118.

[d] (Sup. 1907)

The indebtedness created by the construction of roads, as authorized by Acts 1893, p. 196, c. 112, as amended by Acts 1895, p. 143, c. 63, providing for the paving of roads, is not a liability against the county nor against the township which may constitute the taxing district, but is the indebtedness of the persons whose property, under the law, is liable to be assessed to defray the cost.—*Board of Com'rs of Jackson County v. Branaman*, 169 Ind. 80, 82 N. E. 65.

[e] (App. 1908)

A petitioner for a highway improvement, under Acts 1905, p. 521, c. 167, relating to highways, has no authority to employ an attorney to give advice to the board of commissioners, after the matter has been presented to it, and charge the expenses to the construction fund.—*Overmeyer v. Board of Com'rs of Cass County*, 43 Ind. App. 403, 86 N. E. 77.

The words "all expenses incurred," in Acts 1905, p. 557, c. 167, § 75, authorizing the board of commissioners to issue bonds for the construction of a highway improvement to an amount not exceeding the contract price, and "all expenses incurred" and damages allowed prior to the letting of the contract mean the expenses incurred in the performance of the work required by the act; and, though a petition must be filed to obtain an improvement, a petitioner employing an attorney to draw the petition cannot charge his fees to the construction fund.—*Id.*

One seeking to recover a claim against a public fund must show a statute authorizing the recovery.—*Id.*

FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. High. §§ 346, 355, 356, 362, 380.

§ 119. — Apportionment.

Proceedings for assessment, see post, §§ 138, 144.

[a] (Sup. 1873)

By Act March 6, 1865 (Davis' Rev. St. Supp. 1870, p. 534), the aggregate cost of a proposed gravel road is to be apportioned among the owners of real estate within certain pre-

scribed limits, according to the value of the real estate as assessed on the books of the auditor. The line of a proposed gravel road was projected in three counties, and the estimated cost was reported to the auditor of each county, and the tax was apportioned to the auditor of one without anything being said as to what the lands liable to assessment in the two counties were appraised at, or what the tax would produce. *Held*, that the apportionment was not made on a proper basis, and was illegal.—*Sim v. Hurst*, 44 Ind. 579.

[b] (Sup. 1908)

Where a highway is built on a township or county line, the cost thereof is charged equally to each county.—*Cooper v. Hamilton*, 170 Ind. 113, 83 N. E. 704.

[c] (Sup. 1910)

The board of commissioners in one township may construct, so far as the matter is a legislative concern, gravel roads on county lines, and the adjoining township may be required to contribute ratably on the ground that it is a state matter which is by statute committed to the boards of commissioners as the state's mentalities.—*Cummins v. Pence*, 91 N. E. 101.

FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. High. §§ 357, 358, 400.

§ 120. Drainage.

[a] (Sup. 1853)

A road supervisor was sued for closing a culvert, in such a manner as to prevent water from a hillside into and upon plaintiff's tanyard, to his injury, etc. Plaintiff prosecuted the construction of the culvert in the manner alleged, etc. *Held*, that in order to relieve himself from liability, under Rev. St. 1843, § 1843, plaintiff was bound to show that the culvert was necessary for the construction or repair of a highway, and was constructed at the expense of the township.—*Conwell v. Emrie*, 4 Ind. 209.

[b] (Sup. 1876)

The remedy of a landowner for damages caused by a dam constructed as incident to the repairs of a highway is by an application for an assessment of damages, if the supervisor constructing the dam, acted honestly, and not negligently or corruptly, an action against him personally may be maintainable.—*Mason v. Burrell*, 55 Ind. 425.

[c] (Sup. 1883)

Act April 8, 1881, § 9 (Rev. St. 1881, § 4281), relating to drainage, provides that any drainage will benefit any public highway, and the township trustee of the township in which the same is may, as such, apply for drainage provided in the act, etc. Act April 13, 1881 (Rev. St. 1881, §§ 5064, 5090), created the office of superintendent of roads in each township, and gave the entire charge and control of all highways and bridges in each township to such superintendent, who should

the same to be kept in as good repair as the prudent use of the means in his hands will permit." *Held*, that section 4281, if enforceable at all, is enforceable only by the superintendent of roads provided for by the latter act, and not by the township trustee.—*Jones v. Dunn*, 90 Ind. 78.

[d] (*Sup.* 1889)

Acts 1883, § 16, authorizes the road supervisor to enter on land adjoining a highway, and obtain material or construct such ditches as may be necessary for the repair or preservation of such highway, and, with two disinterested persons, he shall proceed to assess the damages to the owner of the lands, and report them to the trustee, who shall pay the amount assessed. No person's land shall be entered when material can be found or when drainage can be made on the roadway, at a cost less than on private lands. No land shall be entered before demand on the owner. Upon his assent, he may point out the location, and, if accessible, it shall be taken; and, upon his refusal, the supervisor shall notify him of his intent to enter, and point out "the land to be occupied or material to be taken." The owner shall also have notice of the time of the assessment of damages, and a right to be heard, with the right of appeal from the assessment only. *Held*, that the act does not confer upon the supervisor unlimited power to enter on private lands and construct ditches.—*Cauble v. Hultz*, 118 Ind. 13, 20 N. E. 515.

Where it appears that a ditch may be constructed in the highway, or that the landowner has selected a suitable location for the ditch on his land, the supervisor acts without authority in entering upon other land, and a complaint for an injunction by the landowner, showing these facts, and that irreparable injury will result if the ditch is so constructed by the supervisor, is good on demurrer.—*Id.*

Acts 1883, p. 66, § 16, relating to the authority of the supervisor to enter upon land adjoining any highway and construct drains, only authorizes the location of a ditch on private lands when there cannot be suitable drainage made in the roadway at the same expense that would follow in making it upon such private lands.—*Id.*

Where the supervisor cannot provide suitable drainage in the roadway, the landowner has a right to select the location for the drain, and, if the selection is accessible and suitable, it is the duty of the supervisor to adopt it, but, if the landowner fails to point out the location or if the selection he makes is not accessible or suitable, the supervisor may make the location.—*Id.*

If any question is made as to whether proper drainage can be made in a highway, or where the landowner has made a selection, as to its being a suitable one, the landowner has a right to have the question tested in a judicial proceeding, and, if irreparable injury will fol-

low if the ditch or drain is constructed as insisted upon by the supervisor, an action for injunction is the proper action.—*Id.*

[e] (*Sup.* 1892)

A township cannot collect, in artificial ditches along the sides of a road, surface water which naturally flows away from the road, and by a culvert conduct it all onto one side of the road, thereby causing it to be thrown on the land of a property owner on that side.—*Patoka Tp. v. Hopkins*, 131 Ind. 142, 30 N. E. 896, 31 Am. St. Rep. 417.

A court cannot by injunction direct how or when drains shall be constructed by highway officers; control of such matters being committed to the officers, and not to the courts.—*Id.*

Where a township causes water to collect along a public highway, and causes it to flow over the adjoining lands of an individual, the officers of the county may be enjoined to prevent the flowage.—*Id.*

[f] (*App.* 1903)

Where there was a depression in a highway dividing land owned by plaintiff and defendant on the line of a covered public tile drain, so that surface water not carried off by the drain flowed from plaintiff's land over the highway onto the adjoining land, the act of the road supervisor in raising the surface of the highway at that point for about five inches was a proper repair thereof, and not actionable, though it turned back surface water onto plaintiff's land.—*Hart v. Sigman*, 69 N. E. 262, 32 Ind. App. 227.

FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. High. §§ 374-378; 36 CENT. DIG. Mun. Corp. § 1788.

**IV. TAXES, ASSESSMENTS, AND WORK ON HIGHWAYS.**

Rights of bondholders to enforce account of assessments, see ACCOUNT, § 9.

Statutes invalid as depriving of property without due process of law, see CONSTITUTIONAL LAW, § 291.

**§ 121. Power of taxation and assessment in general.**

Creation of taxing districts, see post, § 136.

[a] (*Sup.* 1897)

Acts 1893, p. 109, § 6, as amended by Acts 1895, p. 146, providing that to raise money to pay bonds for free gravel roads the county commissioners shall levy a special valuation tax on the property of the townships through which the roads extend, is within the legislative power to assess the cost of local improvements according to benefits.—*Board of Com'rs of Monroe County v. Harrell*, 46 N. E. 124, 147 Ind. 500.

[b] (*Sup.* 1910)

In matters of taxation for the improvement of public highways, the power of the Leg-

islature is unlimited, except as restricted by the Constitution.—*Smith v. Board of Com'rs of Hamilton County*, 90 N. E. 881; *Moore v. Bible*, Id. 892; *Hutton v. Boze*, Id. 893.

[c] (Sup. 1910)

It is within the legislative power to determine the kinds and character, as well as the situs and location, of property that shall be subject to assessment for local highway improvements.—*Harmon v. Gephart*, 90 N. E. 890; *Moore v. Bible*, Id. 892; *Hutton v. Boze*, Id. 893.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. § 379.

**§ 122. Constitutional and statutory provisions.**

Decisions as to validity and construction as authority in same or co-ordinate court, see COURTS, § 90.

Equality and uniformity of taxation therefor, see TAXATION, § 40.

Local and special laws, see STATUTES, § 95.

Subjects and titles of acts, see STATUTES, § 125.

[a] (Sup. 1872)

The fact that a gravel road had been completed, except one-fourth of a mile, prior to act May 14, 1869 (Acts 1869 [Sp. Sess.] p. 73), is not a sufficient reason for enjoining the collection of an assessment to complete the same. That act, as well as the act on the same subject approved March 11, 1867, was intended for the relief of roads which had been partly constructed before its passage, as well as for those which should be wholly constructed after its passage.—*Fall Creek & W. Tp. Gravel Road Co. v. Wallace*, 39 Ind. 435.

[b] (Sup. 1881)

Act March 3, 1877, authorizing the levying of special assessments for the construction of free gravel roads, is constitutional and valid.—*Ricketts v. Spraker*, 77 Ind. 371.

[c] (Sup. 1901)

Burns' Rev. St. 1894, §§ 6924-6934, as amended by Burns' Supp. 1897, §§ 6924, 6925, 6928, provide that the county commissioners, on petition of 50 freeholders of a township, may submit the question of improving and macadamizing highways designated in the petition to the voters of the township, and authorizes the issuance of bonds to pay for the improvement, and levy special taxes on the assessed valuation of the property of the township to discharge the bonds. *Held*, that the act was not unconstitutional as an improper and unjust exercise of the taxing power, since a tax for such an improvement is for a governmental purpose, and may be levied on all the property in the taxing district.—*Lowe v. Board of Com'rs of White County*, 59 N. E. 466, 156 Ind. 163.

[d] (Sup. 1903)

Act March 11, 1889 (Acts 1889, p. 433, c. 234; Burns' Rev. St. 1901, § 6792 et seq.), provides for the construction and improvement of

county line highways, and for the levying of special assessments against real estate on special benefits, in districts comprising all the real estate within a certain district for the improvement. Act March 6, 1889, p. 468, c. 206 (Burns' Rev. St. 1894, p. 6914 et seq.), relates to the same subject, is affirmative in its terms, and provides for the submission of the proposition as to whether to vote of the townships, and plates the levying of a special tax in such cases. Many of the provisions of the act are in the same language as the former. The second act contains no repealing clause. *Held* to create two methods of improving county line highways, and that the subsequent act repeals the former.—*Sefton v. Board of Com'rs of Howard County*, 66 N. E. 891, 160 Ind. 513.

[e] (Sup. 1908)

Act March 7, 1905 (Acts 1905, p. 496, c. 164; Burns' Ann. St. Supp. 1906, p. 6816-6822), provides for the improvement of county line highways on county lines not exceeding three miles in length, to be paid for by assessment of benefits to the property in the taxing district; while Act March 7, 1905 (Acts 1905, pp. 549, 550, c. 164), provides for the improvement of county line highways without regard to length, to be paid for by assessment of benefits to the property in the taxing district of two miles. *Held*, that the act of March 7th was not repealed by the act of March 8th.—*State ex rel. Board of Com'rs of Hendricks County v. Board of Com'rs of Marion County*, 170 Ind. 505, 85 N. E. 513.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 380, 381.

**§ 123. Highway taxes.**

Exemption from taxation for highways, see TAXATION, § 211.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 381, 382.

**§ 124. — Purposes and grounds of taxation.**

[a] (Sup. 1908)

A uniform tax upon all property, personal, in a taxing district, according to its appraised value, for taxation for the construction and repair of public highways, for a governmental purpose, the same as a tax for the support of the public schools; and the reason for such taxation, if unwise, unjust, or oppressive, must be sought from the legislative, executive, or judicial department.—*State ex rel. Board of Com'rs of Hendricks County v. Board of Com'rs of Marion County*, 170 Ind. 505, 85 N. E. 513.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. § 381.

### — Persons and property liable. Sup. 1873)

the words "real estate," as used in the Act of March 6, 1865 (Davis' Rev. Stat. p. 1870, p. 534), which requires the assessment of the amount of each man's tax according to the value of his real estate within prescribed limits, comprehend improvements, as well as land without improvements.—*Sim v. State*, 44 Ind. 379.

Sup. 1896)

The power given by Act March 24, 1879, for the improvement of all property within a county—as well as cities as without them—for repair of bridges of the county, is not affected by the amendment of Act March 14, 1867, by Act March 6, 1891; the language of Act 1867, declaring that no property within the city shall be taxed for the purpose of repairing any bridge without the limits of the city, is changed by the amendatory act, and extends only to exemption of city property from the ordinary road tax.—*Byram v. Board of Com'rs of Marion County*, 145 Ind. N. E. 357, 33 L. R. A. 476.

CASES FROM OTHER STATES,

25 CENT. DIG. High. § 383.

### — Levy and assessment.

Sup. 1865)

proceedings by mandamus to compel a township trustee to levy a tax to pay the damages awarded by the circuit court on account of the construction of a township road, it was held that it was the duty of the trustee, with the concurrence of the county board, to levy the tax and that there was no money in the township treasury was no answer to the application for the mandamus.—*Huntington v. Smith*, 486.

CASES FROM OTHER STATES,

25 CENT. DIG. High. § 384.

### — Payment, collection, and enforcement.

Sup. 1848)

The road law of 1822 provided that the tax on a nonresident was subject to a certain lien which was to be collected as other taxes were collected. The law of 1822 was repealed by the act of 1824, which took effect on the passage, saving, however, any act done before the taking effect of the act of 1824. Held, that the saving clause did not authorize the sale of property for taxes, under the act of 1822.—*McQuilkin v. Doe ex dem. Doe*, 8 Blackf. 581.

land could not be sold in November, for nonpayment of a road tax assessed under the road law of 1822; that law not being in force at the time of the sale.—*Id.*

CASES FROM OTHER STATES,

25 CENT. DIG. High. § 385.

### § 129. — Remedies for erroneous taxation.

Filing written instruments with pleading, in order to enjoin enforcement, see PLEADING, § 311.

[a] (Sup. 1868)

A taxpayer who, on being tendered by the supervisor a receipt for his road tax, refuses it, will not afterwards be heard to complain of the mode of computation.—*Ribble v. Mathis*, 29 Ind. 434.

[b] (Sup. 1902)

The circuit court on appeal from an order of county commissioners levying assessments for construction of free gravel roads can only take cognizance of such questions as were properly presented before the commissioners, except so far as the issues there formed may be varied by such amendments as are permissible under the rules of practice.—*Smyth v. State ex rel. Braun*, 62 N. E. 449, 158 Ind. 332.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 357, 360.

### § 130. — Disposition of proceeds.

[a] (App. 1902)

A resident taxpayer has such an interest in funds for the construction of a road, to which funds his assessment has contributed, as to give him a right to prevent their wrongful application.—*Miller v. Bowers*, 65 N. E. 559, 30 Ind. App. 116.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. § 387.

### § 131. Local assessments and special taxes.

Laws relating to the grant of special privileges and immunities, see CONSTITUTIONAL LAW, § 205.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 388-404.

### § 132. — Purposes in general.

[a] (Sup. 1881)

The sale of bonds issued for the building of a gravel road, at less than par, in violation of the statute, held not to vitiate the assessment of taxes on the lands benefited; the sale being simply malfeasance of the commissioners.—*Ricketts v. Spraker*, 77 Ind. 371.

[b] (Sup. 1894)

The expense of livery hire, of prospecting for gravel, of publishing notices, and of making tax duplicates in a proceeding for a gravel road are items not chargeable to the gravel road fund.—*Manor v. Board of Com'rs of Jay County*, 34 N. E. 959, 36 N. E. 1101, 137 Ind. 367.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. § 388.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

IND. DIG.—32

### § 135. — Amount of assessment.

[a] (Sup. 1889)

Where the county commissioners transcend their authority in incurring expenses for the construction of a free gravel road, they cannot compel the landowners to pay the additional expense incurred, but the county must bear it, or else compel the commissioners who violated their duty to account. At all events, only the legitimate expense of constructing the road can be assessed against the landowners.—Board of Com'rs of Montgomery County v. Fullen, 20 N. E. 771, 118 Ind. 158.

[b] (Sup. 1891)

Proceedings of a board of commissioners of highways, assessing a special tax, were not void because, in estimating costs for the purposes of assessment, they erroneously included costs for bridges amounting to more than \$75, as such error did not invalidate the entire assessment.—Loesnitz v. Seelinger, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887.

The fact that the cost of the work exceeded the estimate did not render the assessment invalid as to the amount of the estimate.—Id.

[c] (Sup. 1894)

Where bonds are sold to raise a fund for laying out a gravel road, the interest on the bonds, and the expenses attending their sale, are to be considered in determining the amount of the assessment for building the road.—Manor v. Board of Com'rs of Jay County, 137 Ind. 367, 34 N. E. 959, 36 N. E. 1101.

FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. High. § 389.

### § 136. — Property liable and amount of benefit.

[a] (Sup. 1866)

The act of March 6, 1865, "to allow county commissioners to organize turnpike companies," etc. (Acts 1865, p. 90), which permits the costs of constructing such turpikes to be assessed upon the real estate within three-fourths of a mile of the proposed road, is constitutional and valid.—Goodrich v. Winchester & D. Turnpike Co., 26 Ind. 119.

[aa] (Sup. 1868)

That a toll is exacted to maintain the expenses of the highway and make it a free public road in time does not render invalid Act March 11, 1867 (Acts 1867, p. 167), authorizing the assessment to the extent of benefits received of all lands within  $1\frac{1}{2}$  miles on either side or within a like distance of the terminus of any plank, macadamized, or gravel road; Act May 12, 1852, authorizing the construction of such roads.—Law v. Madison, S. & G. Turnpike Co., 30 Ind. 77.

[b] (Sup. 1881)

Omission to include certain property in an assessment to pay the cost of constructing a free gravel road under the act of March 3, 1877, was a mere irregularity which could not be

taken advantage of on collateral attacks. *Etts v. Spraker*, 77 Ind. 371.

[c] (Sup. 1881)

Evidence held to show that certain property was not omitted from an assessment under the act of March 2, 1877, for the construction of a gravel road.—Ludlow Tp. Gravel Road Co., 77 Ind. 409.

[d] (Sup. 1887)

The clear intention of the Legislature in passing the gravel road laws was that the expense of the improvement should be borne by the property benefited.—Board of Com'rs of Montgomery County v. Fullen, 12 N. E. 13, 13 N. E. 574, 111 Ind. 410.

Although a free gravel road, when constructed, becomes a public road, and the property of the locality may be assessed the cost of its construction, in no event can assessments exceed the benefit which accrues to the land from the construction of the

[e] (Sup. 1896)

Act March 24, 1879, constituting the commissioners of the county a board of turnpike directors, making it their duty to report to the county auditor each year the amount necessary to keep such free turnpikes in repair, and providing that on the issuance of a certificate the auditor shall levy on the taxable property of said county "a tax to constitute a turnpike fund, does not extend to taxable property to that outside of incorporated cities and towns of the county."—Board of Com'rs of Marion County, 240, 44 N. E. 357, 33 L. R. A. 476.

Whether property within a city is assessed as that outside it, is benefited by the free turnpikes, and should therefore be assessed therefor, in common with other property in the county, is for the legislature to determine.

[f] (Sup. 1897)

The Legislature may declare that a certain portion of the property within a certain tract is benefited, either according to its value or in proportion to its actual benefit, as determined by the Legislature itself or by persons selected for that purpose.—Board of Com'rs of Monroe County v. Harrell, 124, 147 Ind. 500.

A tax or assessment for local improvement is based on the theory that it is a benefit received by the person who pays the tax or by the property assessed.—Id.

The Legislature may create special districts for road purposes without regard to city or township lines.—Id.

[g] (App. 1898)

The question of whether the real estate of a school township can be legally assessed for the construction of a free gravel road is presented by the record, where such assessment is not a party to the appeal.—Morris v. Board of Com'rs, 49 N. E. 189, 19 Ind. App. 127.

[h] (Sup. 1902)

Where landowners, representing 85 per cent. of an assessment for the construction of a free gravel road, successfully appealed from the confirmation of the assessment, leaving but 15 per cent. available for the construction, but it also appeared that more than one-half of the total estimated cost had been expended in the construction of the road before the 85 per cent. of the assessment was vacated, it will be assumed that those assessed received adequate benefit.—*Smyth v. State ex rel. Braun*, 62 N. E. 449, 158 Ind. 332.

[i] (App. 1904)

A statute creating a certain district containing free gravel roads or other public improvements, a taxing district for the purpose of bearing the cost of such roads or improvements, is for a governmental purpose and is valid.—*Davern v. Board of Com'rs of Decatur County*, 34 Ind. App. 44, 72 N. E. 268.

[j] (Sup. 1906)

Acts 1903, p. 255, c. 145, providing for the improvement of highways at the cost of the property benefited, excluding lands not within two miles of the improvement, must be construed, in view of its provisions with respect to the manner of giving notice of the filing of the petition for the improvement and of the time and place of hearing the report of the viewers and the procedure under the act, and in view of the uniform construction given to Acts 1877, p. 82, c. 47 (*Burns' Ann. St. 1901*, §§ 6855-6867), providing for the construction of gravel roads by assessments of benefits on lands benefited within two miles of the highway, as authorizing the improvement of highways within less than two miles of the county line, and as limiting the land assessed to land within the county in which the highway is located.—*Spaulding v. Mott*, 76 N. E. 620, 167 Ind. 58.

It is within the discretion of the Legislature to determine what property, as regards its location with respect to local improvement, shall be assessed.—*Id.*

[k] (Sup. 1908)

In exercising the power of improving public highways, the Legislature may by a general law provide for taxing districts, without regard to the boundaries of counties, townships, or municipalities.—*State ex rel. Board of Com'rs of Hendricks County v. Board of Com'rs of Marion County*, 170 Ind. 595, 85 N. E. 513.

[l] (Sup. 1910)

The fixing of a taxing district for the improvement of highways by taxation is a purely legislative function, and may be fixed as the Legislature sees fit, unless the nature of the tax conclusively fixes the district.—*Cummins v. Pence*, 91 N. E. 529.

FOR CASES FROM OTHER STATES,  
SEE 25 CENT. DIG. High. § 390.

## § 137. — Objections and estoppel or waiver.

[a] (Sup. 1873)

That persons, whose lands have been assessed to aid in the construction of a turnpike, are stockholders in the turnpike company, and have paid a part of their assessments, and have stood by and seen the work of constructing the road proceed, will not estop them from resisting the payment of an illegal assessment.—*Pavy v. Greensburgh & C. Turnpike Co.*, 42 Ind. 400.

[b] (Sup. 1881)

Where one, upon whom a turnpike assessment has been laid illegally, because not including all the land liable to be assessed, knowing the facts, still agrees to pay the assessment, and, notwithstanding the illegality, joins with others for the purpose of having the road completed, and gives his note for the amount of the assessment, he cannot afterwards avail himself of such illegality as a defense.—*Williams v. Pendleton & F. Turnpike Co.*, 76 Ind. 87.

[c] (Sup. 1890)

Appellants, who have dismissed an appeal from an order establishing a free turnpike in consideration of money paid to them by the other interested parties, cannot, while they retain such money, enjoin the collection of the assessment levied to pay for the road on the ground of alleged irregularities in the proceedings.—*Stipp v. Claman*, 123 Ind. 532, 24 N. E. 131.

[d] (Sup. 1892)

There is no error in refusing to permit remonstrators to prove that the land outside the territory fixed by the viewers to be assessed would be benefited by the proposed improvement.—*Fulton v. Cummings*, 132 Ind. 453, 30 N. E. 949.

[e] (Sup. 1892)

An assessment under Rev. St. 1881, §§ 5092, 5096, will not be enjoined on the ground that some of the petitioners were induced to sign the same by false representations as to the amount that would be assessed against their land, where no objection was made before the sufficiency of the petition was established by the board.—*Board of Com'rs of Carroll County v. Justice*, 133 Ind. 89, 30 N. E. 1085, 36 Am. St. Rep. 528.

[f] (Sup. 1907)

Under *Burns' Ann. St. 1901*, § 6911, providing for the construction of gravel roads, on the completion of such a road the superintendent and engineer are required to report the same to the county board, which must afford an opportunity to persons to be assessed for filing objections which shall be tried; the party aggrieved by the decision being also entitled

to appeal.—Board of Com'rs of Jackson County v. Branaman, 169 Ind. 80, 82 N. E. 65.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. § 391.

§ 138. — Proceedings for assessment.

[a] (Super. 1871)

Where viewers are appointed to assess the benefits accruing to the owners of land by the construction of a gravel road, an assessment by a majority of the viewers is as effectual as if made by all of them.—Baldwin v. Biersdorfer, Wils. 1; Williams v. Little White Lick Gravel Road Co., Id. 7.

[b] (Super. 1871)

Though the statute relative to the assessment of benefits from the construction of gravel roads provides that the assessor shall "proceed to view all lands within one and a half miles of each of such proposed roads, or either end of the same," to make a list of said lands and assess the amount of benefits that will result to each tract, nevertheless land belonging to the state was not intended to be subjected to assessment.—Williams v. Little White Lick Gravel Road Co., Wils. 7.

Where one of three appraisers appointed to assess the benefits accruing to the owners of land by the construction of a gravel road fails to accept his appointment, the appointment of a special assessor to fill the vacancy is discretionary with the commissioners.—Id.

[c] (Sup. 1874)

Where the course of a turnpike road is definite and certain, and the termini can be ascertained from the description given, the route is sufficiently described in a petition for assessment of benefits.—James v. Greensboro & N. J. Turnpike Co., 47 Ind. 379.

[d] (Sup. 1881)

Under Acts 1869, Sp. Sess. p. 73, § 3, authorizing assessments for gravel road purposes, it is the duty of the assessors to make an examination of the lands, upon which it is proposed to lay the tax, from such points of observation as will enable them to accurately ascertain their location, and in what manner the proposed road will affect each separate tract.—Hendricks v. Gilchrist, 76 Ind. 369.

An assessment for a gravel road will not be avoided because a small parcel of land belonging to a township was listed in the name of another person.—Id.

[e] (Sup. 1881)

Act March 3, 1877 (Act 1877, p. 86, § 7), authorizing the issuance of bonds for the construction of free gravel roads, and providing that special assessments levied to pay such bonds "shall be divided in such manner as to meet the payment of principal and interest of said bonds, and so be placed upon the duplicate for taxation against the lands assessed," did not prohibit the levying of a special assessment be-

fore the maturity of the bonds.—R Spraker, 77 Ind. 371.

[f] (Sup. 1881)

In determining the sufficiency of a petition required by statute to be attached to place assessment for gravel road tax duplicate, the statements contained in the petition, and the affidavits pleading to which it is attached are to be considered.—Ludlow v. Union Tp. Gravel Road Co., 77 Ind. 409.

Under Acts 1877, p. 80, § 3, providing for the petition of the board of such turnpike road companies as are entitled to be assessed, it shall be the duty of the auditor of the county to place on the tax duplicate the uncollected assessments for benefits from the construction of a gravel road, provided by a certain act, the validity of the petition and affidavit cannot be questioned after the assessment has been made and the duplicate.—Id.

[g] Where, in proceedings for the assessment of a public road, an adjacent land is sought to be subjected to a special assessment, notice is essential to confer jurisdiction.—(Sup. 1885) Fahlor v. Board of Com'rs of Wells County, 101 Ind. 167; (1886) Same, 107 Ind. 15, 8 N. E. 1; (1892) Com'rs of Wells County v. Fahlor, 133 Ind. 31 N. E. 1112.

[h] (Sup. 1885)

The levy of a special tax for a gravel road by county commissioners at a meeting held on another day than the one appointed by law is not valid, and not a special meeting properly called.—Fahlor v. Board of Com'rs of Wells County, 101 Ind. 167.

[i] (Sup. 1887)

In directing the construction of free gravel roads and levying assessments, county commissioners are not agents of the county, but the maxim respondeat superior cannot be applied.—Board of Com'rs of Montgomery County v. Len, 12 N. E. 208, 13 N. E. 574, 111 Ind. 111.

[j] (Sup. 1892)

Rev. St. § 5096, provides that, when a report of the viewers appointed in a petition to lay out a road is returned, the auditor shall give notice of it by publishing in some newspaper published and of general circulation in the county, and shall also give notice for three consecutive weeks of the time when the commissioners will hear each report. Held, that the notice given by such statute is sufficient to give the owners assessed on account of such road notice in court.—Tucker v. Sellers, 130 Ind. 100, N. E. 531; Same v. O'Neal, 130 Ind. 100, N. E. 533.

The jurisdiction of a board of county commissioners in highway construction is not merely to order the construction of gravel roads, but also to order lands assessed.—Id.

the board of county commissioners has no right to order the making of an assessment or to order an assessment in proceedings for the assessment of free gravel roads without first notice thereof.—Id.

(Sup. 1893)

Under Rev. St. 1881, § 5097, as amended by Elliott's Supp. § 1492, providing that assessments for the construction or improvement of gravel roads shall be divided in such manner as to meet the principal and interest of the county for the expenses of such improvement, the duty of dividing the assessments is in the county auditor, subject to revision by the courts in case of abuse of authority.—*v. McAfee*, 135 Ind. 540, 35 N. E. 277.

(Sup. 1894)

Under Rev. St. 1881, § 5090, relating to the construction of gravel roads and the assessment of such roads by a committee, and providing that the committee shall reduce or add to the same pro rata amount of actual expense more or less than the estimate, requires by necessary implication that such committee shall embody in its report a finding as to the benefit to the land assessed.—*Guckien v. Rothrock*, 37 N. E. 17, 113 Ind. 355.

(Sup. 1902)

Under Burns' Rev. St. 1901, § 6860, providing that when the county commissioners have determined that the apportionment of expense for the construction of a free gravel road has been fairly made, and have confirmed the same, the auditor shall spread the report on record, and place the assessment on a duplicate for the auditor, it was no defense for the auditor, in refusing to compel him to place 15 per cent. of the assessment on a duplicate for collection, that the owners representing the 85 per cent. had successfully appealed from the confirmation.—*Smyth v. State ex rel. Braun*, 62 Ind. 449, 158 Ind. 332.

(Sup. 1906)

Under Acts 1903, p. 255, c. 145, §§ 2, 3, relating to the improvement of highways, providing that the viewers shall apportion the costs and damages to all the lands within the taxing district benefited according to the benefits, requiring them to make a report showing the relative utility of the proposed improvement, and the cost thereof, the damages assessed to the benefits of each tract of land, and a description of the work proposed, do not require the viewers to report a list of all the lands in the taxing district, but only the lands benefited or damaged, and an error in the report of viewers arising from an omission to list lands benefited may be corrected, as authorized by section 6 (page 256) of the act, and the failure of the viewers to assess all the lands does not render the proceeding void.—*Holding v. Mott*, 76 N. E. 620, 167 Ind. 100.

## FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. § 392.

### § 141. — Certificate for work done against specific property.

Defective answer in action by assignee of certificate, to collect, see ASSIGNMENTS, § 131.

[a] (Sup. 1887)

Act April 8, 1885, relating to building gravel and macadamized roads, provides that the superintendent shall issue certificates to the contractor building such roads, showing the sum assessed against each tract of land, and that the same is to be paid within \* \* \* months from the date of the certificate. *Held* that, in the absence of a provision in the contract, the date to be inserted in the certificates is within the discretion of the superintendent, and a refusal by him to date the certificates back to the date of the contract, the work not having been begun until four months after, is not an abuse of such discretion.—*State ex rel. McCray v. Frazier*, 113 Ind. 267, 14 N. E. 561.

Under Act April 8, 1885, § 11, relating to gravel and macadamized roads, certificates of assessments for the construction of such roads bear interest at the rate of 6 per cent. per annum.—Id.

[b] (App. 1899)

In an action on gravel-road certificates issued under Act April 8, 1885, § 11, declaring that such certificates shall be assignable as promissory notes, an answer by the owner of land against which certificates assigned to plaintiff were issued, pleading payment, but failing to allege payment before assignment, or before he had notice thereof, was insufficient.—*Farmers' Bank of Frankfort v. Orr*, 55 N. E. 35, 25 Ind. App. 71.

## FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. § 394.

### § 142. — Confirmation, correction, or setting aside.

[a] (Sup. 1872)

The county commissioners, upon the discovery of any omission of lands liable to be assessed for a turnpike road, may, on their own motion or at the instance of any one interested, reassemble the appraisers and require the proper correction to be made, and direct the treasurer to add the same to the duplicate, thus rendering the entire assessment valid.—*Sand Creek Turnpike Co. v. Robbins*, 41 Ind. 79.

Where, in assessing lands for a turnpike road, there have been casual omissions of tracts of land by the assessors appointed by the county commissioners, such omissions may be corrected, and such completed assessment may be answered by way of defense to the further prosecution of a suit to enjoin the collection of the assessment because of such irregularity.—Id.

Acts 1867, p. 167, require lands to be assessed for the full amount of benefits which

they will receive from the construction of a road, without regard to the cost of the construction; but no more is to be collected than is necessary for the construction of a road in payment of expenses. *Held*, that as the omission of some of the lands would make no difference whatever in the amount to be assessed on others, and that as the repealing clause of the act of 1869 saved acquired rights under the act of 1867, a company which was entitled under the act of 1867 to have an appraisal made was entitled to amend such appraisal, so as to include omitted lands, after suit had been instituted against such company because of such omission.—*Id.*

[b] (Sup. 1892)

Under the statutes relating to the establishment of free gravel roads, an assessment against property owners does not become effective until approved by the board of county commissioners.—*Tucker v. Sellers*, 30 N. E. 531, 130 Ind. 514; *Same v. O'Neal*, 30 N. E. 533, 130 Ind. 597.

[c] (Sup. 1894)

The report of a committee appointed to make an apportionment in proceeding for a gravel road does not perform the office of a complaint but is in the nature of a verdict or special finding of the facts, and objections filed thereto are in the nature of objections to a verdict or finding.—*Manor v. Board of Com'rs of Jay County*, 34 N. E. 959, 36 N. E. 1101, 137 Ind. 367.

FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. High. § 396.

§ 143. — Curative statutes.

[a] (Sup. 1879)

The provision of Acts 1877, p. 72, modifying Acts 1875, p. 80, as to assessments for plank, macadamized, or gravel road purposes, only partially revived that of 1869, p. 73, and was not intended as a curative act. It does not authorize the collection of assessments which were void for noncompliance with the statute under which they were made.—*Marion & M. Gravel Road Co. v. McClure*, 66 Ind. 468.

FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. High. § 395.

§ 144. — Reassessment or additional assessment.

[a] (Sup. 1881)

Act March 3, 1877, authorizing taxation in aid of the construction of gravel roads, confers upon the commissioners authority to make all needed corrections, and to supply omissions in the assessment and apportionment of taxes; and their failure to place certain lands upon the assessment roll does not vitiate the entire assessment.—*Ricketts v. Spraker*, 77 Ind. 371.

[b] (Sup. 1885)

Where a final judgment has been entered by a board of county commissioners, levying

a tax to aid in the construction of gravel road, the board cannot, two years after the entry of final judgment, levy an additional tax without new notice, for notice is sufficient to confer jurisdiction; nor is such a tax implied from section 5095, Rev. St. 1881, authorizing the correction of errors.—*Gavin v. Board of Com'rs of Wells County*, 104 Ind. 281, 17 N. E. 846.

[c] (Sup. 1887)

Although the county commissioners are authorized to order an additional assessment of benefits in aid of the construction of gravel roads, they cannot themselves assess the amount to be paid by landowners, respectively, but must refer the matter to the viewers as in the first instance.—*Board of Com'rs of Montgomery County v. Fullen*, 111 Ind. 410, 12 N. E. 298, 137 Ind. 574.

Under Rev. Laws 1881, § 5102, the authority of constructing gravel roads being paid for by the adjoining proprietors, and not by the county, the board of county commissioners may not order an additional assessment of benefits in aid of the construction, and may do so without a view of the facts, and upon their own motion.—*Id.*

The machinery for levying and collecting a second assessment is substantially the same as that provided for levying and collecting an original assessment.—*Id.*

[d] (Sup. 1888)

Under Rev. St. 1881, § 5096, which provides that, in levying an assessment for the construction of a free turnpike road, the board of county commissioners must refer the matter to a committee to make the assessment, and report to the board, and also give notice that they will meet to hear objections thereto, the board, after they have levied an assessment, cannot increase it without such reference to a committee.—*Board of Com'rs of Wells County v. Fahlor*, 114 Ind. 173, 15 N. E. 830.

[e] (Sup. 1888)

Under Rev. St. 1881, § 5096, which provides that, in levying an assessment for the construction of a gravel road, the board of county commissioners must give notice when they will meet to hear objections, the board, after they have levied an assessment, cannot order an additional assessment without such notice, even though no assessment was made necessary by the fact that the first had not been paid in full, because the auditor made a mistake in paying the duplicate.—*Board of Com'rs of Wells County v. Gruver*, 115 Ind. 224, 17 N. E. 294; *Board of Com'rs of Wells County v. Ives*, 115 Ind. 597, 17 N. E. 294; *Same v. Ives*, 115 Ind. 597, 598, 17 N. E. 294; *Same v. Mounsey*, 115 Ind. 599, 17 N. E. 294; *Same v. Mounsey*, 115 Ind. 599, 17 N. E. 294; *Same v. Van Camp*, 115 Ind. 599, 17 N. E. 294; *Same v. Eaton*, 115 Ind. 599, 17 N. E. 294; *Same v. Popejoy*, 115 Ind. 599, 17 N. E. 294; *Same v. Bolton*, 115 Ind. 600, 17 N. E. 294.

(Sup. 1889)

a reassessment can only be had on notice, as, on notice, the landowners may and judgment may be rendered directing assessment, an appeal lies from an order of such reassessment.—*Campbell v. Board of Com'rs of Monroe County*, 118 Ind. 119, 20 N. E. 72.

Rev. St. 1881, § 5096, providing for the apportionment of the estimated expense of constructing a free gravel road, and providing that the auditor shall reduce or add to the estimate the amount the actual expense shall be, the estimate, must be construed as meaning that the auditor must only add to the assessment when it appears that the addition will not be assessed in excess of the benefits ascertained and reported in compliance with the statute.

Each section does not authorize the auditor to increase the assessment to an amount in excess of the benefits assessed, nor can such increase be legally ratified by the commissioners.

(Sup. 1889)

Where a second assessment against landowners is ordered for the purpose of paying the cost of a free gravel road, the landowners have the right by appeal from the final order to bring before the court all questions affecting the validity of the reassessment. They are not precluded because they do not appeal as each assessment is made.—*Board of Com'rs of Montgomery County v. Fullen*, 118 Ind. 158, 20 N. E. 72.

(Sup. 1892)

Where a road assessment has been confirmed by the commissioners after notice to the landowners, and a hearing of objection made, the questions as to the utility of the road, and the amount of the assessment, are thereby finally adjudicated; and, on appeal for a reassessment, the only question to be decided by the court is as to the validity of the second assessment.—*Tucker v. Board of Com'rs*, 130 Ind. 514, 30 N. E. 531; *Same v. Board of Com'rs*, 130 Ind. 597, 30 N. E. 533.

(Sup. 1894)

Where an assessment for a gravel road was made by a committee under Rev. St. § 5096, a reassessment without notice to the landowners affected thereby is void.—*Guck v. Rothrock*, 137 Ind. 355, 37 N. E. 17.

Under Rev. St. 1881, § 5096, providing for the construction of gravel roads, and the apportionment of benefits by a committee, and that the auditor shall reduce or add to the same, the amount of the actual expense of construction, or less than the estimate, the auditor has no power to increase an assessment beyond the amount assessed as benefits by such committee.—*Id.*

(Sup. 1894)

A board of county commissioners has no authority to direct the levying of an additional assessment for building a gravel road, when

the first assessment proves insufficient, without notice.—*Manor v. Board of Com'rs of Jay County*, 137 Ind. 367, 34 N. E. 959, 36 N. E. 1101.

Proceedings for a reassessment in the building of a gravel road can be had at a special term of the board of county commissioners.—*Id.*

Where, on appeal to the circuit court from a reassessment for building a gravel road, the apportionment of the assessment against appellant's property is too high, the judgment cannot be modified on motion, but the proper remedy is by motion for a new trial.—*Id.*

After the return of the report of commissioners appointed to reassess and apportion the deficit on the building of a gravel road, a notice for three successive weeks, in a weekly paper published in the county, of the time when the board would meet to hear exceptions thereto, gives the board jurisdiction over the persons of the owners of the land affected.—*Id.*

On the hearing on appeal of exceptions to a reassessment for building a gravel road, where the commissioners, on the order of the court, file an itemized statement of expenses, it is in the discretion of the court to refuse to order a more definite statement.—*Id.*

Where, on appeal from a reassessment for building a gravel road, the circuit court makes an entirely different apportionment from that made by the county commissioners, it is immaterial that the committee appointed by them in making its apportionment did not actually view the land assessed.—*Id.*

[k] (Sup. 1896)

In proceedings for an assessment to cover the additional cost of the construction of a free gravel road, there is no question open, except the validity and amount of the additional assessment.—*Goodwin v. Board of Com'rs of Warren County*, 44 N. E. 1110, 146 Ind. 164.

In proceedings for an assessment for additional cost of a free gravel road, though the county was not a necessary party, it had such a nominal interest as to entitle it to be made a party.—*Id.*

Where a free gravel road when completed is not up to the standard contracted for, the remedy is upon the contractor's bond, and objection cannot be raised on hearing as to an additional assessment.—*Id.*

On a hearing as to an additional assessment for the cost of a free gravel road in excess of the original estimate, no question is involved not pertinent if made against the original assessment, and an objection that the road was not properly constructed is not competent.—*Id.*

Under Rev. St. 1894, § 6860 et seq. (Rev. St. 1881, § 5096 et seq.), authorizing a county board to apportion the estimated cost of a free turnpike road upon the lands benefited thereby, where the cost of such road exceeds the esti-

mate the board may make an additional assessment to cover such excess, not exceeding the estimated benefits.—Id.

Where a reassessment of lands for the cost of a free gravel road, which exceeded the original estimate, was made by a county board, under Rev. St. 1894, § 6860 et seq. (Rev. St. 1881, § 5096 et seq.), and from such reassessment certain objectors appeal, it is proper to allow the county board to become a party to such appeal in the circuit court, the proceeding being essentially one to reimburse the county for the expenditure beyond the original estimate in construction of the road.—Id.

1] (Sup. 1898)

A reassessment of the cost of highway improvement cannot be defeated by the fact that the county had already fully paid for the improvement by money advanced, and the new assessment was only designed to reimburse it for the deficiency in the original assessment.—Kline v. Board of Com'rs of Huntington County, 51 N. E. 476, 152 Ind. 321.

Under Burns' Rev. St. 1894, § 6858 (Rev. St. 1881, § 5094), providing that viewers shall make "an assessment of the expenses of such improvement" as a basis for the action of the commissioners, their order directing the making of the contemplated highway improvement and levying an assessment of the cost thereof is not a judicial determination that such assessment will be adequate, so as to bar an additional assessment in case of a deficit.—Id.

Under Burns' Rev. St. 1894, §§ 6855, 6856 (Rev. St. 1881, §§ 5091, 5092), empowering the board of commissioners to lay out and improve roads, etc., the board has power to lay an additional assessment to meet the cost of such improvement when the first was inadequate.—Id.

The six years' statutory limitation has no application to a proceeding under the highway statute to reassess lands for the improvement of highways, because such proceeding is not one for the recovery of money by the county.—Id.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 396, 402.

§ 145. — Lien.

Appellate jurisdiction of actions to enforce liens, see COURTS, § 220 (2).

[a] (Sup. 1886)

Under Rev. St. 1881, §§ 5095-5097, assessments for the construction of free gravel roads become liens at the time of the final order of the county board confirming the report of the committee.—Kirkpatrick v. Pearce, 107 Ind. 520, 8 N. E. 573.

[b] (Sup. 1894)

Rev. St. 1894, § 6886 (Rev. St. 1881, § 5096), providing that the lien of an assessment for the laying out of a road shall relate back

and bind the land assessed from the time of laying the petition for the improvement, qualify or limit the lien allowed by 1894, § 6860 (Rev. St. 1881, § 5096) makes such an assessment a first lien on the land.—Murphy v. Beard, 138 Ind. 566, 33 E. 33.

Under Rev. St. 1894, § 6860 (Rev. St. 1881, § 5096), providing that an assessment for laying out a road shall be a first lien on the land in the same manner as other taxes, the lien of such an assessment takes priority over the lien of a mortgage executed before the act was passed.—Id.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. § 397.

§ 147. — Collection and enforcement.

[a] (Sup. 1885)

Where the sale of land for nonpayment of a gravel road tax assessed under 1881, § 5097, fails to convey title, the assessor secures a lien for all taxes paid together with the statutory penalty.—Morrow v. Millikan, 104 Ind. 162, 2 N. E. 91, 8 E. 816.

Section 5097, Rev. St. 1881, relating to the taxation to raise money for free gravel roads, plainly contemplates the collection of taxes for the purpose of building a gravel road by the county as in other cases. To hold otherwise would nullify the statute.—Id.

[b] (App. 1898)

A complaint in an action to recover the amount due on a gravel-road assessment, to enforce the assessment, and for foreclosure of the lien on the lot improved thereby, states no cause of action against one who was trustee of the soil and in strict occupying said lot.—Morrow v. Millikan, 104 Ind. 162, 2 N. E. 91, 8 E. 816.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. § 398; 4 CENT. DIG. Tax. § 1632.

§ 148. — Remedies for wrongs and enforcement.

Reception of evidence at trial by county board to proceed to restrain levy of assessment, see TRIAL, § 377.

[a] (Sup. 1870)

An appeal lies, by any one interested, from the action of county commissioners in appointing persons, under Act March 1, 1867, to assess benefits to land expected to be derived from the construction of a gravel road, in case of a landowner or other person whose name is on the record, he must file an appeal of interest before such appeal can be maintained.—Swindler v. Monrovia & B. Gravel Road, 33 Ind. 160.

[b] Where assessors, appointed under Act March 11, 1867, providing for assessment

to aid in the construction of plank, etc., did not list, assess, or appraise all the within  $1\frac{1}{2}$  miles of the termini of the road, an injunction lies to prevent the collection of assessments.—(Sup. 1870) Green & B. G. Turnpike Co. v. Albin, 34 Ind. (1871) Forney v. Northern Gravel Road Co., 7 Ind. 118; (1872) Scott v. Mt. Auburn Turnpike Co., 39 Ind. 271; (1872) Hopewell v. Greensburg, K. & C. Turnpike Co., 40 Ind. 14; (1873) Williams v. Greensburg & C. Turnpike Co., 42 Ind. 171; (1873) Pavy v. Ind. 400; (1873) Hendricks v. Indian & S. Gravel Road Co., Id. 562.

(Sup. 1871)

If a party against whom a gravel road assessment has been improperly made does not timely seek his remedy, but allows the commission to incur material expenses, and to enter engagements difficult to be discharged, he loses his right to an interposition of equity.—Williams v. Little White Lick Gravel Road Co., 7 Ind. 7.

(Sup. 1879)

In a suit to enjoin the collection of void gravel-road assessments, the answer alleged that the assessments had stood by and seen defendant perform work and contract debts upon the faith of the assessments, and had instituted no proceedings to contest their validity. *Held*, that the answer was insufficient for not averring during the time specified, plaintiffs had knowledge of the facts rendering the assessments void.—Marion & M. Gravel Road Co. v. McGee, 66 Ind. 468.

(Sup. 1881)

The provisions of Acts March 3, 1877, § 1, for the enjoining of, or declaring void, assessments for the construction of a free gravel road, authorize an action for such purpose only by a single individual, or by persons representing a single interest, and not a joint action by many landowners whose interests are separate and distinct.—Stoddard v. Johnson, 112 Ind. 20.

(Sup. 1881)

Where the Legislature has delegated power to commissioners to levy special assessments for the construction of highways, the courts cannot interfere by injunction to restrain the commissioners from exercising discretion. The power is within the scope of the legislative authorization.—Ricketts v. Spraker, 77 Ind. 112.

That the board of commissioners included in a single order two petitions for the construction of parts of a continuous gravel road under the act of March 3, 1877, was not ground for an injunction against the collection of a special assessment levied to pay the expense of constructing such road.—Id.

The discretion of the board of commissioners in levying special assessments to pay bonds to pay the cost of constructing gravel

roads under the act of March 3, 1877, before such bonds have matured, will not be interfered with in proceedings to enjoin the collection of such special assessments.—Id.

Injunction will not lie to restrain the collection of a tax possessed in aid of the construction of a gravel road, on the ground that the county auditor has illegally increased the assessment.—Id.

Injunction does not lie to control the decision of the viewers and commissioners appointed, under Act March 3, 1877, to assess benefits and damages to lands by reason of the construction of a gravel road.—Id.

That the commissioners provided for the collection of taxes on lands benefited by the building of a gravel road, before the maturity of the bonds issued for the building of such road, was no ground for an injunction against collecting the taxes.—Id.

[g] (Sup. 1881)

In an action to enjoin the collection of an assessment of benefits, under Acts 1877, p. 72, reviving the assessments made under the gravel road act of 1869, *held*, that a sworn petition to the auditor to place the assessment on the duplicate might take the place of petition and affidavit.—Ludlow v. Union Tp. Gravel Road Co., 77 Ind. 409.

A party seeking to enjoin the collection of an assessment of benefits arising from the construction of a gravel road, under Act March 2, 1877, is required to show, not that the necessary facts were not stated in the petition, but that they did not exist.—Id.

[h] (Sup. 1887)

Where two landowners, whose lands are assessed for the construction of a free gravel road, appeal from the order of the board of commissioners levying the tax, and secure a judgment declaring the order of the board to be vacated and annulled, no proceedings can rightfully be had upon such order, and an injunction will lie, for such a case is not within Rev. St. § 5102, relating to immaterial errors committed by the commissioners in the proceedings to lay out a road.—Fleener v. Claman, 112 Ind. 288, 14 N. E. 76.

[i] (Sup. 1889)

Where landowners successfully resist assessments made for the expense of building gravel roads, they cannot, under Rev. St. 1881, § 5102, providing that the costs shall be apportioned among the parties or paid by the county in whole or part, as justice may require, be compelled to pay the fees of the attorneys employed by the board of county commissioners.—Board of Com'rs of Montgomery County v. Fullen, 118 Ind. 158, 20 N. E. 771.

[j] (Sup. 1890)

Under Rev. St. 1881, § 5102, providing that no person shall be permitted to take advantage of any error in proceedings to establish

a free turnpike unless he is affected thereby, and giving the circuit court power, in case of error affecting the right of a plaintiff, to set the proceedings aside as to him, without affecting the rights of other parties in interest, an appeal by one landowner does not stay proceedings or render void assessments as to others, not affected by the error complained of.—*Iligh v. Claman*, 121 Ind. 447, 23 N. E. 279.

[k] (Sup. 1890)

Under the statutory proceedings for the construction of gravel roads, an appeal from the final order confirming the report of freeholders appointed to estimate the expense of the improvement does not affect the right of the board of commissioners to proceed with the matter, so far as the rights of property owners who have not joined in the appeal are concerned.—*Stipp v. Claman*, 123 Ind. 532, 24 N. E. 131; *Anderson v. Claman*, 123 Ind. 471, 24 N. E. 175.

[l] (Sup. 1891)

Rev. St. 1881, §§ 5002, 5006, relating to the construction of free gravel roads, provide that the board of commissioners shall appoint viewers to estimate the expense, etc., and apportion the estimated expense upon land according to the benefits. The auditor is required to then notify those interested, and the board then hears objections, and, if no sufficient reason is shown against it, approves the report of the viewers, and orders an assessment of the amount due from each tract. *Held*, that the order of the board has the force of a judgment, and an action would not lie by a landowner to enjoin collection of an assessment on his land on the ground that it was illegal.—*Loesnitz v. Seelinger*, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887.

[m] (Sup. 1892)

In an action to enjoin an assessment against property owners under a defective notice in proceedings for the establishment of free gravel roads, an answer setting up such notice and an assessment levied after commencement of the action is not sufficient.—*Tucker v. Sellers*, 30 N. E. 531, 130 Ind. 514; *Same v. O'Neal*, 30 N. E. 533, 130 Ind. 597.

In a suit to restrain the collection of a road assessment, it appeared that in the proceedings to open the road the viewers did not include plaintiff's land in their report for the reason that it was included in a report made on a petition for another road. The petition for the other road was dismissed, after which the board of commissioners ordered the lands that had been omitted from the former report to be assessed, and the engineer placed such omitted lands on the map prepared by him, and the board in regular session directed the viewers to view the lands, but by inadvertence this order was not entered on record. Plaintiff's land was within one-fourth of a mile of the line of the road, and the assessment on his

land was just and equitable. After the auditor made their report, the auditor gave the notice of the meeting of the board to plaintiff to hear and determine complaints of owners, and at this meeting plaintiff appeared and filed written objections to the assessment as to his land. *Held* that, as the board had jurisdiction over the general subject, plaintiff could not collaterally attack the assessment.—*Id.*

Proceedings to enforce an additional assessment, begun before the additional assessment was made and placed on the roll, are not enjoined though the assessment was due before the injunction suit was commenced, if it was not pleaded in the answer.—*Id.*

[n] (Sup. 1893)

A landowner who did not appeal from an assessment for costs of a free gravel road could not restrain the collection thereof on the ground that the board of commissioners, without setting aside a verdict by a jury for damages awarded to him from such road, or because, pending a subsequent verdict, the jury deducted from the amount of his damages the amount of the benefits received by him from the collection of the road.—*Cason v. Harrison*, 133 Ind. 330, 35 N. E. 268.

[o] (Sup. 1893)

An injunction will not lie to restrain the collection of part of an assessment on the ground that the money is not yet actually received for the payment of bonds or interest.—*Florer v. McAfee*, 135 Ind. 540, 35 N. E. 330.

[p] (Sup. 1894)

Evidence in a suit to restrain the collection of certain assessments on land for the construction of a gravel road considered, and held insufficient to sustain the verdict as to the assessments.—*Guckien v. Rothrock*, 37 N. E. 100, 135 Ind. 355.

[q] (Sup. 1898)

A complaint to enjoin the collection of assessments on plaintiff's lands to pay the expenses of a road constructed under Rev. St. 1881, §§ 5091–5103 (*Burns' Rev. St.* 1881, §§ 6855–6867), alleging that his lands had not been reported by any engineer or by any assessors as benefited by the road, is insufficient without further alleging what the commissioners' record discloses on the subject, since no authority is conferred on the commissioners by the statute to make all needed corrections or to supply all omissions.—*Layman v. Hughes*, 30 N. E. 1058, 152 Ind. 484.

In a collateral attack by injunction against assessments against plaintiff's lands to pay the expenses of constructing a macadamized road in pursuance of Rev. St. 1881, §§ 5091–5103 (*Burns' Rev. St.* 1881, §§ 6855–6867), alleging irregularities or defects in making the assessment, the assessment cannot be inquired into, where the board of commissioners had jurisdiction.—*Id.*

## [r] (Sup. 1902)

A party aggrieved by the action of county commissioners ordering an assessment of taxes to meet the cost of a road construction at a cost exceeding the limit prescribed by Acts 1899, p. 26, not having the right to appeal by virtue of Burns' Rev. St. 1901, § 7859, giving the right of appeal from decisions of the commissioners which are judicial in character, is entitled to relief in equity.—Board of Com'rs of Owen County v. Spangler, 65 N. E. 743, 159 Ind. 575.

## [s] (Sup. 1906)

In an action to restrain the levy of an assessment for the construction of a gravel road, evidence showing fraud and irregularity in the viewers' report and other proceedings before the commissioners was irrelevant.—Todd v. Crail, 77 N. E. 402, 167 Ind. 48.

FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. High. §§ 399-403.

## § 149. — Disposition of proceeds.

## [a] (Sup. 1884)

Rev. St. 1881, §§ 5091-5103, provide that money for the construction of county roads shall be raised by the sale of county bonds, maturing at intervals after two years, that the principal and interest are to be paid by assessments on the lands benefited, and the improvements provided for are required to be done under contract, and under the superintendence of a competent engineer appointed by the county board. *Held*, that the proceeds derived from the sale of bonds and the collections of assessments are to go into the county treasury, and expenses for improvements are to be paid out upon allowances made by the board of county commissioners.—Matter v. Stout, 93 Ind. 19.

## [b] (Sup. 1891)

Where bonds are issued to pay for a road improvement, the bondholders are not responsible for the application of the money, and the fact that the money is diverted to other purposes, and the improvement is not completed, does not invalidate an assessment made for the purpose of paying the bonds.—Loesnitz v. Seelinger, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887.

## [c] (Sup. 1894)

Where bonds were sold for the construction of a gravel road, the funds of the road were properly charged with payments on the bonds made by the county treasurer.—Manor v. Board of Com'rs of Jay County, 137 Ind. 367, 34 N. E. 959, 36 N. E. 1101.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. § 404.

## § 151. Work on road by taxpayers.

Mandamus to compel certificate of work done, see MANDAMUS, § 87.

## [a] (Sup. 1864)

The certificate of exemption from work on a highway, given by a township trustee, under section 9, 1 Gav. & H. p. 589, is the means of presenting the facts stated in it to the supervisor of the township in which it is issued, and is prima facie evidence of such facts; and the burden of proof is upon the supervisor to show that it is false.—Shideler v. Clinton Tp. ex rel. Choen, 23 Ind. 479.

## [b] (Sup. 1880)

The exemption from labor on the highway, under 1 Rev. St. 1876, p. 857, § 9, is a matter for the exclusive determination of the township trustee, and it is no defense to such action to set up a ground upon which such trustee might have exempted defendant from road work.—Winfield Tp. v. Wise, 73 Ind. 71.

In suit against A. to recover for a failure to perform road work, or to pay the commutation therefor, the jury cannot consider the amount of exemption allowed in cases of judgments founded on contracts in determining the question whether defendant, as he alleged, was too poor to pay the commutation.—Id.

## [c] (Sup. 1895)

Under Rev. St. 1894, § 6823, providing that on application to the township trustee any person liable to work on highways may be exempt therefrom if he belongs to "a legally organized fire company," one claiming exemption must show compliance with Rev. St. 1894, §§ 4584, 4585, in force at the time of the company's organization, which require the original articles of such association to be filed with the county recorder, and section 3423, providing that duplicates or certified copies of such articles shall be filed with the secretary of state.—Porter v. State ex rel. Dunkleberg, 141 Ind. 488, 40 N. E. 1061.

## [d] (App. 1895)

The liability to work on highways, imposed by Burns' Rev. St. 1894, § 6819, on all able-bodied male citizens between the ages of 21 and 50 years, is not in the nature of a poll tax, but of the nature of military or jury service.—Leedy v. Incorporated Town of Bourdon, 12 Ind. App. 486, 40 N. E. 640.

Burns' Rev. St. 1894, §§ 6621-6623 (Rev. St. 1881, §§ 4901-4903), exempting active members of any fire company organized under the corporate authority of a city or town from military or jury service and from the payment of a poll tax, does not exempt a member of a fire company organized under the general laws of the state from the liability to work on the streets and highways.—Id.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 407-416.

See, also, note, 5 L. R. A. (N. S.) 1139; note, 74 Am. St. Rep. 667.

## V. REGULATION AND USE FOR TRAVEL.

Appeal from decision of county board on application for leave to turnpike company to construct road along public highway, see COUNTIES, § 58.

Bridges, see BRIDGES, §§ 29-45.

Turnpikes and toll roads, see TURNPIKES AND TOLL ROADS, §§ 37-51.

### (A) OBSTRUCTIONS AND ENCROACHMENTS.

Canals crossing highways, see CANALS, §§ 17, 19.

Effect of consent of members of town board, to obstruction, see TOWNS, § 26.

Injuries from obstructions, see post, §§ 187-213. Jurisdiction of action for trespass as dependent on whether title to real property is involved, see COURTS, § 163.

Liability of railroad company for injuries from defects in crossings, see RAILROADS, § 303.

Liability of railroad company for injuries from obstructions at crossings, see RAILROADS, § 304.

Liability of railroad company to penalty for obstructing highways, see RAILROADS, § 254. On private roads, see PRIVATE ROADS, §§ 7-9. On streets, see MUNICIPAL CORPORATIONS, §§ 691-700.

Presumptions as to, see EVIDENCE, § 84.

Repeal of penal act by change in definition of offense or in punishment thereof, see STATUTES, § 165.

### § 153. Obstruction of use of highway in general.

#### [a] (Sup. 1853)

The backing of water over a public highway to the injury and annoyance of the public by the erection of a milldam is a common nuisance.—*State v. Phipps*, 4 Ind. 515.

#### [b] (Sup. 1856)

It is no answer to an action for obstructing a public highway that the defendant opened a way through which travel might pass.—*Weathered v. Bray*, 7 Ind. 706.

#### [c] (Sup. 1859)

It is no defense to an action for obstructing a public way that the plaintiff obstructs it on his own land.—*Langsdale v. Bonton*, 12 Ind. 467.

#### [d] (Sup. 1890)

A railroad company has no right to use a highway for the storage of cars or even as a place for the temporary deposit thereof; and hence either temporary or permanent or other occupancy of a highway by a hand car was prima facie unlawful.—*Ohio & M. R. Co. v. Trowbridge*, 26 N. E. 64, 126 Ind. 391.

#### [e] (App. 1892)

The obstruction of a public highway constitutes a public nuisance.—*Zimmerman v. State*, 31 N. E. 550, 4 Ind. App. 583.

#### [f] (App. 1896)

A prescriptive right to maintain a through the embankment of a highway be based on the failure of the public authority to object to its maintenance, where it is interfered with the use of such highway.—*Terre Haute & I. R. Co. v. Zehner*, 1 Ind. App. 273, 42 N. E. 756.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 299, 414.

See, also, notes, 12 L. R. A. 115, 140.

A. 308, 2 L. R. A. (N. S.) 159, 268.

§ 155. Persons entitled to remedies. Rights and remedies of abutting owners, ante, §§ 86, 87.

#### [a] (Sup. 1881)

Where there is no inconvenience to the individual by the obstruction of a highway, the individual cannot right the supposed wrongs to the public vi et armis; but the public must prosecute its proper officers to remove the obstruction and punish the party erecting it.—*Bidinger v. State*, 76 Ind. 244.

#### [b] (Sup. 1881)

One who has erected costly buildings enjoin the obstruction of the highway, by enjoining his only means of ingress and egress to the buildings, before he has suffered actual damage from the obstruction.—*Ross v. The State*, 78 Ind. 90.

[c] One cannot maintain an action for unlawful obstruction of a public highway unless he shows that he has sustained actual injury.—(Sup. 1883) *Powell v. Bunker*, 64; (1886) *Sohn v. Cambern*, 106 Ind. N. E. 813.

#### [d] (Sup. 1883)

A person's right to use a public way for passage thereon is not affected by the obstruction of his residence therefrom as proximately to him no greater right of passing than any other person, and hence, not being specially injured by an obstruction, he can have no private right of action therefor.—*Powell v. Bunker*, 64.

To be prohibited by one through whose lands a highway runs from passing up the highway, and to cease to use or refrain from using the road because of such order, would constitute a special injury from a public nuisance, or afford a right of action for the inconvenience arising from going a more circuitous way.—*Id.*

#### [e] (Sup. 1883)

To entitle plaintiff to recover for obstruction of a highway, he must show that he had sustained damages different in degree or different in kind from those sustained by the public generally by reason of the obstruction.—*Matlock v. Hawkins*, 92 Ind. 225.

In an action to recover damages for obstructing of a public highway, plaintiff

show by preponderating evidence the existence of the highway described in the complaint.—Id.

To entitle plaintiff to recover damages for the obstruction of a highway, it devolves on him to show by a fair preponderance of the evidence that the highway was obstructed as alleged.—Id.

[f] (Sup. 1883)

In a private action for damages resulting from an obstruction in a highway, and to abate the alleged obstruction, the complaint should allege special damages to plaintiff.—Waltman v. Rund, 94 Ind. 225.

[g] (Sup. 1886)

The fact that a citizen's route to his market is interfered with by obstructions placed in the highway is not such a special injury as will entitle him to maintain an action.—Sohn v. Cambern, 106 Ind. 302, 6 N. E. 813.

[h] (Sup. 1888)

An allegation that the obstruction prevents the access of petitioners to a public cemetery in which members of their family are buried does not show special damages.—Sunderland v. Martin, 113 Ind. 411, 15 N. E. 689.

[i] (Sup. 1890)

An action for damages cannot be maintained by a private citizen against one who obstructs a public highway, unless such citizen, by reason of such obstruction, has sustained some damage peculiar to himself, and not suffered by the public generally.—Fossion v. Landry, 24 N. E. 96, 123 Ind. 136.

A special verdict, which finds that the use of a public way as a means of ingress and egress to plaintiff's buildings is of a given value per month, and that the plaintiff has been deprived of the use of it for a stated number of months, will be construed, on appeal, as assessing the damages with reference to the value of the way as an appurtenance of plaintiff's property.—Id.

[j] (Sup. 1891)

Where land is so situated with reference to a public highway that such highway is necessary to ingress and egress to and from the land, the owner has a private easement in the public highway, and may maintain an action for its obstruction.—Harding v. Cowgar, 26 N. E. 799, 127 Ind. 245.

[k] A complaint in an action for the obstruction of a public highway, which alleges that it was used by the public, and that its use and occupancy by defendant for its railroad track cut off plaintiff's means of ingress to and egress from his adjacent property, sufficiently shows his special interest in the highway, entitling him to maintain the action.—(App. 1904) Cincinnati, R. & M. R. R. v. Miller, 72 N. E. 827, 73 N. E. 1001, 36 Ind. App. 26; (1906) Same v. Troutman, 75 N. E. 277, 38 Ind. App. 700.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. HIGH. §§ 432-436.

# § 157. Removal.

Mandamus to compel removal of obstruction, see MANDAMUS, § 98.

[a] (Sup. 1854)

He who had obstructed a county road was not entitled to notice before suit to remove the obstruction, under the Acts 1849, p. 116.—Epler v. Niman, 5 Ind. 459.

[b] (Sup. 1866)

Act March 6, 1865, authorizing supervisors to remove fences along highways in certain cases, is not liable to the objection that it confers judicial powers on the supervisors.—Hymes v. Aydelott, 26 Ind. 431.

[c] (Sup. 1887)

Filling up a culvert, thereby causing a highway to become impassable, and constructing a ditch so as to collect the surface water into a channel, and discharge it upon another's land, is a nuisance which the party specially injured may abate by restoring the culvert, doing no wanton or unnecessary injury.—Reed v. Cheney, 111 Ind. 387, 12 N. E. 717.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. HIGH. §§ 423-429, 434.

# § 159. Injunction.

[a] (Sup. 1869)

To show that the highway obstructed is the plaintiffs' usual, convenient, and necessary route of travel from their houses, which are all on or in the vicinity of the road, to their market town and usual place of business, and that without greater or less circuitry, when the road is so obstructed, they and each of them have no other means, nor have the public wishing to use the road, of going to and fro, as they have a right to do, for business, comfort, and pleasure, is not enough to entitle plaintiffs to enjoin the obstruction of the highway as a nuisance.—McCowan v. Whitesides, 31 Ind. 235.

A private person cannot enjoin the obstructing of a public highway without showing a special and peculiar injury to himself, not common to the public. The fact that the injury to such person is greater in degree than that to others does not entitle him to such relief. The injury must be special. It may be to more than one person, but must not embrace the entire public.—Id.

[b] (Sup. 1891)

The complaint in an action to enjoin the obstruction of a public highway must describe it as a public highway.—Harding v. Cowgar, 26 N. E. 799, 127 Ind. 245.

[c] (Sup. 1900)

In a suit for a mandatory injunction to compel the removal of an obstruction in a highway, the fact that the removal injured others in like manner and degree to plaintiffs, was immaterial, so long as the injury was peculiar to them, and did not embrace the public

in general.—*Martin v. Marks*, 57 N. E. 249, 154 Ind. 549.

A finding of fact, in a suit of an abutting landowner to enjoin the obstruction of a highway by a fence, that, after the obstruction was built, plaintiff placed a gate in his own fence bordering the highway, which was one foot narrower than the average farm gates in the neighborhood, and so partially obstructed access to his farm, is not ground for an objection to a conclusion of law that plaintiff is entitled to the relief asked; it appearing that such gate would have afforded plaintiff sufficient access to his property had the highway not been obstructed, and he having the same right to erect such gate after the obstruction was built as before.—*Id.*

FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. High. §§ 430, 431, 435.  
See, also, note. 52 Am. Rep. 574.

### § 160. Actions for damages.

Joinder of causes of action, see ACTION, § 45.

[a] An action on the case lies for an injury occasioned by obstructing any highway.—(Sup. 1838) *Martin v. Bliss*, 5 Blackf. 35, 32 Am. Dec. 52; (1850) *Board of Com'rs of Franklin County v. White Water Val. Canal Co.*, 2 Ind. 162.

[b] (Sup. 1884)

The complaint, in an action for damages for the obstruction of a public highway, alleged that, by reason of the obstruction, the comfort of plaintiff had been disturbed, and the free use of plaintiff's property so obstructed as essentially to interfere with the comfortable enjoyment of life and his property. *Held*, that the complaint was insufficient, there being no showing that plaintiff was hindered in the use of the public easement, or that ingress to or egress from his real estate had been or would be prevented, or that the value of his property was or would be depreciated.—*Waltman v. Rund*, 94 Ind. 225.

[c] (Sup. 1890)

In an action for obstructing an alley, construing the verdict as assessing the damages with reference to the value of the alley in controversy as an appurtenance to the property of the plaintiffs, it covers all the issues presented by the pleadings, and was sufficient to authorize judgment upon it.—*Fossion v. Landry*, 24 N. E. 96, 123 Ind. 136.

[d] (Sup. 1900)

In a suit to enjoin an obstruction to a highway, and also for damages suffered by reason thereof, it is proper to admit evidence as to what effect, if any, the continuance of the obstruction would have in diminishing the value of plaintiff's lands abutting on the highway.—*Martin v. Marks*, 57 N. E. 249, 154 Ind. 549.

[e] A complaint in an action for the obstruction of a public highway which became such

more than 30 years before the alleged action need not allege how the highway existed as such.—(App. 1904) *Oincin & M. R. R. v. Miller*, 72 N. E. 827, 1001, 36 Ind. App. 26; (1906) *Same v. man*, 75 N. E. 277, 38 Ind. App. 700.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 426,  
36 CENT. DIG. Mun. Corp. § 15

### § 161. Actions for penalties.

Disposition of proceeds, see PENALTIES  
Exclusive or concurrent jurisdiction  
COURTS, § 472.

Joinder of counts for separate penalties,  
PENALTIES, § 32.

Mandamus to compel suit for, see MA  
§§ 3, 73.

[a] (Sup. 1842)

The circuit court has not original jurisdiction to enforce penalties incurred by obstructions to remain in highways. Penalties can only be sued for before judgment of the peace.—*Aldrich v. Hawkins*, 6 Bla

[b] (Sup. 1866)

1 Gav. & H. St. p. 592, which the supervisor of roads to sue for obstruction of a highway within three days after knowledge of the fact, was not intended to operate as a statute of limitations as to the time of actions; and such a suit will not be defeated if not brought within that period.—*Lindley v. Braxton*, 27 Ind. 56.

[c] (Sup. 1866)

When an action begun by the supervisor of a road district, in the name of the trustee, to recover a penalty for the obstruction of a highway, is dismissed, the trustee is liable for costs.—*Sebrell v. Fall Creek*, Madison County, 27 Ind. 86.

[d] (Sup. 1876)

Under 1 Gav. & H. St. p. 592, § 592, providing that any person who shall "unlawfully, and to the hindrance of passengers, obstruct any highway," shall forfeit the sum of \$100, the complaint should allege that the defendant "unnecessarily, and to the hindrance of passengers," obstructed the highway, and is not sufficient to allege that he obstructed the highway so as to make it impassable, so that it could not be traveled and used by the public.—*Nowels v. Alter*, 53 Ind.

[e] (Sup. 1881)

Where a highway was temporarily obstructed, so that the public was compelled to travel around the obstruction, the highway was thereby vacated; hence one who fell from across the way was liable, under 1 Gav. & H. St. p. 592, § 5082, imposing a penalty for the obstruction of a highway.—*Davis v. Nicholson*, 183.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 322, 4

### § 162. Criminal responsibility.

Ignorance of the law as defense, see CRIMINAL LAW, § 32.

Sufficiency of affidavit charging obstruction, see CRIMINAL LAW, § 211.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 444-455.

### § 163. — Offenses.

[a] (Sup. 1850)

By Rev. St. 1843, p. 974, the making a fence across a public highway is a public nuisance, and is indictable as such.—*State v. Miskimmons*, 2 Ind. 440.

[b] (Sup. 1852)

Section 121 of the general road law of 1849, providing a remedy at the suit of the road supervisor for obstructing a public highway, does not take away the remedy by indictment authorized by section 65 of the chapter on crimes and punishments (Acts 1849, p. 116, § 121), but furnishes a cumulative remedy.—*State v. Virt*, 3 Ind. 447; *Same v. Burger*, Id. 448; *Same v. Catron*, Id.; *Same v. Morris*, Id. 449; *Same v. Jones*, Id.

[c] (Sup. 1853)

The backing of water over a public highway by the erection of a milldam is indictable; and it is no defense that defendant may have acquired a right, by virtue of the writ of *ad quod damnum*, to the use of the land of individuals on which the highway runs, for the purpose of flowing the water upon the land. Neither is a prescription from 20 years' continuance of the nuisance a defense.—*State v. Phipps*, 4 Ind. 515.

[d] (Sup. 1857)

In a prosecution for obstructing a highway, it appeared that the road had been worked and traveled for 15 years. *Held*, that user for 15 years was sufficient to establish the road.—*Hays v. State*, 8 Ind. 425.

[e] (Sup. 1858)

On a prosecution for obstructing a highway, it is not necessary to show that the highway was established by authority.—*State v. Hill*, 10 Ind. 219.

[f] (Sup. 1864)

Act June 14, 1852, providing that "any person who shall in any manner obstruct any public highway shall be fined," etc., was sufficiently definite, and an information thereunder should not be quashed on the ground that the statute defines no offense.—*State v. Craig*, 23 Ind. 185.

[g] (Sup. 1867)

It is not necessary, in order to constitute a road used as a public highway a highway, within the meaning of the act forbidding the obstructions of highways (2 Gav. & II. St. p. 475, § 66), that it should be worked.—*State v. Frazer*, 28 Ind. 196.

[h] (Sup. 1883)

The question of intent is immaterial on the prosecution of one who purposely places an obstruction across a public way in violation of the express provisions of a statute.—*Nichols v. State*, 89 Ind. 298.

It is no defense to a prosecution for obstructing a public highway that the township trustee told defendant he had a right to fence it up.—*Id.*

[i] (Sup. 1886)

Where the public acquiesce in the occupation of a part of a road by the adjoining land-owners for miles along the line, in such a manner as to narrow it, for more than 20 years, an abandonment will be presumed, and no criminal prosecution can be maintained, for obstructing the highway, against one who in good faith sets his fence on the line with his neighbors.—*Hamilton v. State*, 106 Ind. 361, 7 N. E. 9.

[j] (Sup. 1889)

The fact that mandamus is a remedy for obstruction of a highway does not bar an indictment therefor.—*State v. Baltimore, O. & C. R. Co.*, 120 Ind. 298, 22 N. E. 307.

[k] (App. 1893)

On an indictment for obstructing certain highways, it appeared that defendants were directors of a turnpike, upon which they maintained a tollgate, at the intersection of the pike with two public highways; that the tollgate was so constructed that a traveler coming from one of the highways, intending to go upon the other, would be compelled to pass under the pole of the tollgate; and that the pole was kept down a large portion of the time, which compelled such traveler to stand and wait until it could be raised. *Held* evidence sufficient to warrant a conviction.—*Cliff v. State*, 6 Ind. App. 199, 33 N. E. 211.

[l] (App. 1899)

A gas company constructing a pipe line along a public highway without consent of the owner of the fee or of the board of county commissioners is a trespasser.—*Huffman v. State*, 52 N. E. 713, 21 Ind. App. 449, 69 Am. St. Rep. 368.

A gas company unlawfully constructing a pipe line along a public highway without the consent of the owner of the fee or of the board of county commissioners could not thereafter lawfully remove such pipe line without the fee owner's consent.—*Id.*

[m] (Sup. 1909)

Where a public highway has been established on the line of abutting owners, and their fences have been set back and the road opened and used by the public, an owner cannot defend his setting his fence on the highway as established, by showing that the highway was not opened on the proper line, where he has not caused the mistake to be corrected in a legal manner.—*Curless v. State*, 172 Ind. 257, 87 N. E. 129, 88 N. E. 339.

Where a survey, made by an owner to locate the half-section line between his own and the abutting owner, was made without notice to the abutting owner, or his consent in writing, as required by Burns' Ann. St. 1901, §§ 8024, 8025, in case of relocating corners, it did not bind the abutting owner or the public, so that such survey was no defense to a prosecution for obstructing the highway, though it showed that the part of the highway obstructed was on defendant's land.—Id.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 444-446.

**§ 164. — Prosecution and punishment.**

Civil suit as bar to criminal prosecution, see CRIMINAL LAW, § 163.

Duplicity in indictment, see INDICTMENT AND INFORMATION, § 125.

Jurisdiction of justices of the peace, see CRIMINAL LAW, § 90.

Presumptions as to dedication, see DEDICATION, § 41.

Sufficiency of evidence as to dedication, see DEDICATION, § 44.

**[a] (Sup. 1843)**

The termini of the road need not be stated in an indictment charging that defendant was supervisor of the highway in a certain road district and unlawfully suffered a part of the road to be obstructed.—State v. Harsh, 6 Blackf. 346.

**[b] (Sup. 1857)**

In a prosecution for obstructing a highway, evidence is sufficient to show the existence of the way, where it is shown that the road had been used and worked as a public highway for 18 years, except that for the last 3 years it had been used but not worked.—Hays v. State, 8 Ind. 425.

**[c] (Sup. 1861)**

An indictment for obstructing a public highway by "erecting and maintaining a fence and stable thereon" sufficiently sets out and charges the manner of the obstruction.—Boyer v. State, 16 Ind. 451.

**[d] (Sup. 1869)**

An affidavit charging defendant with obstructing a highway is sufficient where it charges that the obstruction was within the jurisdiction of the court, it not being necessary to state the particular place where it was erected on the road.—State v. Buxton, 31 Ind. 67.

In an affidavit charging defendant with obstructing the highway, the mistake of the draftsman in writing "believed" instead of "believes" was immaterial.—Id.

An affidavit charging defendant with obstructing a highway in a certain county, "then and there situate, being the highway running nearly north and south through section 9, town 3, range 8 east, from the Scaffold Lick and Kent road to Lexington and Paris road," sufficiently describes the highway.—Id.

An affidavit charging defendant with obstructing a highway is not defective for being made on information and belief.—Id.

**[e] (Sup. 1874)**

An affidavit charging that the defendant did unlawfully and knowingly obstruct a certain public highway "by then and there erecting a rail fence across said road" sufficiently describes the offense of obstructing a public highway.—Jeffries v. McNamara, 14 Ind. 142.

**[f] (Sup. 1876)**

On a prosecution for obstructing a highway, it is not error to instruct the jury that it is proper for them, in determining the question whether the highway existed at the time of the offense, to inquire whether it is shown by the evidence that one of the defendants was in cutting out such road, and whether the defendants, while owning land over which it passed, admitted the existence of such way.—Sullivan v. State, 52 Ind. 30.

On the trial of a prosecution for obstructing a highway, it was not error to instruct the jury that before they could convict the defendant must be satisfied, beyond a reasonable doubt, that there was a public highway where the defendant claimed that the obstruction had been made, that there was an obstruction, and that the defendants, or some one or more of them, were guilty of the obstruction.—Id.

**[g] (Sup. 1876)**

An indictment for obstructing a highway by unlawfully cutting a "ditch along the side of the highway and making an embankment alongside thereof, causing water to flow over the road," is not bad for its failure to state the depth of the ditch and the height of the embankment.—State v. Day, 52 Ind. 483.

**[h] (Sup. 1877)**

An indictment for obstructing a highway, under 2 Rev. St. 1876, p. 4, which requires "a full and complete description of the digging and construction of a ditch, and that the ditch be running very nearly parallel with the highway, without showing an obstruction thereof," is not defective.—State v. Baker, 58 Ind. 417.

**[i] (Sup. 1879)**

An indictment for obstructing a highway, giving no more particular description of the location than the name of the township, and state, is fatally defective.—Stewart, 66 Ind. 555.

**[j] (Sup. 1883)**

The description is sufficient in an indictment for obstructing a public highway, wherein it is stated that "a certain public highway located in a certain township, situated on the half-section line running north and south through the center of" a certain section, township, range, and county.—State v. State, 89 Ind. 298.

An information for obstruction of a highway sufficiently describes the location of the highway.

the way where it gives such a description as will identify it and distinguish it from other highways of the county.—Id.

[k] (Sup. 1886)

Under section 1964, Rev. St. 1881, making it sufficient, in a prosecution for obstructing a highway, to show, upon the question of the public nature of the way, that it is used and worked as a public highway, such proof is not conclusive.—*Johns v. State*, 104 Ind. 557; 4 N. E. 153.

[l] (Sup. 1889)

An indictment found under Rev. St. 1881, § 1897, subjecting corporations to prosecution for obstructing highways, which alleges that there was a highway; that the defendant obstructed it, stating the character of such obstruction; and that travel was thereby obstructed, and the public greatly inconvenienced,—is sufficient, though there is no allegation of criminal intent.—*State v. Baltimore O. & C. R. Co.*, 120 Ind. 298, 22 N. E. 307.

An indictment for obstructing a public highway is not bad because it fails to charge a criminal intention.—Id.

[m] (App. 1891)

In a criminal prosecution for obstructing a highway, it is not error to direct a verdict of not guilty, where the evidence failed to show that the alleged highway had been established by law or by prescription or dedication.—*State v. Trove*, 1 Ind. App. 553, 27 N. E. 878.

On a prosecution for obstructing a public highway evidence considered, and held insufficient to sustain a conviction.—Id.

[n] (App. 1892)

In a prosecution for obstructing a highway, the court upon conviction of the defendant may order the abatement of the obstruction as a part of its judgment.—*Zimmerman v. State*, 31 N. E. 550, 4 Ind. App. 583.

In order to show the existence of a highway, it is not necessary to introduce record evidence of its having been located and opened out as such.—Id.

On a prosecution for obstructing a public highway, it is for the court to tell the jury what facts are necessary to establish the existence of a highway, and for the jury to determine the existence of those facts.—Id.

[o] (App. 1898)

A fine of \$25 for obstructing a public highway is not excessive, under Burns' Rev. St. 1894, § 2043 (*Horner's Rev. St. 1897*, § 1964), permitting a fine of not more than \$500 and imprisonment therefor.—*Hoch v. State*, 50 N. E. 93, 20 Ind. App. 64.

[p] (Sup. 1907)

An obstruction in a public highway constitutes a nuisance, which the court may cause to

be abated upon conviction of the offender.—*State v. Southern Indiana Gas Co.*, 169 Ind. 124, 81 N. E. 1149.

In a proceeding to abate a nuisance consisting of an obstruction in a public highway, the highway should be described or identified in the indictment or complaint.—Id.

Under the rule of pleading that if a criminal statute defines an offense and states specifically what acts constitute it, it is sufficient to charge the offense in the language of the statute, but if the definition contains generic terms it is not sufficient to allege the species of the crime, but the particulars must be stated, an indictment charging a violation of a statute forbidding in general terms the obstructing of any public highway should set out the facts constituting the crime, including a description of the highway, with such certainty as fairly to apprise the accused of what he was to meet, and in case abatement was ordered sufficient to enable the officer charged with the execution of such order to act understandingly; the mere averment that the accused obstructed a public highway in a certain county being insufficient.—Id.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 447-455.

## (B) USE OF HIGHWAY AND LAW OF THE ROAD.

Animals running at large, see ANIMALS, §§ 47-55.

Collisions of street cars with animals or vehicles, see STREET RAILROADS, §§ 89, 90.

Right of way over street railroad tracks, see STREET RAILROADS, § 85.

Statutory and municipal regulations relating to movement of trains across highways, see RAILROADS, §§ 242, 243.

Use of street as highway, see MUNICIPAL CORPORATIONS, §§ 701-707.

## § 165. Power to control and regulate.

[a] (App. 1908)

The township has no such interest in, power over, or liability for, the public highways through it as cities and towns over their streets and alleys, as the law imposes no duty and no liability on a township as a corporate body with reference to such highways, except that it is required to pay damages assessed in specified cases.—*Posey Tp., of Franklin County, v. Senour*, 42 Ind. App. 580, 86 N. E. 440.

## § 166. Statutory and local regulations.

Certainty of statutes, see STATUTES, § 47.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. § 457.

See, also, note, 47 L. R. A. 290, 301.

**§ 167. Right to use.**

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 456-458.

See, also, note, 36 L. R. A. 413; note, 131 Am. St. Rep. 532.

**§ 169. — Motor vehicles and bicycles.**

Frightening animals, see post, § 181.

[a] (Sup. 1889)

A person in a carriage drawn by horses, and the rider of a bicycle, have equal rights upon the highway; and allegations that defendant rode a bicycle in the center of the road at the rate of 15 miles an hour, up to within 25 feet of the faces of plaintiff's horses, whereby they became frightened and ran away and injured plaintiff, do not state a cause of action. — *Holland v. Bartch*, 120 Ind. 46, 22 N. E. 83, 16 Am. St. Rep. 307.

[b] (Sup. 1905)

The rights of the driver of horses and automobiles in a public highway are equal. — *Indiana Springs Co. v. Brown*, 165 Ind. 465, 74 N. E. 615, 1 L. R. A. (N. S.) 238.

The use of automobiles on a public highway is not, as matter of law, negligence; and, so long as they are constructed and propelled in a manner consistent with the use of the highway, they have equal rights with other vehicles. — *Id.*

[c] (Sup. 1906)

Inasmuch as automobiles have been recognized by Acts 1905, p. 202, c. 123, as lawful vehicles, if the operation of an automobile results in injury to one traveling in another mode, the autoist is not liable for the injury, unless he used the machine at a time, in a manner, or under circumstances inconsistent with a proper regard for the rights of others. — *McIntyre v. Ormer*, 76 N. E. 750, 166 Ind. 57, 4 L. R. A. (N. S.) 1130, 117 Am. St. Rep. 359.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. § 458.

See, also, notes, 16 L. R. A. 148, 19 L. R. A. 632, 47 L. R. A. 289, 296; notes, 16 Am. St. Rep. 314, 48 Am. St. Rep. 377.

**§ 171. Care required in use of highway.**

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 459, 460.

**§ 172. — In general.**

Local and special laws, see STATUTES, § 93.

[a] (App. 1907)

A traveler upon a public highway has a right to assume within reasonable limits that others using it will exercise reasonable care. — *Indianapolis St. R. Co. v. Hoffman*, 40 Ind. App. 508, 82 N. E. 543.

[b] (App. 1910)

All persons using a public highway have equal rights, and one using an automobile must

have due regard for the equal rights of others, taking into consideration the tendency of the machine to frighten horses and cause injury to travelers. — *Haynes Automobile Co. v. ...*, 91 N. E. 171.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. 459, 460.

See, also, 28 Cyc. pp. 25, 27; note, A. (N. S.) 345.

**§ 173. — As to persons on foot.**

[a] (App. 1909)

Persons can walk in a public highway as well as ride or drive upon it, their rights are equal, and drivers must exercise such care as the circumstances demand, but both driver and pedestrian must use reasonable care, and not infringe the rights of each other. — *A. v. Lazro*, 87 N. E. 97, rehearing denied, 87 N. E. 99.

The rights of pedestrians and vehicles upon the highway are equal, and drivers of automobiles are required to exercise such care and prudence as the circumstances demand to prevent injury. — *Id.*

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 459,

See, also, 28 Cyc. p. 28.

**§ 174. — As to children and other persons of inferior disability.**

[a] (App. 1899)

An ice wagon ran over a two-year-old child. The driver did not see the child until after the injury. It was not shown how the child got under the wagon, or what he was doing. The team on the wagon was gentle, and was going on a slow walk. The driver was in the wagon, with the lines in easy reach, and the sides being closed. If the driver had been on the seat of the wagon, he could have seen the child when injured. Held, no show of actionable negligence. — *McNamara v. Beck*, 52 N. E. 707, 21 Ind. App. 483.

[b] (App. 1909)

A blind man walking in a highway is entitled to use ordinary care only, in determining his position, his infirmities, and all circumstances, and the question of care reasonably necessary to be considered; and a pedestrian who is almost blind, suing for injury caused by an automobile running north, could allege that the driver was walking south on the west side of the highway, and to the right of the beaten path, and was bearing on his exercise of care. — *A. v. Lazro*, 87 N. E. 97, rehearing denied, 87 N. E. 99.

That a pedestrian in a highway, using an automobile, was almost blind and used ordinary care, does not show contributory negligence.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 459,

**Meeting and crossing.****Sup. 1883)**

who, while in the exercise of due care, crossing a street on foot at a point other than regular crossing, and is knocked down by a carelessly and negligently driven, may maintain an action against the owner of the horse.—*Simons v. Gaynor*, 89 Ind. 165.

**Sup. 1889)**

a matter of law, plaintiff, who was injured by defendant negligently riding his horse while she was crossing a public street, was not negligent because she did not take special precautions against the reckless conduct of defendant in riding at an unusual and dangerous rate of speed in the public street.—*Harvill v. Frost*, 116 Ind. 477, 19 N. E. 331, 100 Am. St. Rep. 614, 9 Am. St. Rep. 875.

**App. 1899)**

the law of the road, requiring travelers to give way to each other on a highway to turn to the right applies to crossings.—*F. W. Cook Brewster v. Ball*, 52 N. E. 1002, 22 Ind. App. 100.

**App. 1909)**

the strict law of the road that drivers, when turning, must turn to the right, does not apply to pedestrians.—*Apperson v. Lazro*, 87 N. E. 99, 100 Ind. App. 100.

an action by a pedestrian struck in a highway by an automobile traveling in an opposite direction, it was immaterial which side of the highway the automobile used before the accident.

though automobiles could use the left side of the highway so as not to unreasonably infringe the right of a pedestrian approaching on that side, the fact that the automobile at a high rate of speed was approaching toward him, and so close to him that he was compelled or excited to flee from him to avoid a collision, was unreasonable.

**CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. High. §§ 461-464.  
See, also, 28 Cyc. p. 28.

**Overtaking and passing.****Sup. 1871)**

a complaint showing that defendant, with his horse, was standing on the road, and that plaintiff asked him to get out of their way, and on his failure to comply with their request they attempted to pass by and were injured, not by any action of defendant, but by the attempt of plaintiffs to drive past defendant, shows that the injury was caused by the fault and negligence of plaintiffs.—*Newell v. Miller*, 35 Ind. 463.

**CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. High. § 465.  
See, also, 28 Cyc. p. 28; note, 47 L. R. A. 1132, 4 L. R. A. (N. S.) 1130.

**§ 177. Excessive speed and racing.****[a] (App. 1910)**

The law requires that automobiles shall not be run at an unreasonable rate of speed, and, if this law is disregarded and injury follows to a traveler lawfully occupying the highway, the owner is liable for damages, and, in an action for injuries caused by plaintiff's horse becoming frightened at defendant's automobile, the court properly refused to instruct that, if defendant was not operating his automobile at a speed of more than 20 miles an hour, plaintiff could not recover.—*Haynes Automobile Co. v. Sinnett*, 91 N. E. 171.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. High. § 466.

See, also, 28 Cyc. pp. 29, 30, 33; note, 36 L. R. A. 305.

**§ 179. Stopping and standing.****[a] (Sup. 1890)**

A person heedlessly standing in the carriageway of a public street after nightfall, engaged in conversation, cannot recover for injuries received from a carelessly driven vehicle, when it appears that the driver did not see the plaintiff in time to avoid the collision.—*Evans v. Adams Exp. Co.*, 122 Ind. 362, 23 N. E. 1039, 7 L. R. A. 678.

**FOR CASES FROM OTHER STATES,**

SEE 25 CENT. DIG. High. § 467.

See, also, 28 Cyc. p. 30.

**§ 180. Horses or other animals not under control, and runaways.****[a] (Sup. 1874)**

A team of horses attached to a wagon, in consequence of a fright received in the street, ran away and collided with and injured the plaintiff's carriage, but without any fault or negligence on the part of the owner of the team. *Held*, that the latter was not liable for the injury.—*Bennett v. Ford*, 47 Ind. 264.

**[b] (Sup. 1881)**

A person who hitched his horses by the lines only to a rubber block on his wagon, standing in a public street, within 10 feet of a railroad switch, *held* liable for the injury caused by their being frightened and running.—*Wagner v. Goldsmith*, 78 Ind. 517.

**[c] (App. 1901)**

A person driving on the highway had the right to assume that a team approaching from the rear was in the hands of a competent driver, and was not therefore guilty of contributory negligence in failing to turn and look, whereby he might have ascertained that the team was running away.—*Scotfield v. Myers*, 60 N. E. 1005, 27 Ind. App. 375.

Where one driving along a public highway was killed by his vehicle being run into from behind by a runaway team attached to an oil wagon, when he could have seen the approaching team if he had turned and looked, and

could have heard them when they were 300 feet distant from him, and in an action for the death there is no evidence showing deceased looked and listened, the evidence does not show negligence on his part.—Id.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. § 46b.

### § 181. Frightening animals.

[a] (Sup. 1861)

A complaint that one, by reckless and noisy driving on a highway, so frightened the horse of the plaintiff, then properly pastured at the side of the highway, that he ran away and destroyed the buggy of the plaintiff, alleges a sufficient cause of action.—Howe v. Young, 16 Ind. 312.

[b] (Sup. 1888)

The mere fact that an object is in a highway in violation of the statute does not necessarily make the owner liable for damages resulting from fright which the object may have occasioned to horses, but there must have been some natural causative connection between the violation of the statute and the frightening of the horses.—Cleveland, C. & I. R. Co. v. Wynant, 17 N. E. 118, 114 Ind. 525, 5 Am. St. Rep. 644.

[c] (Sup. 1906)

Where defendant drove its automobile at a speed of 20 miles an hour towards plaintiff on a narrow approach to a bridge, from whence plaintiff could not escape without proceeding forward to a cross-street, and, though observing the frightened condition of plaintiff's horse, and his signals to them to stop and allow him to escape, refused to slacken its speed, causing plaintiff's horse to run away and injure him, such conduct was an unwarrantable use of the highway, rendering defendant liable for plaintiff's injuries.—Indiana Springs Co. v. Brown, 74 N. E. 615, 165 Ind. 465, 1 L. R. A. (N. S.) 238.

A highway established for the general benefit of passage and traffic must admit of new methods of use whenever it is found that the general benefit requires them, and an automobile being a conveyance of uncommon appearance and one giving forth unusual noises, the driver thereof must conduct the same so as not to frighten teams lawfully using the highway.—Id.

[d] (Sup. 1906)

It was negligence for an autoist to drive his automobile at the rate of more than 15 miles an hour toward a team of horses which were frightened at the machine, where the autoist saw, or could have seen, when 300 feet away, that the horses were frightened.—McIntyre v. Orner, 76 N. E. 750, 166 Ind. 57, 4 L. R. A. (N. S.) 1130, 117 Am. St. Rep. 359.

Where an autoist, when at the distance of 300 feet from a team of horses, saw the team trying to break away with fright, it was his

duty, under the express provisions of p. 202, c. 123, to stop or check up. Failure to do so was not excusable on the ground that he did not have the opportunity to do so because of the necessity of his attention fixed on the road, in order to avoid holes and obstacles.—Id.

The failure of the autoist to stop or check up on seeing the fright of the team was not excusable because of the fact that he had previously passed the same team, and that the same had not caused any injury to the occupants of the carriage.—Id.

One riding in a carriage, who saw that horses were frightened at an approaching automobile, was not guilty of contributory negligence in remaining in the carriage.—Id.

The owners and users of automobiles must take notice that their appearance and conduct are likely to frighten teams of ordinary horses and must govern themselves accordingly.

[e] (Sup. 1907)

Burns' Ann. St. 1905, § 8703e, provides that any person operating a motor vehicle to give a signal to allow teams to pass, is for the purpose of relieving the fear of the teams of travelers from fright of the automobile.—State v. Goodwin, 169 Ind. 265, 82 N. E. 100.

Under Acts 1905, p. 202, c. 123, providing that any person operating a motor vehicle upon meeting any person driving a horse-drawn vehicle on a public highway shall upon signal by the person driving the horse-drawn vehicle from the hand from "any such person or operator of a motor vehicle" etc., immediately stop the motor vehicle to a stop, the signal need not be given by the person who holds the reins, but may be given by any occupant of the vehicle, the word "driving" not being limited to the mere physical act of managing or directing the horse.—Id.

[f] (App. 1908)

Though Acts 1905, p. 202, c. 123, providing for the regulation of the operation of a motor vehicle on a public highway or in any public place, and recognizing the right of the public of speed greater than is reasonable, having regard to the use in common on a highway or place, recognizes the right of automobiles in common with other vehicles on public highways, it also recognizes the right of horses to become frightened at the approach of a motor vehicle, and the need of using the same care in view of such conditions likely to occur.—Brinkman v. Pacholke, 41 Ind. App. 100, 100 N. E. 762.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. § 46b.

See, also, 28 Cyc. pp. 30, 34; 1 L. R. A. 295.

### § 182. Injuries to highways.

[a] (App. 1901)

Under the Code provision that a person who by an express trust may sue without limitation of time with him the person for whose benefit the trust is prosecuted, a township trustee

bring an action in his official capacity for damages for injury to a highway of the town without joining the township with him.—*Pittsburgh, C., C. & St. L. R. Co. v. Iddings*, 62 N. E. 112, 28 Ind. App. 504.

Since *Horner's Rev. St. 1897, § 5090h* (*Burns' Rev. St. 1894, § 6848*), provides that, where a road runs north and south on a township line, the north half is assigned for repairs to the township on the west side of the line, and the south half to the township on the east side, a township has such an interest in the road that, whether or not it has a property right in the highway, if it suffers a pecuniary loss through the wrongful injury of the road, it may recover from the wrongdoer.—*Id.*

The right of action has accrued when the injury has been consummated.—*Id.*

The amount of damages is the amount which has been or will be expended necessarily in making the repairs.—*Id.*

The township being a political subdivision of the state, and its officers public agents, it cannot be charged with contributory negligence by reason of the failure of the trustee to exercise reasonable care to prevent the destruction of the road, culverts, and bridges.—*Id.*

#### § 184. Actions for injuries.

Allegations as to scope of employment of negligent servant, see *MASTER AND SERVANT, § 329*.

Documentary evidence, see *EVIDENCE, § 359*.

##### [a] (*Sup. 1882*)

In an action for injuries resulting to plaintiff's carriage and his children therein at the time by reason of a collision with defendant's wagon, evidence examined, and held to support a verdict for plaintiff.—*Cassady v. Magher*, 85 Ind. 228.

##### [b] (*Sup. 1888*)

It is not a subject to be pleaded and proved whether a box car or any other particular object is naturally calculated to frighten horses. This is to be determined by the express observation and intelligence of the court and jury, as applied to all the facts of the particular case before them.—*Cleveland, C., C. & I. R. Co. v. Wynant*, 17 N. E. 118, 114 Ind. 325, 5 Am. St. Rep. 644.

##### [c] (*Sup. 1889*)

In an action to recover damages for injuries inflicted by the defendant in negligently riding his horse upon plaintiff while she was crossing a public street, evidence that there was more travel upon that street than upon any other street in the city is competent to show the impropriety of defendant's conduct in riding at an immoderate rate of speed.—*Stringer v. Frost*, 116 Ind. 477, 19 N. E. 331, 2 L. R. A. 614, 9 Am. St. Rep. 875.

##### [d] (*Sup. 1889*)

In an action for damages, allegations that defendant negligently and carelessly rode

his bicycle in the center of the road at the rate of 15 miles an hour, up to within 25 feet of the faces of plaintiff's horses, whereby they became frightened, are not sufficiently specific as to defendant's negligence, where the negligence sought to be charged is in the manner of riding such bicycle, and not in the speed and place in which it was ridden.—*Holland v. Bartch*, 120 Ind. 46, 22 N. E. 83, 16 Am. St. Rep. 307.

##### [e] (*Sup. 1890*)

The court properly refused to instruct that, if defendant's servant left the team beside the highway, and while he was getting a drink, at a distance of only 10 or 12 feet away, the team ran away, causing decedent's death, that fact alone was not such negligence as would make defendant liable, as it ignored other facts, besides taking the question of negligence from the jury.—*Hudson v. Houser*, 123 Ind. 309, 24 N. E. 243.

##### [f] (*App. 1893*)

A complaint sufficiently alleged the negligence of defendant, when it stated that he left the body of his dead cow in a public highway, and that, while plaintiff was exercising proper care in attempting to drive past the body, his horses were frightened thereat, and ran away and injured him.—*Hindman v. Timme*, 8 Ind. App. 416, 35 N. E. 1046.

##### [g] (*App. 1894*)

A special verdict finding that defendant, while driving a bus, at a trot, along a street, met plaintiff, driving in the opposite direction; that defendant negligently failed to turn to the right, and give plaintiff half the street; that plaintiff was obliged to get out of the beaten track, where his sleigh, without his fault, was overturned; that, at the point of passing, the road on defendant's right was level for 15 feet from the traveled roadway; that there was an electric light within 40 yards of the place; that both parties were familiar with the place; and that all the damages were caused by defendant's negligence,—will not support a judgment for plaintiff, it not appearing that defendant did or could have seen plaintiff in time to turn out, or that plaintiff did not discover, in time to avoid the accident, that defendant was not going to turn out.—*Walkup v. May*, 9 Ind. App. 409, 36 N. E. 917.

##### [h] (*App. 1899*)

In an action involving a collision between a bicyclist and a team on a highway, a charge that the law requires persons meeting on the highway to keep to the right is not erroneous, since the jury would understand that it applied to the meeting of vehicles, and that each should keep to the right of the other.—*F. W. Cook Brewing Co. v. Ball*, 52 N. E. 1002, 22 Ind. App. 656.

##### [i] (*Sup. 1906*)

In an action for injuries owing to plaintiff's horses having been frightened by defend-

ant's automobile, an instruction that if plaintiff, in standing up in her carriage and trying to get out, acted under a sudden fright and impulse created by peril, and in so doing acted as "ordinarily prudent persons might act" under the circumstances, it was a question for the jury whether she was negligent, was not erroneous on the theory that prudent men often act imprudently.—*McIntyre v. Orner*, 76 N. E. 750, 166 Ind. 57, 4 L. R. A. (N. S.) 1130, 117 Am. St. Rep. 359.

[J] (App. 1908)

In an action by a driver of a horse on a public highway at a place where it was only 12 feet wide for injuries caused by the horse becoming frightened by an automobile coming from behind and passing it, there was evidence that when the automobile arrived at a point 200 or 300 feet behind the buggy in which plaintiff was riding the operator commenced to sound the automobile horn, that thereupon the horse showed fright obvious to the occupants of the automobile, and that, notwithstanding the indication of danger, the operator of the car attempted to pass the plaintiff's horse and buggy while the horse was manifesting fright, as a result of which the horse ran away and plaintiff was injured. There was also evidence from which the jury might have found that under the circumstances it would have been reasonably prudent for the operator to have given plaintiff an opportunity to reach the cross-highway which was close by, where plaintiff might have turned his horse away from the cause of the fright, and that he proceeded at a greater rate of speed than was reasonable and proper, having regard to the use in common of the highway. *Held*, that on such evidence the court on appeal could not say as a matter of law that a verdict for plaintiff was not sustained by sufficient evidence or was contrary to law.—*Brinkman v. Pacholke*, 41 Ind. App. 662, 84 N. E. 762.

In order to recover for injuries to a driver of a horse on a highway, caused by the horse becoming frightened by an automobile coming up behind, it was not necessary to prove that the car was as large as alleged in the complaint, or to prove various immaterial statements in the pleading exactly as alleged; but it was sufficient if the material allegations were proved.—*Id.*

In an action by a driver of a horse for injuries received by him which were caused by the horse being frightened by an automobile coming up behind it, an instruction stating the proper consideration to be given by the jury to the fact that the driver did not propel the automobile at a rate of speed exceeding 20 miles an hour when it approached the horse, and explaining in the same connection correctly the duty of care and caution devolving upon the operator, was not objectionable as singling out and discrediting a portion of the evidence in defendant's behalf, in view of the provision of Acts 1905, p. 202, c. 123, relating to the use

of highways by motor vehicles, that in should such motor vehicle be operated of speed greater than 20 miles an hour of municipalities.—*Id.*

In an action by a driver of a horse for injuries received by him, caused by his becoming frightened at the approach of a mobile from behind on a public highway, a requested instruction relating to the fact that the tugs of the harness which plaintiff was using became detached from the horse and were broken, or that one of them was detached or broken by reason of the fright of the horse when he became frightened by the tooting of the automobile horn, which was left out of consideration the question of negligence on the part of plaintiff with reference to the tugs or other attachments to the buggy was faulty.—*Id.*

[K] (App. 1909)

Allegations that defendants negligently drove their automobile at a high, reckless, and dangerous speed along the edge of a highway, and against plaintiff, knocking him down and inflicting specified injuries, chargeable negligence.—*Apperson v. Lazro*, 41 Ind. App. 97, rehearing denied 88 N. E. 90.

One of two defendants, in an action for injuring a pedestrian by running an automobile against him, was not entitled to judgment on the answers to special interrogatories, notwithstanding a verdict for plaintiff on the theory that he was merely an occupant of the automobile where the allegation of the complaint was that the defendants were in possession and control of the automobile was not contradicted by the answers.—*Id.*

Allegations that plaintiff was negligent in driving his automobile along the edge of the roadway, that defendant was traveling in the opposite direction in the same roadway, and that the automobile on the same side of the road, so that defendant could only turn to the right to avoid collision, and that defendant negligently failed to do so, but ran straight ahead, and he struck plaintiff, knocking him down and dragging him across the highway and over him, states a cause of action.—*Id.*

[L] (App. 1910)

In an action for injuries caused by the plaintiff's horse becoming frightened at the approach of an automobile, an instruction that the driver of an automobile must use due care in driving at his speed so as not to endanger the safety of the limb of others lawfully using the highway, that the speed of an automobile must be reasonable, is not objectionable as based on the theory that the driver was guilty of negligence in operating the automobile at a rate of speed greater than was reasonable and prudent.—*Haynes Automobile Co. v. Sinnett*, 41 Ind. App. 171.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 471.

See, also, note, 5 L. R. A. (N. S.) 1130, 117 Am. St. Rep. 306.

**§ 186. Offenses incident to travel.****[a] (Sup. 1849)**

In an indictment for permitting a horse to be run in a horse race on a public road, the termini of the road need not be stated.—*State v. Burgett*, 1 Ind. 479, Smith, 340.

**[b] (Sup. 1851)**

On an indictment against defendant for knowingly suffering his horse to be run in a horse race along a public highway, it is not necessary to prove that a bet or wager was made, or a distance to be run agreed upon, or that judges were appointed.—*Watson v. State*, 3 Ind. 123.

On trial of an indictment for racing upon a public highway, evidence that the racer ran along a road leading from one town to another was sufficient to sustain the averment that the road in question was a public highway.—*Id.*

**[c] (Sup. 1875)**

Defendant was charged with suffering his horse to be run in a horse race along a public highway, and the evidence showed that he did not own the horse, but ran the horse of another person. *Held*, that the evidence did not prove the offense charged.—*Robb v. State*, 52 Ind. 218.

**[d] (App. 1898)**

In a prosecution for heavy hauling, intent is not of the essence of the offense, and hence accused's belief as to whether he had a lawful load is immaterial.—*Hamilton v. State*, 52 N. E. 419, 22 Ind. App. 479.

An oil wagon had the front and rear wheels held together by side bars, between which rested an iron tank bolted permanently to the side bars by iron straps. There was no coupling pole to the wagon. *Held*, that the tank was a part of the load, and not of the wagon, within Rev. St. 1894, § 2047, prohibiting hauling a load of more than 2,500 pounds on a broad-tired wagon over gravel roads, when they are thawing through, etc.—*Id.*

**[e] (Sup. 1905)**

An affidavit charging that defendant, at a certain time and place in the state, did then and there unlawfully act as a rider in a certain horse race along the public highway, then and there situate, is sufficient to charge an offense under Burns' Ann. St. 1901, § 2280, providing that whoever knowingly suffers his horse to be run in a horse race along any public highway, and whoever acts as a rider in any such race, on being convicted, shall be fined.—*State v. New*, 76 N. E. 400, 165 Ind. 571, transferred from Appellate Court, 76 N. E. 181, 36 Ind. App. 521.

Under Burns' Ann. St. 1901, § 2280, providing that whoever suffers his horse to be run in a race on a public highway and whoever acts as rider in any such race shall, on conviction, be fined, etc., it is one offense for an owner of

a horse to suffer it to run in a race on a highway and another to act as rider in such race.—*Id.*

An affidavit charging an offense under Burns' Ann. St. 1901, § 2280, prohibiting horse racing on a public highway, to have been committed on "the — day of February, in the year 1905," sufficiently states the time; Burns' Ann. St. 1901, § 1807, providing that the precise time of the commission of an offense need not be stated, except where time is an indispensable ingredient.—*Id.*

A description of the highway as being situated in Hancock county is sufficient in an affidavit charging an offense under Burns' Ann. St. 1901, § 2280, prohibiting horse racing on a public highway.—*Id.*

**[f] (Sup. 1905)**

Burns' Ann. St. 1901, § 2280, re-enacting Rev. St. 1843, p. 982, § 103, creates two offenses: (1) Knowingly suffering one's horse, mare, or gelding to be run in a horse race on a public highway; and (2) acting as a rider in a horse race on a public highway.—*State v. New*, 165 Ind. 571, 76 N. E. 400.

**[g] (Sup. 1907)**

In a prosecution for failure to stop an automobile on a public highway when signaled to do so by a person driving a horse, etc., where it "appeared that J. and R. were riding in a buggy together, that R. was driving, and that J. gave a signal to defendant to stop, an averment in the affidavit that the signal given by J. was for and on behalf of R. should be regarded as surplusage.—*State v. Goodwin*, 169 Ind. 265, 82 N. E. 459.

An indictment charging that defendant failed to stop his automobile on signal from a companion of the person driving a horse hitched to a buggy on the highway sufficiently states an offense, under Burns' Ann. St. 1905, § 8703c, requiring persons using motor vehicles to stop upon the giving of a signal by any person "driving a horse" or any farm animals.—*Id.*

**[h] (Sup. 1910)**

In a prosecution for hauling an excessive load over a highway, the road superintendent could testify that, two or three weeks before the alleged offense was committed, he had warned accused not to haul heavy loads over the road, as tending to show willful disregard of the law, aggravating the punishment.—*Lucas v. State*, 90 N. E. 305.

In a prosecution for hauling an excessive load upon a highway, in violation of statute, evidence *held* to sustain a conviction as against an objection that it did not show that the road was in a condition to be injured by the load hauled.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. HIGH. §§ 476, 477.

### (C) INJURIES FROM DEFECTS OR OBSTRUCTIONS.

Accidents at railroad crossings, see RAILROADS, §§ 298-352.

In bridges, see BRIDGES, §§ 34-46.

Injuries to traveler from blasting, see EXPLOSIVES, § 12.

In street railroad tracks, see STREET RAILROADS, § 86.

In streets, see MUNICIPAL CORPORATIONS, §§ 755-823.

In turnpikes and toll roads, see TURNPIKES AND TOLL ROADS, §§ 44-49.

Liability of railroad company for injuries caused by defect in highway occupied by tracks, see RAILROADS, § 362.

Liability of railroad company for injuries to horse by defect in highway crossing, see RAILROADS, § 410.

#### § 187. Nature and grounds of liability.

[a] (Sup. 1859)

As a general rule, a person who without fault or negligence on his part receives a bodily injury or suffers damage to his horse or carriage in consequence of a direct collision with an obstruction in a highway is specially damaged and may maintain an action against the author of the obstruction.—Wood v. Mears, 12 Ind. 515, 74 Am. Dec. 222.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 326, 327, 478, 479, 480, 482, 505; 36 CENT. DIG. Mun. Corp. § 1602.

See, also, note, 47 L. R. A. 298.

#### § 193. Notice of defects or obstructions.

Knowledge of person injured, see post, § 197.

[a] (Sup. 1884)

To render a county liable for injuries due to defects in its highways, actual notice of defects is not essential, but long continuance of the defect may effect constructive notice.—Board of Com'rs of Porter County v. Dombke, 94 Ind. 72.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 480, 484, 487-490.

#### § 194. Precautions against injury.

[a] (App. 1891)

Where a gas company excavated a trench in a highway, it was its duty to keep it guarded at all times.—Noblesville Gas & Imp. Co. v. Teter, 27 N. E. 635, 1 Ind. App. 322.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. § 486.

See, also, note, 79 Am. Dec. 702.

#### § 196. Proximate cause of injury.

Contributory negligence as proximate cause, see post, § 197.

[a] (App. 1891)

The fact that a cow fell into a trench dug in a public highway because a third person had just driven her, with no unnecessary violence, out of his uninclosed lot, does not relieve from responsibility the persons who made the trench and left it unguarded, where there is no evidence that the person who drove the cow out of his lot purposely caused her to fall into the trench.—Noblesville Gas & Imp. Co. v. Teter, 1 Ind. App. 322, 27 N. E. 635.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 483, 494.

#### § 197. Contributory negligence of person injured.

[a] Proof of one's previous knowledge of a highway defect whereby he was injured is not conclusive of his want of due care.—(Sup. 1887) Henry County Turnpike Co. v. Jackson, 113 Ind. 111, 44 Am. Rep. 274; (1884) Wills v. Trafalgar & B. C. Gravel Road Co., 93 Ind. 287; (1887) Town of Gosport v. Evans, 133 Ind. 133, 13 N. E. 256, 2 Am. St. Rep. 100; (1887) Evansville & T. H. R. Co. v. Carr, 113 Ind. 51, 14 N. E. 738.

[b] (Sup. 1887)

In an action for injury to a horse at a railroad crossing, caused by the track being too far above the surface of the highway, the plaintiff's construction which proceeds on the theory that the plaintiff could have avoided the injury by lightening his load, or by other means, encountering the obstruction, it was his duty to do so, without regard to the nature of the obstruction and the being such that a reasonably prudent man might have foreseen that injury was likely to result unless some steps were taken to avoid it, is properly refused.—Evansville & T. H. R. Co. v. Carr, 113 Ind. 51, 14 N. E. 738.

[c] (Sup. 1890)

Where a woman was injured by a horse which she was riding taking fright at a car left in the road, the fact that she knew the position of the hand car does not necessarily prove that she was guilty of contributory negligence in trying to pass it.—Ohio & N. W. Ry. Co. v. Trowbridge, 126 Ind. 391, 26 N. E. 101.

[d] (Sup. 1891)

An intoxicated person, who is injured in an accident caused by his attempting to cross over a washout, which he could have seen and avoided had he been sober, cannot recover from the county therefor, since drunkenness when intoxicated constituted contributory negligence.—Woods v. Board of Com'rs of Tipton County, 128 Ind. 280, 27 N. E. 611.

[e] (App. 1891)

The owner of cattle which may lawfully run at large may reasonably expect that a company digging a trench in a street will form its duty to the public by keeping it properly guarded, and it is not contributory

for the owner of the animal to fail to make a breach of such duty.—*Nobleville Imp. Co. v. Teter*, 27 N. E. 635, 1 Ind. 22.

(App. 1892)

Knowledge that there is a defect in a highway making it dangerous to attempt to travel does not of itself make it negligence to use the highway carefully and cautiously. Knowledge of the existence of a dangerous place, however, makes it incumbent upon the traveler to use care and caution proportionate to the danger which he knows lies in his way.—*City of Franklin v. City of Franklin*, 30 N. E. 149, 4 Ind. App. 515.

(App. 1897)

Contributory negligence for a horse-drawn carriage obstructed in the highway at the time his horse first took fright and ran back, to voluntarily ride up to the obstruction again.—*Town of Salem v. Walker*, 46 Ind. App. 687.

While a person with knowledge of a defect in a highway is not bound to forego travel, he must use care proportionate to the defect.—*Id.*

(Sup. 1903)

While it is the duty of a traveler on a highway to avoid all threatening situations by any other way when he may reasonably do so, he is nevertheless entitled to travel the highway, and, where he has no alternative, is bound to forego an effort to pass, provided the highway is not so defective as to make it dangerous to a person of ordinary understanding. The danger cannot be encountered without compensation.—*Chicago, I. & L. R. Co. v. Leachman*, 161 Ind. 512.

A traveler on a highway must observe due care according to the degree of peril confronting him, and, if the place is not impassable, or is not so defective as to render injury inevitable, he will be justified in proceeding if he exercises that degree of care which a person of ordinary prudence in like place would deem prudent to guard against the threatening danger.—*Id.*

(App. 1906)

Contributory negligence is not a defense to a claim for damages for injury to a person traveling on a public highway because of the dangerous condition of the highway, unless the defect was one which rendered it obvious to a person of ordinary understanding that the highway could not be used without injury.—*City of Indianapolis v. City of Indianapolis*, 37 Ind. App. 586, 76 N. E. 902.

CASES FROM OTHER STATES,

SEE 25 CENT. DIG. HIGH. §§ 482, 491-493, 498-503.

See, also, note, 17 L. R. A. 124; note, 47 Am. Rep. 744.

## § 198. Liabilities of local authorities and officers.

[a] (Sup. 1850)

A private action cannot be sustained against a supervisor for damages suffered from his neglect to keep the roads and bridges in his district in repair.—*Lynn v. Adams*, 2 Ind. 143.

[b] (Sup. 1881)

In 1879, a civil township had no such powers conferred or duties imposed upon it as required it to keep in repair the public highways; and hence it was not liable for damages accruing from neglect to do so.—*Yeager v. Tippecanoe Tp.*, 81 Ind. 46.

[c] (Sup. 1888)

It is the duty of township trustees and road supervisors under the express provisions of the statutes to repair highways, and the fact that the board of county commissioners exercises supervisory control over township trustees in the matter of levying road and other township taxes does not render the county liable for injuries caused by the negligent construction of a highway.—*Abbett v. Board of Com'rs of Johnson County*, 16 N. E. 127, 114 Ind. 61.

In the absence of a statute imposing on counties in express terms the duty of keeping highways in repair, and authorizing county boards to appropriate means for that purpose, a county is not responsible for the negligence of those charged with the care of public highways; nor can an action be maintained against it for an injury caused by a defective highway, where no right of action is expressly given by statute.—*Id.*

In an action against a county, a complaint alleging that defendant, by its officers and agents, while repairing a bridge which formed part of a public highway in the county, negligently placed lumber alongside of the highway in a manner calculated to frighten horses of ordinary gentleness, and that plaintiff's horse took fright, and ran away, and she was injured in consequence, is defective; the county not being liable for the negligence or misconduct of those to whom such work is committed.—*Id.*

[d] (Sup. 1894)

A county is not liable for personal injuries caused by defects in the construction and repair of its free gravel roads.—*Cones v. Board of Com'rs of Benton County*, 137 Ind. 404, 37 N. E. 272.

[e] (App. 1895)

A county is not liable for injuries resulting from defects in a free gravel road or ordinary highway.—*Shrum v. Board of Com'rs of Washington County*, 13 Ind. App. 583, 41 N. E. 349.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. HIGH. §§ 504-507.

See, also, notes, 52 Am. Dec. 92, 83 Am. Dec. 563, 98 Am. Dec. 608; note, 27 Am. Rep. 647, 702.

### § 200. Liabilities of persons causing defects or obstructions.

[a] (App. 1892)

In an action to recover damages for personal injuries suffered in a buggy accident alleged to have been caused by defendant's negligence in leaving a dead dog in the highway, it appeared that defendant's dog had died, and been properly placed by him out of the way, but was removed by some mischievous persons onto the highway, of which defendant was notified. *Held*, that plaintiff had failed to show negligence in defendant.—*Davis v. Williams*, 4 Ind. App. 487, 31 N. E. 204.

[b] (App. 1895)

A person who brings an object upon or does an act upon the highway that is likely to frighten a horse of ordinary gentleness is guilty of negligence; and, if a person bring an object upon or do an act upon the highway with the design, intention, or purpose of frightening horses, he is guilty of a positive and aggressive wrong, and liable for the injury resulting, no matter what the character of the horse may be.—*Keeley Brewing Co. v. Parnin*, 41 N. E. 471, 13 Ind. App. 588.

[c] (App. 1898)

One who maintains a pile of refuse and slack from a mine, near a highway, for a number of years, knowing that it is continually taking fire at the bottom, and sliding down from above, is liable for injuries caused by a horse being frightened by such a sliding.—*Island Coal Co. v. Clemmitt*, 49 N. E. 38, 19 Ind. App. 21.

[d] (Sup. 1905)

A railroad which negligently and unlawfully places a hand car in the public highway within two feet of the wagon track, and thereby causes a team of gentle and well-broken mules, which is being driven along the highway, to become frightened and run away, is liable for injuries consequentially resulting to the driver of the mules.—*Southern Indiana R. Co. v. Norman*, 74 N. E. 806, 165 Ind. 126.

It is prima facie unlawful for a railroad to place a hand car on a public highway.—*Id.*

FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. High. § 509.

### § 201. Actions for injuries.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. High. §§ 510-542.

### § 208. — Pleading.

[a] (Sup. 1859)

It is a good answer to a complaint for negligently leaving building materials on the highway, which alleges defendant's right so to leave them and the negligence of the plaintiff in driving carelessly upon them.—*Wood v. Mears*, 12 Ind. 515, 74 Am. Dec. 222.

[b] (Sup. 1879)

A complaint alleging an obstruction of a highway by a defendant of a highway in such a manner that while plaintiff was driving a team of mules fell through the timbers composing the obstruction, and were killed solely because of the negligence, carelessness, and willful conduct of defendant, stated a cause of action.—*Perry v. Barnett*, 65 Ind. 522.

A complaint alleged that plaintiff was driving on a public highway, without notice on his part, drove upon "a pile of wood which the defendants intended to serve as a bridge," and that the defendants where it crossed a bayou; and that the team fell "through and over the timbers which were killed; and that such timbers were negligently placed at a point in the road where they could not be avoided by travelers, and the danger ascertained before going upon the same." *Held* that, since the complaint alleged injury by the obstruction of a highway, it stated that defendant had built a defective bridge, and would not support a recovery.—*Id.*

In an action against the supervisors of a road district, the plaintiff alleged that a team of mules fell through "a pile of wooden timbers intended to serve as a bridge," at a point in the road where it crossed a deep and narrow bayou; that such timbers had been carelessly and willfully placed there by the defendants, and that the accident was entirely the result of such carelessness and willful misconduct on the part of the defendants. *Held*, that the complaint stated an obstruction of the highway by the defendant, resulting in an injury to the plaintiff without fault on his part.—*Id.*

[c] (Sup. 1892)

In an action against county commissioners for the death of plaintiff's intestate, the complaint alleging that deceased met his death while driving a team of mules up a steep approach to a bridge in the county, which approach was a large embankment, and the defendants negligently failed to barricade the approach, sufficiently charges negligence on the part of defendants.—*Board of Com'rs of Hamilton County v. Huffman*, 134 Ind. 100, 35 N. E. 570.

[d] (App. 1893)

Where a complaint alleged that defendant left the body of his dead cow in a public highway, and that, while plaintiff was exercising proper care in attempting to drive his team, his horses were frightened thereat, and ran away and injured him, evidence that plaintiff's horses ran away when he was attempting to lead, rather than drive them, past the body, is an immaterial variance.—*Hindman v. ...*, 35 N. E. 1046, 8 Ind. App. 416.

[e] (App. 1895)

In an action against defendant for negligently leaving an object in a highway frightening a horse and injuring plaintiff, the complaint alleged either specially or in equivalent terms that the object unloaded or the act of unloading

ncy to or was likely to frighten a horse  
ary gentleness.—*Keeley Brewing Co. v.*  
41 N. E. 471, 13 Ind. App. 588.

ASES FROM OTHER STATES,  
25 CENT. DIG. High. §§ 522-525.

### — Presumptions and burden of proof.

(App. 1895)  
e presumption is that an obstruction in  
e highway is there wrongfully.—*Senhenn*  
of Evansville, 40 N. E. 69, 140 Ind. 675.

ASES FROM OTHER STATES,  
25 CENT. DIG. High. § 526.

### — Sufficiency of evidence.

(App. 1893)  
vidence that defendant left a sick and  
d cow in the public highway, where he  
od reason to believe it would die, and  
y would frighten the horses of passers-by,  
ally occurred, was sufficient to sustain  
dict for plaintiff.—*Hindman v. Timme*,  
App. 416, 35 N. E. 1040.

ASES FROM OTHER STATES,  
25 CENT. DIG. High. §§ 526, 527-532.

### — Instructions.

ction and effect of charge as a whole,  
TRIAL, § 295.

ASES FROM OTHER STATES,  
25 CENT. DIG. High. §§ 538-540.

### — Verdict and findings.

ns proper to be submitted by special in-  
ratories, see TRIAL, § 350.  
ncy of special findings in general, see  
L, § 355.

ASES FROM OTHER STATES,  
25 CENT. DIG. High. § 541.

## HINDERING.

rs, by fraudulent assignment for benefit  
f creditors. ASSIGNMENTS FOR BENEFIT  
F CREDITORS, §§ 142-161.

fraudulent transfers. FRAUDULENT  
ONVEYANCES.

UCTING JUSTICE.

## HIRING.

See—

ANIMALS, § 27.

BAILMENT.

Horses and vehicles. LIVERY STABLE KEEP-  
ERS, §§ 9-12.

Premises. LANDLORD AND TENANT.

Servants. MASTER AND SERVANT.

## HISTORICAL FACTS.

Judicial notice of, see EVIDENCE, § 11.

## HISTORY.

Of statute as aid to construction, see STAT-  
UTES, § 217.

## HOGS.

See—

Liability of railroad company for injury to.  
RAILROADS, § 411.

Power of city to regulate keeping of. MUNICI-  
PAL CORPORATIONS, § 604.

SALES.

## HOLDING OUT.

As partner as creating estoppel to deny exist-  
ence of partnership, see PARTNERSHIP, §§ 33-  
37.

## HOLDING OVER.

See—

Officer—

CLERKS OF COURTS, § 7.

COUNTIES, §§ 43, 65.

DISTRICT AND PROSECUTING ATTOR-  
NEYS, § 2.

JUDGES, § 9.

MUNICIPAL CORPORATIONS, § 149.

OFFICERS, § 54.

SCHOOLS AND SCHOOL DISTRICTS, § 48.

SHERIFFS AND CONSTABLES, §§ 5, 12.

Tax assessor. TOWNS, § 58.

Tenant, as affecting liability for rent. LAND-  
LORD AND TENANT, § 196.

As creating tenancy at sufferance. LAND-  
LORD AND TENANT, § 119.

As creating tenancy from year to year.  
LANDLORD AND TENANT, § 114.

As extension or renewal of tenancy for  
years. LANDLORD AND TENANT, § 90.

Digest is compiled on the Key-Number System. For explanation, see page iii.

## HOLIDAYS.

### *Scope-Note.*

[INCLUDES days designated by law, other than Sunday, for suspension of business or judicial or other official proceedings; and effect of violations of such validity of acts, transactions, and proceedings affected, and on the rights and of persons engaged therein.

[EXCLUDES restrictions on grounds other than the character of the day, regulation of sale of intoxicants (see *Intoxicating Liquors*); and omission of ho computation of time (see *Time*; and particular acts and proceedings under other For complete list of matters excluded, see cross-references, post.]

### *Cross-References.*

*See—*

Exclusion in computation of time. *TIME*, § 10.

Keeping open liquor place on, as criminal offense. *INTOXICATING LIQUORS*, § 145.

Regulations as to sale of intoxicating on. *INTOXICATING LIQUORS*, § 120.  
Sale or gift of intoxicating liquors on inal offense. *INTOXICATING LIQUORS* SUNDAY.

### **§ 6. Official acts.**

[a] (*Sup.* 1886)

A sale of property for taxes made on Christmas Day is not invalid, no statute so declaring.—*Hadley v. Musselman*, 104 Ind. 459, 3 N. E. 122.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. *Holidays*, § 6.

See, also, 21 Cyc. p. 445.

### **HOME.**

*See—*

*DOMICILE.*

*HOMESTEAD.*

**This Digest is compiled on the Key-Number System. For explanation, see p**

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# HOMESTEAD.

## *Scope-Note.*

[INCLUDES exemption from forced sale, for payment of debts, of real property of debtors, as constituting the family residence; constitutional and statutory provisions for such exemption; nature, grounds, and extent thereof in general; who are entitled to benefit of such exemptions; acquisition, selection, declaration, and establishment of homestead; quantity or value of property exempt; as to what liabilities homesteads are exempt; waiver or forfeiture of right of exemption, abandonment, alienation, devise, or descent of homestead; rights of devisees, heirs, or surviving members of family, and duration and termination of exemption; and protection and enforcement of the right.

[EXCLUDES exemption from forced sale of property of debtors in general (see *Exemptions*); rights of widow in real property of deceased husband (see *Dower*); and acquisition of public lands under homestead laws (see *Public Lands*). For complete list of matters excluded, see cross-references, post.]

## *Analysis.*

### **I. Nature, Acquisition, and Extent.**

#### **(A) NATURE, CREATION, AND DURATION OF ESTATE OR RIGHT IN GENERAL.**

[No paragraphs of references in this Digest. But see 25 Cent. Dig. Home. §§ 1-16.]

#### **(B) PERSONS ENTITLED.**

[No paragraphs of references in this Digest. But see 25 Cent. Dig. Home. §§ 17-36.]

#### **(C) ACQUISITION AND ESTABLISHMENT.**

[No paragraphs of references in this Digest. But see 25 Cent. Dig. Home. §§ 37-85.]

#### **(D) PROPERTY CONSTITUTING HOMESTEAD.**

§ 87. Wife's separate property.

#### **(E) LIABILITIES ENFORCEABLE AGAINST HOMESTEAD.**

[No paragraphs of references in this Digest. But see 25 Cent. Dig. Home. §§ 128-175.]

### **II. Transfer or Incumbrance.**

§ 127. Rights of purchasers and mortgagees.

§ 128. — In general.

§ 130. Avoidance.

§ 131. — In general.

### **III. Rights of Surviving Husband, Wife, Children, or Heirs.**

[No paragraphs of references in this Digest. But see 25 Cent. Dig. Home. §§ 245-306.]

### **IV. Abandonment, Waiver, or Forfeiture.**

§ 178. Forfeiture.

§ 179. — In general.

### **V. Protection and Enforcement of Rights.**

§ 197. Contest and determination of claim.

§ 208. Actions and defenses.

§ 213. — Pleading.

## *Cross-References.*

*See—*

Dower rights of widow. DOWER.

EXEMPTIONS.

PARTITION, § 12.

Transfers, validity as to creditors or subsequent purchasers. FRAUDULENT CONVEYANCES, § 52.

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

[5 Ind. Dig.—Page 525]

## I. NATURE, ACQUISITION, AND EXTENT.

### (A) NATURE, CREATION, AND DURATION OF ESTATE OR RIGHT IN GENERAL.

FOR CASES FROM OTHER STATES.

SEE 25 CENT. DIG. HOME. §§ 1-16.

See, also, 21 Cyc. pp. 458-465.

### (B) PERSONS ENTITLED.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. HOME. §§ 17-36.

See, also, 21 Cyc. pp. 466-470.

### (C) ACQUISITION AND ESTABLISHMENT.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. HOME. §§ 37-85.

See, also, 21 Cyc. pp. 470-487.

### (D) PROPERTY CONSTITUTING HOMESTEAD.

#### § 87. Wife's separate property.

[a] (Sup. 1859)

The husband is not entitled to claim a homestead out of land which is the separate property of the wife.—Holman v. Martin, 12 Ind. 553.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. HOME. §§ 125.

See, also, 21 Cyc. p. 507.

### (E) LIABILITIES ENFORCEABLE AGAINST HOMESTEAD.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. HOME. §§ 128-175.

See, also, 21 Cyc. pp. 509-527; note, 24 L. R. A. 780; note, 45 Am. St. Rep. 383.

## II. TRANSFER OR INCUMBRANCE.

Validity as to creditors or subsequent purchasers, see FRAUDULENT CONVEYANCES, § 52.

#### § 127. Rights of purchasers and mortgagees.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. HOME. §§ 224-234.

See, also, 21 Cyc. pp. 551-556.

#### § 128. — In general.

[a] A mortgagor cannot claim an exemption in property after a judgment has been rendered against him in foreclosure.—(Sup. 1858) Slaughter v. Detiney, 10 Ind. 103; (1860) Id., 15 Ind. 49.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. HOME. §§ 224-232.

#### § 130. Avoidance.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. HOME. §§ 235-244.

See, also, 21 Cyc. pp. 557-560.

#### § 131. — In general.

[a] (Sup. 1858)

An answer to a bill for foreclosure, that the mortgage was of property exempt from execution, and not executed by the wife, as in that case required, need not negative that the mortgage was not for the purchase money, but, that exception being in a section of the act by itself, must be set up by a reply.—Slaughter v. Detiney, 10 Ind. 103.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. HOME. §§ 235-243.

## III. RIGHTS OF SURVIVING HUSBAND, WIFE, CHILDREN, OR HEIRS.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. HOME. §§ 245-306.

See, also, 21 Cyc. pp. 561-597.

## IV. ABANDONMENT, WAIVER, OR FORFEITURE.

#### § 178. Forfeiture.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. HOME. §§ 348-350.

See, also, 21 Cyc. p. 620.

#### § 179. — In general.

[a] (Sup. 1883)

A debtor is not precluded from claiming the property as exempt from execution by the fact that he has committed perjury in swearing to a false schedule on claiming the same.—Over v. Shannon, 91 Ind. 99.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. HOME. § 348.

See, also, 21 Cyc. p. 620.

## V. PROTECTION AND ENFORCEMENT OF RIGHTS.

#### § 197. Contest and determination of claim.

[a] (Sup. 1883)

Where an execution defendant claims real estate as exempt from execution in the statutory manner, the sheriff cannot make a valid sale thereof by regarding the claim of exemption or neglecting to have an appraisal of property claimed as exempt.—Over v. Shannon, 91 Ind. 99.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. HOME. §§ 308, 309.

See, also, 21 Cyc. p. 626.

**Actions and defenses.**

CASES FROM OTHER STATES,

25 CENT. DIG. HOME. §§ 389-405.

also, 21 Cyc. pp. 634-644; note, 30 L. A. 100.

**— Pleading.**

Sup. 1873)

petition asking an injunction, which allowed an execution on a judgment against a toll company was levied on property constituting the homestead of plaintiff that at the time of the levy defendant toll company offered to give up a toll to be sold to satisfy such execution, is sufficient, in that it does not allege that the toll belonged to the execution defendants, or to them.—*Alexander v. Mullen*, 42 Ind. 308.

An allegation that defendant filed with the sheriff a schedule of his property is not sufficient to show the filing of such schedule of execution property as the law requires.—(Sup. 1881) *Shannon*, 75 Ind. 352; (1883) Id., 91

A pleading alleging that defendant claimed property sought to be recovered as exempt from execution, but which fails to show that defendant took the steps required by law to secure

the exemption of the property, is insufficient.—Id.

A pleading which alleges that defendant had claimed the property as exempt from sale under execution, and that the sheriff had wrongfully refused to allow his claim, but which fails to allege that defendant had any title to the real estate, or the facts from which such an inference could be drawn, is insufficient.—Id.

[c] (Sup. 1884)

A complaint to set aside a sheriff's sale of real estate on the ground that it was exempt from execution as the property of a resident householder, under Rev. St. p. 81, § 703, is fatally defective if it does not allege that the schedule required by sections 713, 714, which the debtor delivered to the sheriff, contained a list of all his property at the date of issuing of the writ.—*Guerin v. Kraner*, 97 Ind. 533.

An allegation in a complaint to set aside a sheriff's sale of real estate that the plaintiff complied with all the statutory provisions entitling the property to exemption is insufficient, without specific averments.—Id.

FOR CASES FROM OTHER STATES,

SEE 25 CENT. DIG. HOME. §§ 394-396.

See, also, 21 Cyc. pp. 635-637.

**Digest is compiled on the Key-Number System. For explanation, see page iii.**

# HOMICIDE.

## *Scope-Note.*

[INCLUDES killing a human being, aiding in, attempting, or soliciting such killing, and assaults with intent to kill; nature and elements of murder, manslaughter, and of degrees thereof, and of attempts and assaults with intent to commit such offenses; nature and extent of criminal responsibility therefor, and grounds of defense, more particularly justification or excuse, and prosecution and punishment of such acts as public offenses.

[EXCLUDES killing one's self (see *Suicide*); conspiracy to kill (see *Conspiracy*); right to bail (see *Bail*); and actions for damages for causing death (see *Death*). For complete list of matters excluded, see cross-references, post.]

## *Analysis.*

### **I. The Homicide.**

- § 2. Nature of act or omission causing death.
- § 3. Nature of means or instrument used.
- § 5. Cause of death.

### **II. Murder.**

- § 10. Malice.
- § 11. — In general.
- § 13. — Implied.
- § 14. Deliberation and premeditation.
- § 15. Nature of act causing death.
- § 17. Killing one with design to effect death of another.
- § 18. Homicide in commission of or intent to commit other offense.
- § 20. Homicide in resisting officer or other person in performance of duty.
- § 21. Degrees.
- § 22. — First degree.
- § 23. — Second degree.
- § 27. Insanity.
- § 28. Intoxication.
- § 30. Principals and accessories.

### **III. Manslaughter.**

- § 33. Elements of voluntary manslaughter.
- § 34. Elements of involuntary manslaughter.
- § 35. Absence of malice.
- § 36. Absence of design to effect death.
- § 38. Sudden passion or heat of passion.
- § 39. — In general.
- § 40. — Time for cooling.
- § 41. Provocation.
- § 45. — Threatening or insulting language or conduct.
- § 51. — Seeking or inciting provocation.
- § 52. Relation of act causing death to provocation.
- § 53. Homicide in resisting unlawful act.
- § 57. — Trespass or other injury to property.
- § 59. Nature of means or instrument used.
- § 61. Homicide in commission of or attempt to commit other offense.
- § 62. — In general.
- § 63. — Assault and mutual combat.
- § 66. — Offenses against property.
- § 69. Homicide in undue exercise of authority or duty.

**Manslaughter—Continued.**

- § 73. — Suppression of affray or riot, and preservation of peace.
- § 75. Neglect to perform act required by law.
- § 83. Principals and accessories.

**Assault with Intent to Kill.**

- § 84. Nature and elements in general.
- § 86. Intent.
- § 87. Malice.
- § 88. Ability to execute intent.
- § 89. Nature of act in general.
- § 90. Nature of weapon or instrument used.
- § 93. Defenses.
- § 94. — In general.
- § 95. — Provocation.
- § 96. — Self-defense.
- § 99. — Defense of property.
- § 100. Persons liable.

**Excusable or Justifiable Homicide.**

- § 101. Grounds of excuse or justification in general.
- § 103. Exercise of authority or duty.
- § 105. — Making arrest or preventing escape of prisoner.
- § 108. Self-defense.
- § 109. — In general.
- § 111. — Resistance of arrest.
- § 112. — Aggression or provocation of attack.
- § 113. — Withdrawal after aggression.
- § 114. — Voluntary participation in contest or mutual combat.
- § 116. — Apprehension of danger.
- § 117. — Necessity of act in general.
- § 118. — Duty to retreat.
- § 119. — Manner of repelling attack.
- § 122. Defense of another.
- § 124. Defense of property.
- § 125. Accident or misfortune.

**Indictment and Information.**

- § 127. Requisites and sufficiency in general.
- § 128. Intent.
- § 130. Deliberation and premeditation.
- § 131. Description of person killed or assaulted.
- § 134. Act or omission causing death.
- § 135. Means or instrument, and manner of use thereof.
- § 136. Wound or other injury causing death.
- § 137. Death from injury, and place and time thereof.
- § 138. Commission of or attempt to commit other offense or unlawful act.
- § 139. Specification of grade or degree of homicide.
- § 141. Assault with intent to kill.
- § 142. Issues, proof, and variance.

**Evidence.**

**(A) PRESUMPTIONS AND BURDEN OF PROOF.**

- § 145. Intent.
- § 146. Malice.
- § 149. Cause of death.
- § 151. Excuse or justification.

**VII. Evidence—Continued.****(B) ADMISSIBILITY IN GENERAL.**

- § 154. Identity of deceased.
- § 155. Intent, malice, deliberation, and premeditation.
- § 157. — Previous quarrels and ill feeling.
- § 158. — Previous threats and expressions of ill will by accused.
- § 162. Commission of or participation in act by accused in general.
- § 163. Character and habits of parties.
- § 164. Physical condition of parties.
- § 165. Personal relations of parties.
- § 166. Motive.
- § 167. Threats, preparations, and previous attempts.
- § 168. Ability and opportunity.
- § 169. Circumstances preceding act.
- § 170. Identity and presence of accused.
- § 171. Nature of act and attendant circumstances in general.
- § 172. Commission of or attempt to commit other offense or unlawful act.
- § 174. Subsequent incriminating or exculpatory circumstances.
- § 175. Cause of death.
- § 177. Suicide.
- § 178. Incriminating others.
- § 179. Insanity.
- § 181. Passion and provocation.
- § 182. Unlawful character of act of deceased, and resistance by accused.
- § 186. Self-defense.
- § 187. — In general.
- § 188. — Character and habits of person killed or assaulted.
- § 189. — Previous quarrels and ill feeling.
- § 190. — Previous threats by person killed or assaulted.
- § 193. — Possession and use of weapons by person killed or assaulted.
- § 194. — Imminence and apprehension of danger to accused.
- § 198. Defense of property.

**(C) DYING DECLARATIONS.**

- § 201. Condition of person making declaration.
- § 202. — Danger and imminence of death.
- § 203. — Sense of impending death.
- § 204. — Time intervening before death.
- § 205. Circumstances attendant on making of declaration.
- § 206. Making and form of declaration.
- § 207. — In general.
- § 214. Subject-matter and relevancy.
- § 215. Competency of declaration as evidence.
- § 216. Preliminary evidence.
- § 217. Method of proof.
- § 218. Determination of question of admissibility.
- § 220. Contradiction and corroboration.
- § 221. Effect.

**(D) PROCEEDINGS AT INQUEST.**

- § 222. Admissibility in general.
- § 223. Testimony and statements of accused.
- § 226. Method of proof.

**(E) WEIGHT AND SUFFICIENCY.**

- § 228. Corpus delicti.
- § 230. Intent.
- § 232. Deliberation and premeditation.

**Evidence—Continued.****(E) WEIGHT AND SUFFICIENCY—Continued.**

- § 234. Commission of or participation in act by accused.
- § 237. Insanity.
- § 239. Passion and provocation.
- § 241. Excuse or justification in general.
- § 244. Self-defense.
- § 250. Degree of homicide in general.
- § 251. Degree of murder.
- § 253. — First degree.
- § 254. — Second and lesser degrees.
- § 255. Degree of manslaughter.
- § 257. Assault with intent to kill.

**Trial.****(A) CONDUCT IN GENERAL.**

- § 262. Presence and use of articles connected with offense.
- § 263. Reception of evidence.
- § 267. — Use of dying declarations.

**(B) QUESTIONS FOR JURY.**

- § 268. Questions of law or of fact in general.
- § 269. Elements of offense.
- § 276. Self-defense.
- § 282. Grade or degree of offense.
- § 282½. Extent of punishment.

**(C) INSTRUCTIONS.**

- § 283. Province of court and jury in general.
- § 284. Corpus delicti.
- § 285. Elements of offense in general.
- § 286. Intent, malice, deliberation, and premeditation.
- § 287. Motive.
- § 288. Nature and circumstances of act.
- § 291. Cause of death.
- § 292. Elements of assault with intent to kill.
- § 293. Matters of defense in general.
- § 294. Insanity or intoxication.
- § 297. Excuse or justification in general.
- § 300. Self-defense.
- § 301. Defense of another.
- § 305. Principals and accessories.
- § 306. Grade or degree of offense.
- § 308. — Murder.
- § 309. — Manslaughter.
- § 310. — Assault with intent to kill.
- § 311. Punishment.

**(D) VERDICT.**

- § 312. Form and requisites in general.
- § 313. Specification of grade or degree of offense.
- § 314. Assessment of punishment.
- § 315. Construction and operation.

**New Trial.**

- § 319. Newly discovered evidence.

**Appeal and Error.**

- § 324. Right of review.
- § 325. Presentation and reservation in lower court of grounds of review.
- § 327. Record.
- § 331. Review of discretion of lower court.
- § 332. Review of questions of fact.
- § 333. Harmless error.

**X. Appeal and Error—Continued.**

- § 334. — In general.
- § 336. — Conduct of trial in general.
- § 337. — Rulings as to indictment or pleas.
- § 338. — Admission of evidence.
- § 339. — Exclusion of evidence.
- § 340. — Instructions.
- § 341. — Failure or refusal to give instructions.
- § 342. — Verdict.
- § 347. Reduction or modification of sentence.

**XI. Sentence and Punishment.**

- § 351. Constitutional and statutory provisions.
- § 353. Entry and record of judgment.
- § 354. Nature and extent of punishment.

*Cross-References.**See—*

BAIL, § 43.

Civil liability for causing death. DEATH, §§ 7-108.

Conscientious scruples against capital punishment as affecting competency of juror. JURY, § 108.

Coroner's inquest. CORONERS, §§ 9-21.

Death of insured by, as risk within insurance policy. INSURANCE, § 443.

Former jeopardy. CRIMINAL LAW, §§ 168, 178, 181, 184, 199, 200.

Words imputing crime of as libel or slander. LIBEL AND SLANDER, § 7.

**I. THE HOMICIDE.****§ 2. Nature of act or omission causing death.**

[a] (Sup. 1884)

One who, while drunk, draws a pistol and shoots another, although without malice, commits a criminal offense.—*Surber v. State*, 99 Ind. 71.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 4.

See, also, note, 61 L. R. A. 277; note, 124 Am. St. Rep. 322.

**§ 3. Nature of means or instrument used.**

[a] (Sup. 1884)

Where defendant purposely drew a pistol on deceased, which was discharged, thereby killing deceased, defendant was guilty of felonious homicide, unless the act of pointing the weapon was justifiable or excusable on some legal ground.—*Surber v. State*, 99 Ind. 71.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 5.

See, also, note, 2 L. R. A. (N. S.) 897.

**§ 5. Cause of death.**

Admissibility of evidence, see post, § 175.

Instructions, see post, § 291.

Presumptions and burden of proof, see post, § 149.

[a] (Sup. 1876)

Where a person has inflicted wounds upon another, which are fatal, and of which the lat-

ter dies, or which are dangerous in themselves, though not necessarily fatal, and cause congestion of the brain, of which the wounded person dies, or where congestion of the brain, so induced, causes the exposure of the injured person to the inclemencies of the weather by which he dies, it must be deemed that the person who gave the wounds caused the death by the infliction of them.—*Kelley v. State*, 53 Ind. 311.

Where wounds have been inflicted by one person upon another, and the latter afterwards dies, it is not indispensable to a conviction of the former of murder or manslaughter, under an indictment based upon the infliction of such wounds, that they were necessarily fatal, and were the direct cause of the death; but if they caused the death indirectly, through a chain of natural effects and causes, unchanged by human action, it is sufficient in this regard.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 7-10.

See, also, 21 Cyc. pp. 694-702.

**II. MURDER.****§ 10. Malice.**

Admissibility of evidence, see post, §§ 155-158.

Instructions, see post, § 286.

Malice element of murder in first or second degree, see post, §§ 21-23.

Premeditated malice, see post, § 14.

Presumptions and burden of proof, see post, § 146.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 15-18.

See, also, 21 Cyc. pp. 703-718.

**In general.**

In a murder case, it is not error to charge malice includes not only hatred and re- but every other unlawful and unjusti- act; that it is not confined to ill will is an individual, but is intended to denote ion flowing from any wicked or corrupt —a thing done with a wicked mind, at- with such circumstances as plainly indi- heart regardless of social duty, and fa- bent on mischief.—(Sup. 1883) McDonel ate, 90 Ind. 320; (1893) Davidson v. 135 Ind. 254, 34 N. E. 972.

(Sup. 1899)

Accused was jealous of his wife, who, on y preceding the night of the homicide, had without accused's knowledge, to a picnic ceased and several others. On their ret night, deceased accompanied her to the ace where she was employed, some dis- from her own home. Deceased stood y to her for a few minutes, when accused atched, and, without speaking, clinched ed. They struggled for a short time, dur- which deceased was cut several times, one enetrating his heart, resulting in death. ed's distrust of his wife had involved him iculties previous to the homicide. Held ent to justify a finding that the killing one purposely and maliciously.—Bridge- v. State, 153 Ind. 560, 55 N. E. 737.

**CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. §§ 15, 16.  
See, also, 21 Cyc. pp. 703-706.

**Implied.**

(Sup. 1900)

An instruction that malice in the law in- not only anger, hatred, and revenge, but other unlawful and unjustifiable motive, not confined to ill will, but is intended gnate an action growing from any wicked rupt motive,—a thing done with bad and ous intent,—and is therefore implied from eliberate and cruel act against another, er sudden, was proper.—Harris v. State, nd. 15, 56 N. E. 916; Id., 155 Ind. 265, E. 75.

**CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. § 18.  
See, also, 21 Cyc. p. 707.

**Deliberation and premeditation.**

Admissibility of evidence, see post, §§ 155-158.  
Allegations in indictment, see post, § 130.  
Elements of murder in first degree, see post, 1, 22.  
Elements of murder in second degree, see , §§ 21, 23.  
Instructions, see post, § 286.  
Agency of evidence, see post, § 232.

(Sup. 1879)

Premeditated malice may exist though there appreciable space of time between the

formation of the intention to kill and the kill- ing.—Binns v. State, 66 Ind. 428.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. §§ 19, 20.  
See, also, 21 Cyc. p. 726.

**§ 15. Nature of act causing death.**

Admissibility of evidence, see post, § 171.  
Allegations in indictment, see post, § 134.  
Instructions, see post, § 288.

[a] (Sup. 1910)

One is guilty of murder who by felonious- ly severing another's blood vessel causes him to bleed to death, where through want of assistance decedent is unable to prevent excessive loss of blood.—Rigsby v. State, 91 N. E. 925.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. § 21.

**§ 17. Killing one with design to effect death of another.**

[a] (Sup. 1897)

Where the killing of deceased was in the mistaken belief that he was another, and the act would have been murder had the person shot been as believed, the offense was not, by reason of such mistake, reduced below the grade of murder.—Brown v. State, 147 Ind. 28, 46 N. E. 34.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. § 23.  
See, also, 21 Cyc. p. 712.

**§ 18. Homicide in commission of or in- tent to commit other offense.**

Admissibility of evidence, see post, § 172.  
Allegations in indictment, see post, § 138.  
Manslaughter, see post, §§ 61-66.

[a] (Sup. 1876)

Under 2 Rev. St. 1876, p. 423, defining murder in the first degree, an intent to kill is necessary to constitute killing by poison murder in the first degree. To administer cantharides to a woman with intent to excite her passions, so as to induce consent to sexual intercourse, and without intending to kill, is not murder in the first degree, although she dies from its effects.—Bechtelheimer v. State, 54 Ind. 128.

[b] (Sup. 1880)

One who unintentionally kills another in an attempt at robbery is guilty of murder in the first degree, under a statute making it murder in the first degree to kill any person in an attempt to commit robbery.—Moynihan v. State, 70 Ind. 126, 36 Am. Rep. 178.

[c] (Sup. 1908)

The killing of a person in the perpetration of, or attempt to perpetrate, the crime of arson,

is murder in the first degree.—*Ludwig v. State*, 170 Ind. 648, 85 N. E. 345.

**FOR CASES FROM OTHER STATES.**

SEE 26 CENT. DIG. Homic. §§ 24-31.

See, also, 21 Cyc. pp. 716-718; notes, 63 L. R. A. 902, 68 L. R. A. 193.

**§ 20. Homicide in resisting officer or other person in performance of duty.**

Excusable or justifiable homicide, see post, § 111.

[a] (Sup. 1886)

It is murder for a pickpocket to kill a citizen who is in fresh pursuit of him for the purpose of making an arrest.—*Kennedy v. State*, 107 Ind. 144, 6 N. E. 305, 57 Am. Rep. 99.

**FOR CASES FROM OTHER STATES.**

SEE 26 CENT. DIG. Homic. §§ 33, 34.

See, also, note, 66 L. R. A. 353.

**§ 21. Degrees.**

Instructions, see post, § 308.

Question for jury, see post, § 282.

Specification in indictment, see post, § 139.

Specification in verdict, see post, § 313.

Sufficiency of evidence, see post, §§ 251-254.

[a] (Sup. 1854)

Under Rev. St. 1843, malice was necessary to constitute murder either in the first or second degree, and the distinction consisted in its being accompanied in the first degree with, and in the second degree without, deliberation and premeditation.—*Finn v. State*, 5 Ind. 400.

**FOR CASES FROM OTHER STATES.**

SEE 26 CENT. DIG. Homic. §§ 35-41.

See, also, 21 Cyc. pp. 719-733; note, 18 Am. Dec. 774.

**§ 22. — First degree.**

[a] (Sup. 1864)

In murder in the first degree, premeditated malice requires that there should be time and opportunity for deliberate thought, and that, after the mind conceives the thought of taking life, the conception should be meditated upon, and a deliberate determination formed to do the act; and it makes no difference how soon afterwards the fatal resolve is carried into execution.—*Fahnestock v. State*, 23 Ind. 231.

In murder in the second degree, there is a formed design and purpose to kill; but it is followed immediately by the act, and is not premeditated, the time and circumstances not being such as to allow of deliberate thought. Hence, when a person forms a design in the midst of a conflict to kill his opponent, and immediately afterwards executes such design, the killing is not premeditated, and is not, therefore, murder in the first degree.—*Id.*

[b] (Sup. 1884)

Where the design to take human life is formed after deliberation, and there is adequate

time and opportunity for deliberate thought, the killing is murder in the first degree, no matter how soon it took place after the formation of the settled purpose.—*Koerner v. State*, 98 Ind. 7.

[c] (Sup. 1890)

In order that there may be such premeditated malice as will make a homicide murder in the first degree, the thought of taking life must have been consciously conceived in the mind, the conception must have been meditated upon, and a deliberate determination formed to do the act.—*Aszman v. State*, 24 N. E. 123, 123 Ind. 347, 8 L. R. A. 33.

[d] (Sup. 1905)

A killing in a combat which engenders hot blood is not murder in the first degree, in the absence of premeditation.—*Osburn v. State*, 73 N. E. 601, 164 Ind. 262.

**FOR CASES FROM OTHER STATES.**

SEE 26 CENT. DIG. Homic. §§ 35-38.

See, also, 21 Cyc. pp. 719-726.

**§ 23. — Second degree.**

Assault with intent to commit murder in second degree, see post, § 89.

[a] A killing in a combat which engenders hot blood is not murder in the second degree, unless the elements of purpose and malice concur in the act.—(Sup. 1879) *Patterson v. State*, 66 Ind. 185; (1905) *Osburn v. Same*, 73 N. E. 601, 164 Ind. 262.

**FOR CASES FROM OTHER STATES.**

SEE 26 CENT. DIG. Homic. §§ 35, 39, 40.

See, also, 21 Cyc. pp. 730-732.

**§ 27. Insanity.**

Admissibility of evidence, see post, § 179.

Allegations in indictment that defendant is of sound mind, see post, § 127.

Insanity caused by intoxication, see post, § 28.

Instructions, see post, § 294.

Presumptions, see post, § 151.

Sufficiency of evidence, see post, § 237.

[a] On a trial for murder, an instruction that "frenzy arising solely from the passions of anger and jealousy, no matter how furious, is not insanity," does not give defendant any ground of complaint.—(1879) *Guetig v. State*, 66 Ind. 94, 32 Am. Rep. 99; (1884) *Sanders v. Same*, 94 Ind. 147; (1884) *Goodwin v. Same*, 96 Ind. 550.

[b] (Sup. 1890)

As it is of the very essence of the crime of murder that there should have been time and opportunity for deliberation or premeditation after the mind has consciously formed the design to take life, it follows as a necessary corollary that there must have been mental capacity to think deliberately upon, and determine rationally in respect to, the nature and consequences of the act which follows.—*Aszman v.*

State, 24 N. E. 123, 123 Ind. 347, 8 L. R. A. 33.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. §§ 43½, 44.

See, also, 21 Cyc. pp. 663-668.

**§ 28. Intoxication.**

[a] (Sup. 1872)

On a trial for murder, no proof of intoxication at the time of the crime, which falls short of showing the defendant to have been utterly incapable of acting from motive, will shield him from conviction. If the reason be perverted, or destroyed by fixed disease, though brought on by his own vices, the laws holds him not accountable.—Cluck v. State, 40 Ind. 263.

[b] (Sup. 1883)

An instruction in a murder case, that, where delirium tremens was set up as a defense, the delirium must have existed at the time the crime was committed, was proper.—Goodwin v. State, 96 Ind. 550.

[c] (Sup. 1884)

In a prosecution for homicide, it was no defense that defendant was voluntarily intoxicated at the time.—Surber v. State, 99 Ind. 71.

[d] (Sup. 1890)

Under Rev. St. 1881, § 1904, which provides that "whoever purposely, and with premeditated malice, \* \* \* kills any human being, is guilty of murder in the first degree," where the evidence shows that the defendant had drunk to excess on the day of the homicide, and the jury have been instructed that drunkenness is no palliation or excuse for crime, it is reversible error to refuse to instruct them that if, upon the whole evidence, they have reasonable doubt whether, at the time of the killing, defendant had sufficient mental capacity to deliberately think upon and rationally determine to kill the deceased, they cannot find him guilty of murder in the first degree, though such inability was the result of intoxication.—Aszman v. State, 123 Ind. 347, 24 N. E. 123, 8 L. R. A. 33.

Mere intoxication, in the absence of such mental incapacity resulting therefrom as renders one who takes the life of another incapable of thinking deliberately and meditating rationally upon the purpose to take human life, and which leaves him with full power to know the quality of his act, and to abstain from doing it, cannot of itself be regarded as sufficient to reduce a homicide from murder in the first to murder in the second degree.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. §§ 44-46, 133;

14 CENT. DIG. Crim. Law, § 65.

See, also, 21 Cyc. pp. 668-678; note, 36 L. R. A. 470.

**§ 30. Principals and accessories.**

In manslaughter, see post, § 83.

Instructions, see post, § 305.

[a] (Sup. 1870)

A charge that, if murder was perpetrated with the knowledge, consent, or connivance of another, he is a principal, is error.—Clem v. State, 33 Ind. 418.

[b] (Sup. 1880)

Though the defendant was present at a homicide and knew of its commission, he is not guilty unless he participated therein.—Wade v. State, 71 Ind. 535.

[c] (Sup. 1891)

On indictment of defendant as accessory before the fact of murder, it is proper to refuse to charge that, in order to prove defendant's guilt, it must be shown that in pursuance of his counsel, command, or procurement the principal did some act whose "direct and immediate effect" was the death of deceased.—Sage v. State, 127 Ind. 15, 26 N. E. 607.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. §§ 48-51; 14

CENT. DIG. Crim. Law, § 89.

See, also, 21 Cyc. pp. 679-694.

**III. MANSLAUGHTER.**

**§ 33. Elements of voluntary manslaughter.**

Assault with intent to commit voluntary manslaughter, see post, § 89.

Homicide in commission of other offense, see post, § 62.

Indictment, see post, § 139.

Variance, see post, § 142.

[a] (Sup. 1869)

The word "voluntarily" in our statutory definition of manslaughter means by the free exercise of the will done by design purposely.—Murphy v. State, 31 Ind. 511.

[b] (Sup. 1877)

The unlawful and felonious killing of a human being, "without malice, but voluntarily upon a sudden heat," is voluntary manslaughter, while involuntary killing in the commission of an unlawful act is involuntary manslaughter.—Bruner v. State, 58 Ind. 159.

[c] (Sup. 1883)

It is not error to charge that voluntary manslaughter is the unlawful killing of a human being, "without malice, express or implied,—voluntary, upon a sudden heat, as upon adequate provocation the passion has been aroused, and the fatal act is unlawfully and voluntarily committed before sufficient time has elapsed to allow the passion to cool and for reason to resume its sway."—Stout v. State, 90 Ind. 1.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. § 54.

See, also, 21 Cyc. pp. 736-758.

### § 34. Elements of involuntary manslaughter.

Homicide in commission of or attempt to commit other offense, see post, §§ 62, 63.

Homicide in undue exercise of authority or duty, see post, § 73.

Indictment, see post, § 139.

Variance, see post, § 142.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HOMIC. § 55.

See, also, 21 Cyc. p. 760.

### § 35. Absence of malice.

[a] (Sup. 1859)

In manslaughter there may be intention to kill, arising in the sudden transport of passion, but it may, and must in this grade of offense, be unaccompanied by both premeditation and malice.—Dennison v. State, 13 Ind. 510.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HOMIC. § 56.

See, also, 21 Cyc. pp. 739, 760.

### § 36. Absence of design to effect death.

[a] (Sup. 1869)

On the trial of an indictment for assault and battery with intent to murder, the court instructed the jury, in effect, that there can be no purpose to kill in manslaughter; and that if such a purpose be shown to exist, and if death result, the killing is murder. *Held*, that this was error.—Murphy v. State, 31 Ind. 511.

[b] (Sup. 1877)

In a prosecution for manslaughter, it was error to refuse to instruct that, if defendant and another had simultaneously assaulted deceased without a mutual understanding that they would injure him, and the other without the knowledge or contribution of the defendant had caused the death of the deceased, defendant was not guilty.—Waybright v. State, 56 Ind. 122.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HOMIC. § 57.

See, also, 21 Cyc. pp. 738, 760.

### § 38. Sudden passion or heat of passion.

Admissibility of evidence, see post, § 181.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HOMIC. §§ 59-64.

See, also, 21 Cyc. pp. 736, 758; note, 5 L. R. A. (N. S.) 809.

### § 39. — In general.

[a] (Sup. 1865)

Killing, if without malice, in order to constitute manslaughter, must have been voluntarily done upon a sudden heat.—Creek v. State, 24 Ind. 151.

[b] Although a person purposely and unlawfully kills a human being, yet if it is done in a

sudden heat of passion caused by a sufficient provocation, and in the absence of express malice, malice will not be implied from the act, but the offense will be manslaughter.—(Sup. 1868) *Ex parte Moore*, 30 Ind. 197; (1869) *Murphy v. State*, 31 Ind. 511.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HOMIC. §§ 59-61.

### § 40. — Time for cooling.

[a] (Sup. 1871)

On a trial for the murder of the prisoner's wife, he offered to prove that the deceased had for a long time been having adulterous intercourse, of which he had for a long time been cognizant. *Held*, that this evidence was incompetent, in justification or palliation of the offense. After the lapse of time sufficient for the passion to cool, and for reason to assume her sway, the killing was as criminal and indefensible as if the deceased had never been guilty of conjugal infidelity.—*Sawyer v. State*, 35 Ind. 80.

[b] (Sup. 1874)

On a trial for murder in the first degree, it is error to instruct that, "to reduce a homicide upon provocation, it is essential that the fatal blow shall have been given immediately upon the provocation given, for if there be time sufficient for the passion to subside, and the person provoked kill the other, this will be murder, and not manslaughter," since the defendant's cooling time is limited too closely by such instruction.—*Ferguson v. State*, 49 Ind. 33.

[c] (Sup. 1886)

The refusal of a woman to carry out a marriage contract, or the suspicion that she was guilty of infidelity to her betrothed, or the fact that he actually found her in an act of sexual intercourse with another man, will not constitute such a provocation as will reduce a killing, if done after ample time for passion to subside, from murder to manslaughter.—*Hennings v. State*, 106 Ind. 386, 6 N. E. 803, 7 N. E. 4, 55 Am. Rep. 756.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HOMIC. §§ 62-64.

See, also, 21 Cyc. p. 758.

### § 41. Provocation.

Admissibility of evidence, see post, § 181.

Defense in prosecution for assault with intent to kill, see post, § 95.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HOMIC. §§ 65-75.

See, also, 21 Cyc. pp. 741-758.

### § 45. — Threatening or insulting language or conduct.

[a] (Sup. 1886)

Mere words or gestures, however offensive or insulting, will not reduce homicide from mur-

der to manslaughter.—*Boyle v. State*, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. § 69.

See, also, 21 Cyc. p. 743; note, 4 L. R. A. (N. S.) 154.

**§ 51. — Seeking or inciting provocation.**

[a] (Sup. 1835)

One who provokes an assault and then kills his assailant may be convicted of manslaughter.—*Barnett v. State*, 100 Ind. 171.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. § 75.

See, also, 21 Cyc. p. 749.

**§ 52. Relation of act causing death to provocation.**

[a] (Sup. 1842)

The following instructions, there being evidence on the subject, on the trial of an indictment for murder, were given to the jury: "If homicide be committed in a sudden heat, by the use of a deadly weapon, no provocation given by mere words will reduce the killing to manslaughter. The question should never be, was there anger, merely? but, was there legal provocation to such anger? The use of a dangerous weapon under a provocation by words only, or under no provocation, is always evidence of malice aforethought. To constitute malice aforethought, it is only necessary that there be a formed design to kill; and such design may be conceived at the moment the fatal stroke is given, as well as a long time before. Malice aforethought means the intention to kill; and, where such means are used as are likely to produce death, the legal presumption is that death was intended." *Held*, that these instructions were correct.—*Beauchamp v. State*, 6 Blackf. 299.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. §§ 76, 77.

**§ 53. Homicide in resisting unlawful act.**

Admissibility of evidence, see post, § 182.

Justifiable homicide in resisting arrest, see post, § 111.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. §§ 78-81.

See, also, 21 Cyc. pp. 753-755.

**§ 57. — Trespass or other injury to property.**

[a] (Sup. 1900)

Deceased rented a stall in defendant's barn in which he kept his horse a part of each day. He brought feed with him, which was kept, by the permission of the defendant, in the part of the barn where the latter kept his feed. Defendant, becoming suspicious that deceased was stealing his feed, watched the barn and saw him taking it. The next day he procured a

gun, and on the following night he shot the deceased while the latter was in the act of stealing feed. In opening the barn door, deceased had to free a hasp held over a staple by a pin, and the defendant testified that he did not give deceased permission to go to that part of the barn. *Held* sufficient to sustain a verdict of manslaughter.—*Bloom v. State*, 58 N. E. 81, 155 Ind. 292.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. § 81.

See, also, 21 Cyc. p. 755.

**§ 59. Nature of means or instrument used.**

Allegations in indictment, see post, § 135.

[a] (Sup. 1901)

*Burns' Rev. St. 1894*, § 1977 (*Horner's Rev. St. 1897*, § 1904), declares that whoever purposely, and with premeditated malice, or by administering poison or causing the same to be done, kills any human being, is guilty of murder in the first degree. Section 1981 (section 1908) provides that whoever unlawfully kills any human being without malice, either voluntarily on a sudden heat, or involuntarily, but in the commission of some unlawful act, is guilty of manslaughter. *Cr. Code*, §§ 259, 260 (*Burns' Rev. St. 1894*, §§ 1903, 1904), authorize the jury, on an indictment for an offense consisting of different degrees, to find the defendant not guilty of the degree charged in the indictment, and guilty of any lower degree, or of an attempt to commit the offense, and in all other cases to find the defendant guilty of an offense the commission of which is necessarily included in that with which he is charged. *Held*, that the jury had the power to find a person charged with murder in the first degree, by administering poison, guilty of voluntary manslaughter, notwithstanding the difficulty of seeing how poison could be administered in a sudden heat.—*Hasenfuss v. State*, 59 N. E. 463, 156 Ind. 246.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. § 83.

**§ 61. Homicide in commission of or attempt to commit other offense.**

Admissibility of evidence, see post, § 172.

Allegations in indictment, see post, § 133.

Murder, see ante, § 18.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. §§ 85-90.

See, also, 21 Cyc. pp. 761-765; notes, 63 L. R. A. 600, 68 L. R. A. 193; note, 19 Am. Rep. 2.

**§ 62. — In general.**

[a] (Sup. 1877)

One who involuntarily commits an unlawful act which unintentionally, but not necessarily, results in the death of another, is guilty of

involuntary, and not voluntary, manslaughter.—*Bruner v. State*, 58 Ind. 159.

[b] (Sup. 1886)

*Burns' Rev. St. 1894, § 2068*, declares that whoever draws or threatens to use any pistol already drawn upon another person shall be deemed guilty of misdemeanor and on conviction shall be fined, etc. *Held*, that under such section, if one draw a revolver at another, and it is unintentionally discharged, and kills the person on whom it is drawn, the offense is involuntary manslaughter; the drawing of the revolver at the person killed being an unlawful act in violation of the statute.—*Siberry v. State*, 39 N. E. 936, 47 N. E. 458, 149 Ind. 684.

One who intentionally points the muzzle of a pistol at another violates *Rev. St. 1894, § 2068 (Rev. St. 1881, § 1984)*, making it a misdemeanor to "draw" a pistol upon another person; and if the weapon is unintentionally discharged, and kills the person at whom it is pointed, the other is guilty of involuntary manslaughter, which consists (*Rev. St. 1894, § 1981; Rev. St. 1881, § 1908*) in killing a person "involuntarily, but in the commission of some unlawful act."—*Id.*

[c] (Sup. 1904)

That the pistol, by the accidental discharge of which deceased was killed while defendant was playing with him, was carried concealed by defendant, in violation of law, does not make him guilty of involuntary manslaughter, under *Burns' Rev. St. 1901, § 1981 (Horner's Rev. St. § 1908)*, declaring guilty of manslaughter one who kills another without malice, involuntarily, but in the commission of some unlawful act.—*Potter v. State*, 70 N. E. 129, 162 Ind. 213, 64 L. R. A. 942, 102 Am. St. Rep. 198.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HOMIC. § 85.

See, also, 21 Cyc. p. 761.

### § 63. — Assault and mutual combat.

[a] (Sup. 1885)

If a person unlawfully commit an assault and battery upon another, without any purpose or intention to kill him, but thereby inflicts a wound by reason of which the person so assaulted subsequently dies, the person committing such assault is guilty of involuntary manslaughter.—*State v. Johnson*, 102 Ind. 247, 1 N. E. 377.

[b] (Sup. 1906)

An unlawful assault and battery on a person resulting in his death constitutes manslaughter.—*Weston v. State*, 167 Ind. 324, 78 N. E. 1014.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HOMIC. §§ 86, 87.

See, also, 21 Cyc. p. 762.

### § 66. — Offenses against property.

[a] (Sup. 1876)

Where, after a person had burglariously broken and entered into a house, and while he was yet within the house, and immediately after a watchman, who came to the door by which said person had so entered, had shot at such person, he shot and killed the watchman, the homicide, being committed within the res gestæ of the burglary, was committed "in the perpetration" of the burglary, within the meaning of 2 *Rev. St. 1876, p. 423, § 2*.—*Bissot v. State*, 53 Ind. 408.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HOMIC. § 85.

### § 69. Homicide in undue exercise of authority or duty.

Exercise of authority or duty as justification of homicide, see post, §§ 103–105.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HOMIC. §§ 93–96.

See, also, note, 29 L. R. A. 154.

### § 73. — Suppression of affray or riot and preservation of peace.

[a] (Sup. 1879)

On the trial of A., indicted jointly with B. for the murder of C., it appeared that A. was called upon by B. to assist him and others in taking from C. a pistol exhibited by him, with which he threatened to shoot any one who interfered with him. In the struggle for the pistol, and while it was in B.'s hands, it was accidentally discharged, and C. was killed. *Held*, that B. was only guilty of involuntary manslaughter.—*Adams v. State*, 65 Ind. 565.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HOMIC. § 96.

### § 75. Neglect to perform act required by law.

[a] (Sup. 1904)

Where it is the duty of a person in charge of an infant child to furnish it with medical attendance in order to relieve or cure it of disease, it is no defense to a prosecution for manslaughter, in case the child dies from a want of such attendance, that defendant conscientiously believed that it was against the teachings of the Bible to have recourse to medical attendance and remedies for that purpose, but that prayer was a cure for all disease.—*State v. Chenoweth*, 71 N. E. 197, 163 Ind. 94.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HOMIC. § 102.

See, also, 21 Cyc. p. 770; note, 61 L. R.

A. 281; note, 124 Am. St. Rep. 322.

### § 83. Principals and accessories.

Instructions, see post, § 305.

[a] (Sup. 1858)

One may be guilty of manslaughter, though he did not assist in the actual conflict, if he is

engaged with another in an illegal undertaking, as in picking a quarrel with intent to rob, and is ready to render aid to the one who struck.—*Stipp v. State*, 11 Ind. 62.

[b] (*Sup.* 1866)

One may aid and abet another in the commission of the offense of manslaughter, and be punishable accordingly.—*Goff v. Prime*, 26 Ind. 196.

[c] (*Sup.* 1879)

A person cannot be convicted as aider and abettor to an involuntary manslaughter, since the intent to kill is wanting.—*Adams v. State*, 65 Ind. 565.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 109.

See, also, 21 Cyc. pp. 679-684.

#### IV. ASSAULT WITH INTENT TO KILL.

Indictment and information, see post, § 141.

Instructions, see post, §§ 292, 310.

Sufficiency of evidence, see post, § 257.

#### § 84. Nature and elements in general.

[a] (*Sup.* 1869)

To justify a conviction of an intent to murder in the commission of an assault and battery, there must be some adaptation, real or apparent, in the act done and the means used to accomplish the alleged purpose. If it be evident to every reasonable mind that the means used are entirely inadequate to the consummation of the intent charged, that fact will rebut or disprove the felonious intent, and a conviction cannot be justified. But, where the object is not accomplished because of an impediment which is of such a nature as to be wholly unknown to the offender, who uses appropriate means, though not fully or only apparently adapted to the object, the criminal attempt is committed.—*Kunkle v. State*, 32 Ind. 220.

The material facts necessary to be established to justify a conviction under an indictment charging the defendant with having committed an assault and battery on the body of another with intent to murder him, are, first, that the defendant committed the assault and battery as alleged; second, that at the time of its commission he intended thereby to kill such person; and, third, that if death had resulted from the act, the crime, in legal contemplation, would have been murder.—*Id.*

[b] (*Sup.* 1899)

On trial for an assault with intent to commit voluntary manslaughter, an instruction that if defendant unlawfully committed the assault in a sudden heat of passion, provoked by the prosecuting witness, and, being in such heat, had, without malice, designed to kill prosecuting witness, he should be found guilty of an assault with intent to commit voluntary manslaughter, is proper.—*Robinson v. State*, 53 N. E. 223, 152 Ind. 304.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 110.

See, also, 21 Cyc. pp. 778, 779, 787.

#### § 86. Intent.

Admissibility of evidence, see post, §§ 155-158.

Presumptions and burden of proof, see post, § 145.

[a] (*Sup.* 1856)

An indictment charged that the respondent committed an assault and battery on A., with intent the said A. to kill and murder. On trial, the judge charged the jury that "if the defendant fired into the crowd in question, of which A., the prosecuting witness was one, with the deliberate intention, either formed at the time or previously, of killing and murdering some one of the crowd, and A. received a portion of the shot and contents of said gun, and was wounded thereby, it will be sufficient to establish the assault and battery with the intent charged; and, if the case is otherwise made out, it will be the duty of the jury to find the defendant guilty as charged in the indictment." *Held*, that there was no error in thus charging the jury.—*Walker v. State*, 8 Ind. 290.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 112.

See, also, 21 Cyc. pp. 782-784.

#### § 87. Malice.

Admissibility of evidence, see post, §§ 155-158.

[a] (*Sup.* 1874)

In charging the jury in a prosecution for assault and battery with intent to commit murder, it was error to define the words "purposely and maliciously," used in the indictment, as being equivalent to the words "knowingly and willfully," and to charge the jury that, if the assault and battery was knowingly and willfully done with intent to kill, this was sufficient to sustain the higher charge included in the indictment.—*Long v. State*, 46 Ind. 582.

[b] (*Sup.* 1877)

On trial for assault with intent to kill, it was error to charge that if the jury found beyond a reasonable doubt that defendant, without malice, but voluntarily and in a sudden heat of passion, "unlawfully assaulted and beat" the prosecutor "in the manner and form charged in the indictment," he would be guilty of an assault with intent to kill.—*West v. State*, 59 Ind. 113.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 113.

See, also, 21 Cyc. p. 782.

#### § 88. Ability to execute intent.

[a] (*Sup.* 1857)

Where the present ability to commit a felonious intent is wanting, the offense is not complete. So, where a man was indicted for shooting at another with intent to murder, and on trial it appeared that the gun contained in it

nothing but powder and cotton wad (though the man shooting believed it contained a bullet), and the man shot at was 40 feet distant, it was held that he was not guilty as charged.—*State v. Swails*, 8 Ind. 524, 65 Am. Dec. 772.

[b] (Sup. 1869)

A conviction of an assault with intent to kill will not be disturbed, on the ground that the means adopted were not sufficient to accomplish that purpose, where it was shown that defendant shot at the prosecuting witness at a distance of not exceeding 90 feet, that the shot-gun was loaded with powder and shot, and that one of the discharges took effect on the prosecuting witness, destroying one of his eyes and seriously wounding the other, though, owing to the distance and the manner in which the gun was loaded, the prosecuting witness was not killed.—*Kunkle v. State*, 32 Ind. 220, disapproving *State v. Swails*, 8 Ind. 524.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 114.

See, also, 21 Cyc. pp. 782-784.

### § 89. Nature of act in general.

[a] (Sup. 1848)

A person may be indicted, under Rev. St. 1843, c. 53, § 7, for an assault and battery with intent to commit murder in the second degree.—*State v. Kesler*, 8 Blackf. 575.

[b] (Sup. 1876)

Under 2 Gav. & H. 438, § 9, prescribing a penalty for the perpetration of an assault, or an assault and battery, with intent to commit a felony, an indictment will lie for an assault, or an assault and battery, with intent to commit voluntary manslaughter.—*State v. Throckmorton*, 53 Ind. 354.

[c] (Sup. 1900)

Defendant, while driving in a sleigh along a road which had been narrowed by a snow-drift, called to the prosecuting witness, who was driving a sled loaded with logs, to give him the road. Witness replied that he could not, and defendant jumped from his vehicle, and, with oath, drew a revolver, and shot at witness. Held, that a conviction of assault with intent to commit voluntary manslaughter would not be disturbed.—*Keesier v. State*, 56 N. E. 232, 154 Ind. 242.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 115-118.

See, also, 21 Cyc. p. 780.

### § 90. Nature of weapon or instrument used.

[a] (Sup. 1900)

In a prosecution for assault with intent to kill, proof that the weapon used was a revolver of 32 caliber was sufficient to justify instructions based on the use of a deadly weapon.—*Keesier v. State*, 56 N. E. 232, 154 Ind. 242.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 119.

See, also, 21 Cyc. pp. 779, 781, 785-787.

### § 93. Defenses.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 122-129.

See, also, 21 Cyc. pp. 789-793.

### § 94. — In general.

[a] (Sup. 1891)

In a trial for assault with intent to kill, it is not error to refuse to charge that, if defendant was not interfering with the prosecuting witness, and was seized by him, and, in his effort to get away, defendant's pistol was discharged, and the witness injured, defendant should be acquitted.—*Burrell v. State*, 129 Ind. 290, 28 N. E. 699.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 122.

See, also, 21 Cyc. p. 790.

### § 95. — Provocation.

[a] (Sup. 1894)

It was not error to refuse to charge that if, while defendant was passing along the highway, prosecutrix's son, in her presence, threw in the face of him and his companions water-melon, and defendant, aggravated thereby, did the act complained of, this fact is to be considered in determining the penalty to be affixed.—*Walker v. State*, 136 Ind. 663, 36 N. E. 356.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 123.

See, also, 21 Cyc. p. 789.

### § 96. — Self-defense.

Admissibility of evidence, see post, §§ 186-194.  
Defense in prosecution for homicide, see post, §§ 108-119.

Instructions, see post, § 300.

Sufficiency of evidence, see post, § 244.

[a] (Sup. 1878)

At the trial of an indictment for an assault with intent to kill, the defendant testified that the assaulted party presented a loaded pistol at him and threatened to shoot him, and that he fired his own pistol in self-defense, but he could not tell which fired first. The evidence of the government was that the assaulted party had been requested by a constable to assist him in serving a bastardy warrant upon the defendant, and that the defendant was trying to escape arrest on such warrant; he having told the defendant that he had it, and ordered him to stop, which the defendant denied. It also appeared that shots were exchanged by both parties. The court refused to instruct the jury, substantially, that the assaulted party had no right to shoot the defendant if he attempted to escape, and that, if the jury should find that if he did attempt to take the defendant's life, or to do him great bodily harm, by shooting at

with a dangerous and deadly weapon, then defendant would have had the right to repel an attack with force, using no more than reasonably necessary. *Held*, that this instruction should have been given.—*Agee v. State*, 64 Ind. 340.

(*Sup.* 1891)

In a trial for assault with intent to kill a saloon-keeper, it was not error to refuse to give that "a saloon is a public place, in which persons that so desire may go, and no one has a right to expel another therefrom by force or violence," as the proprietor may lawfully remove one guilty of gross misconduct, and may use such force as is necessary to accomplish the result.—*Burrell v. State*, 129 Ind. 290, 28 N. E. 699.

(*Sup.* 1903)

Where defendant committed an assault on his brother without provocation, it was not error to charge that one who provokes or voluntarily enters into a combat cannot avail himself of the excuse of self-defense as he first withdraws from the contest which has been brought on.—*Starr v. State*, 67 N. E. 160 Ind. 661.

(*Sup.* 1904)

An assault with a knife is not justified by the fact alone that the person so assaulted first attacked the defendant with his fist.—*Larkin v. State*, 71 N. E. 959, 163 Ind. 375.

#### CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 124-127.  
See, also, 21 Cyc. pp. 791, 792.

#### — Defense of property.

(*Sup.* 1887)

On a trial for assault with intent to murder it appeared that the father of defendant was leaving to the latter and his brothers and sisters, including the prosecuting witness, a tract of land; that a field constituted a part of the tract; that in the fall of the year defendant intended to take possession thereof and did some work upon it; that in the following spring defendant again commenced work with a view to planting corn; that in the meantime the prosecuting witness rented the same field to a third person as his tenant, and his tenant commenced about the same time to plow in the field; that this resulted in an arrangement between defendant and the tenant by which they cultivated the field in corn together that year; that after the crop had somewhat matured, defendant and the tenant agreed upon a territorial division of the growing corn; that early in the ensuing fall the prosecuting witness, claiming to have an interest in the crop, pulled corn on several occasions from the stalks standing in that part of the field which had been assigned to the defendant on the division, and carried it away in sacks; that this exasperated defendant, and induced him to make threats to be on the lookout for the prosecuting witness; that afterwards the prosecuting wit-

ness drove up to the field in a wagon, stopping at the fence at a point where he had formerly pulled off corn, and went into the field with two sacks for the purpose of getting corn for his own use; that defendant, on hearing this, got a double-barrel shotgun, loaded with powder, and shot and fired one barrel in the air with the avowed purpose of frightening the prosecuting witness, and proceeded to the field with a gun, and that on entering the field, and being guided by some moving or shaking cornstalks, he fired the other barrel in the direction of the place at which he supposed the prosecuting witness was, inflicting painful wounds on the latter's body. *Held*, that the trespass was not of a character which justified the use of a deadly weapon in repelling it.—*Rauk v. State*, 11 N. E. 450, 110 Ind. 384.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 129.

See, also, 21 Cyc. p. 792.

#### § 100. Persons liable.

Prosecution of principal and accessory, see CRIMINAL LAW, § 80.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 130.

See, also, 21 Cyc. p. 788.

### V. EXCUSABLE OR JUSTIFIABLE HOMICIDE.

Admissibility of evidence, see post, §§ 186-194, 198.

Instructions, see post, §§ 297, 300, 301.

Presumptions and burden of proof, see post, § 151.

Question for jury, see post, § 276.

Sufficiency of evidence, see post, §§ 241, 244.

#### § 101. Grounds of excuse or justification in general.

Instructions, see post, § 207.

[a] (*Sup.* 1904)

The fact that decedent's wife and minor stepdaughter owned the land on which deceased resided with his wife and family did not give the stepdaughter the right to authorize defendant to remain on the land after deceased ordered him to leave.—*Coolman v. State*, 72 N. E. 568, 163 Ind. 503.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 131.

See, also, 21 Cyc. pp. 793-795; note, 36 L. R. A. 470.

#### § 103. Exercise of authority or duty.

Homicide in undue exercise of authority or duty as constituting manslaughter, see ante, §§ 69-73.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 134-136.

See, also, 21 Cyc. pp. 795-798.

### § 105. — Making arrest or preventing escape of prisoner.

[a] (Sup. 1893)

Where an officer is resisted before he has used needless force and violence, he may then overcome such resistance even to the taking of the life of the person arrested, if absolutely necessary.—*Plummer v. State*, 34 N. E. 968, 135 Ind. 308.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 135.

See, also, 21 Cyc. pp. 795-798.

### § 108. Self-defense.

Admissibility of evidence, see post, §§ 186-194.

Burden of proof, see post, § 151.

Defense in prosecution for assault with intent to kill, see ante, § 96.

Instructions, see post, § 300.

Question for jury, see post, § 276.

Sufficiency of evidence, see post, § 244.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 138-176.

See, also, 21 Cyc. pp. 800-826; note, 26 Am. Dec. 279; note, 12 Am. Rep. 212.

### § 109. — In general.

[a] (Sup. 1881)

The giving of a series of instructions professing to cover the whole subject of self-defense, in none of which it is intimated that the right may extend to the taking of life, is error.—*Batten v. State*, 80 Ind. 394.

[b] (Sup. 1892)

One who is violently assaulted, without fault on his part, and while in a place where he has a right to be, may, under the belief that great bodily injury is about to be inflicted, repel force by force, even to the taking of life, where this is necessary in the reasonable exercise of the right of self-defense.—*Fields v. State*, 134 Ind. 46, 32 N. E. 780.

[c] (Sup. 1908)

The law of self-defense is available only to those who act honestly and in good faith, and cannot be employed as a shield for the protection of one clearly guilty of murder.—*Duncan v. State*, 171 Ind. 444, 86 N. E. 641.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 138, 139.

See, also, 21 Cyc. p. 800.

### § 111. — Resistance of arrest.

[a] (Sup. 1893)

Though defendant may have been guilty of a misdemeanor authorizing his arrest without a warrant, where the officer pursued defendant, and struck him on the head with a billy, and then shot at him with a revolver, without having first informed defendant of any intention of arresting him, and without any violence or resistance on the part of defendant other than his walking towards home with a revolver in his hand, and telling the officer to

keep away, defendant was justified in defending himself, even to the taking of the officer's life.—*Plummer v. State*, 135 Ind. 308, 34 N. E. 968.

A peace officer is not allowed by the law to use more force than is necessary in making an arrest, and, if he does, he may be lawfully resisted, and, if in exercising the right of self-defense the officer be killed, the killing is justified.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 143, 144.

See, also, 21 Cyc. pp. 802, 803; note, 5 L. R. A. (N. S.) 1016.

### § 112. — Aggression or provocation of attack.

[a] (Sup. 1863)

If a man, on returning to his own house, find himself barred out therefrom by another, and then repeatedly demands and is denied admission, he has a legal right to break in the door; and if he encounter resistance on thus entering, and be first stricken by the unlawful occupant with a deadly weapon, and then, meeting force with force, he take the life of such occupant, such killing would seem to be excusable homicide, committed in self-defense.—*De Forest v. State*, 21 Ind. 23.

[b] (Sup. 1885)

Defendant, to avail himself of self-defense, must have been free from fault in provoking or bringing on the difficulty which resulted in the killing. It is not enough that in the course of the difficulty it became necessary for defendant to kill deceased in order to save his own life or prevent great bodily harm.—*Story v. State*, 99 Ind. 413.

On a trial for murder, it is proper to charge that one cannot acquit himself of liability for the consequences of a personal difficulty on the ground of self-defense, unless he is reasonably free from fault in entering thereupon.—*Id.*

[c] (Sup. 1896)

A charge on self-defense, ignoring the question of provocation by defendant, of which there was evidence, is properly refused.—*Deilks v. State*, 141 Ind. 23, 40 N. E. 120.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 145-150.

See, also, 21 Cyc. pp. 805-810; note, 45 L. R. A. 687; note, 109 Am. St. Rep. 804.

### § 113. — Withdrawal after aggression.

[a] (Sup. 1862)

An instruction that if one on trial for murder made an unlawful attack, or got into a fight with the deceased upon a sudden heat, and therein slew him, "he would be guilty of manslaughter at any rate," is wrong, unless so qualified as to give the accused the benefit of any retreat, flight, or withdrawal from the contest which the jury may, from the evidence,

him to have made after his aggression  
t.—Hittner v. State, 19 Ind. 48.

(Sup. 1886)  
ne must withdraw from a conflict which  
ungfully brings on, to justify the taking  
antagonist's life in self-defense.—Deal v.  
140 Ind. 354, 39 N. E. 930.

(Sup. 1896)  
defendant forced himself into a place  
he had no right to be, and provoked or  
nced a quarrel, he could not avail him-  
t a plea of self-defense, unless, in good  
he attempted to withdraw from the com-  
Voght v. State, 145 Ind. 12, 43 N. E. 1049.

#### CASES FROM OTHER STATES.

E 26 CENT. DIG. Homic. §§ 151, 152.  
e, also, 21 Cyc. pp. 810, 811.

#### — Voluntary participation in contest or mutual combat.

(Sup. 1896)  
was not error to instruct the jury that  
ore one enters a combat, he provides him-  
with a deadly weapon, intending to use it  
adversary gets the best of him, and does  
it, he cannot avail himself of a plea of  
fense, unless he gave up the fight, and,  
d faith, attempted to withdraw from the  
.—Voght v. State, 145 Ind. 12, 43 N. E.

#### CASES FROM OTHER STATES.

E 26 CENT. DIG. Homic. §§ 153, 154.  
e, also, 21 Cyc. p. 812.

#### — Apprehension of danger.

ibility of evidence, see post, § 194.

(Sup. 1865)  
o justify a homicide on the ground of  
fense there must have been not only the  
but also reasonable ground for defend-  
believe, that at the time of killing de-  
be was in imminent or immediate dan-  
his life or great bodily harm from de-  
—Creek v. State, 24 Ind. 151.

(Sup. 1875)  
is sufficient to establish self-defense in  
icide case, if the defendant, being with-  
ult believed, and had reasonable ground  
eve, from the acts of deceased, that his  
s in danger or that he was in danger of  
bodily harm.—Wall v. State, 51 Ind. 453.

(Sup. 1877)  
o justify shooting at an assailant, the  
d must show that he had reasonable ap-  
sion of great bodily harm. An instruc-  
at, if he had any such apprehension, he  
used, is too broad.—West v. State, 59  
13.

(Sup. 1881)  
charge which postulates, as one of the  
ts of self-defense, real intent on the part  
assailed to take life or do some grievous

bodily harm to the assailant, is erroneous.  
Such intent need not exist in fact. If it be  
evidenced by a present act or demonstration,  
inducing in the mind of the slayer a reasonable  
belief that the danger to his life or person was  
then imminent, this is enough.—Hays v. State,  
77 Ind. 450.

[e] (Sup. 1881)

The right to take life in self-defense is  
not dependent on the fact that a man of ordi-  
nary prudence would under the circumstances  
apprehend immediate and urgent danger, but  
on the fact that the accused himself was really  
and reasonably so impressed by the appearanc-  
es.—Batten v. State, 80 Ind. 394.

[f] (Sup. 1883)

In proper cases an assaulted person has  
a right to meet force with force, and, if death  
results to the assailant, the killing may be ex-  
cusable without a belief on the part of the  
assaulted person that it was necessary for his  
own safety. In such cases the defense is pur-  
posely made, but the killing is not purposely  
done. It is simply the result of the defense.—  
McDermott v. State, 89 Ind. 187.

[g] (Sup. 1892)

An instruction on the law of self-defense,  
that one who is in no apparent danger, who  
does not apprehend it, and has no grounds for  
such apprehension, may deliberately and mali-  
ciously kill another, and successfully interpose  
the defense of self-defense, because it subse-  
quently appears that there was actual danger,  
of which he was at the time ignorant, is a mis-  
statement of law, and was properly refused.—  
Troglon v. State, 133 Ind. 1, 32 N. E. 725.

The court charged on the law of self-de-  
fense that, where an assault is such that the  
party assaulted has reason to believe, and does  
believe, that he is in danger of losing his life, or  
of great bodily harm, he may use any means at  
hand to repel the attack, and, if death results,  
he will not be guilty of unlawful homicide; and  
if, in such case, the danger appears to be real,  
and he believes that it is, when in fact it was  
not real, but only apparent, he is not, for that  
reason, guilty, for the question of apparent ne-  
cessity, as well as the amount of force neces-  
sary to repel the assault, must be determined  
from the standpoint of the party attacked, at the  
time and under all the existing circumstances.  
Held, that there is nothing in such instruction  
to mislead the jury into the understanding that  
the right of self-defense only exists where the  
danger is "merely apparent," and not "real,"  
and that it is a correct statement of the law  
governing self-defense.—Id.

[h] (Sup. 1892)

In a prosecution for murder, it was error  
to refuse an instruction that if defendant went  
to the house of a certain person for the pur-  
pose of ministering to his wants as an invalid  
and having no quarrel with deceased, and de-  
ceased, requested him to go out of the house  
with him, and, when outside, the deceased

threatened to assault and beat defendant, and without cause did assault him violently and in anger, and if defendant at the time believed that deceased was about to and would do him great bodily harm defendant had a right to defend himself with his pocket knife, and if in the reasonable defense of his person the defendant inflicts wounds on the deceased, of which he died, then the defendant was not guilty.—*Fields v. State*, 32 N. E. 780, 134 Ind. 46.

[i] (Sup. 1886)

An instruction to the effect that, if defendant believed himself in great bodily danger, he might do what he thought reasonably necessary for his own defense, may fairly be construed as an instruction that defendant might lawfully act upon his own belief of danger to himself, and is a sufficient statement of defendant's rights.—*Voght v. State*, 145 Ind. 12, 43 N. E. 1049.

[j] (Sup. 1906)

A person accused of homicide may justify the act as having been committed in self-defense, though, in fact, he was not in imminent danger of great bodily harm or of losing his life at the hands of deceased, where, at the time of its commission, he honestly and reasonably believed the danger was real.—*Weston v. State*, 167 Ind. 324, 78 N. E. 1014.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 158-163.

See, also, 21 Cyc. pp. 815-819.

### § 117. — Necessity of act in general.

[a] (Sup. 1874)

The use of a deadly weapon, resulting in homicide, under circumstances that endanger the life of the person using such weapon, or would result in great bodily harm to him, will justify the killing.—*Kingen v. State*, 45 Ind. 518.

[b] (Sup. 1875)

It is not necessary, to justify a homicide on the ground of self-defense, that the defendant should have believed the taking of the assailant's life necessary to the defense of himself. When the death of the assailant results from the defendant's reasonable defense of himself, the latter is excusable, whether he intended that consequence or believed it necessary.—*Hicks v. State*, 51 Ind. 407.

[c] (Sup. 1883)

Where the killing of the assailant is purposely done by the assaulted party, he must have acted under the belief that such killing was necessary to preserve his own life, or to save himself from great bodily harm, to render the killing excusable, though the person assaulted need not have acted under the belief that the death of the assailant was necessary.—*McDermott v. State*, 89 Ind. 187.

[d] (Sup. 1886)

An instruction that, to constitute justifiable or excusable homicide on the ground of self-defense, "the killing must be done under a well-founded belief that it was absolutely necessary for the defendant to kill the deceased to save himself from death, or to save himself from great bodily harm," is erroneous, since, when one justly believes himself in such danger, he has a right to defend himself by force, whether he believes it necessary to kill his assailant or not.—*Bryant v. State*, 106 Ind. 549, 7 N. E. 217.

[e] (Sup. 1891)

One who shoots an assailant when seven feet distant, after the latter has thrown away his weapon, and while he is turning away, cannot justify on the ground of self-defense.—*Meurer v. State*, 129 Ind. 587, 29 N. E. 392.

[f] (Sup. 1896)

An instruction that defendant is entitled to an acquittal if he was assaulted by deceased in such a manner as to cause him to believe, and he did believe, that he was in imminent danger of his life or suffering great bodily harm, and he killed deceased while so believing, is not erroneous as requiring that defendant should have believed it necessary to kill deceased in order to excuse such killing.—*Deilks v. State*, 141 Ind. 23, 40 N. E. 120.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 164-167.

### § 118. — Duty to retreat.

[a] (Sup. 1865)

Instructions to the jury on a trial for murder that no threatening actions of the deceased could justify the defendant in taking his life, and, in a separate charge, that if the deceased made a violent assault upon the defendant while he was retreating and the deceased was pursuing him, and the defendant had reasonable apprehensions of great bodily harm and had used all reasonable means to keep out of the way, he would be justifiable in repelling the assault, and if, in so doing, the death of the deceased was produced, the defendant ought to be acquitted, are erroneous, since retreat is not always a condition which must precede the right of self-defense.—*Creek v. State*, 24 Ind. 151.

[b] Where a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force; and if, in the reasonable exercise of his right of self-defense, he kills his assailant, he is justifiable.—(Sup. 1877) *Runyan v. State*, 57 Ind. 80, 23 Am. Rep. 52; (1881) *Presser v. Same*, 77 Ind. 274; (1895) *Page v. Same*, 141 Ind. 236, 40 N. E. 745.

[c] (Sup. 1877)

The ancient doctrine as to the duty of a person assailed to retreat as far as he can before he is justified in repelling force by force

been greatly modified in this country, and much narrower application than formerly. The real question is, did the defendant, assaulted, believe, and have reason to believe, that the use of a deadly weapon was necessary to his own safety?—*Runyan v. State*, 80, 26 Am. Rep. 52.

(Sup. 1881)

Where one goes to the home of another to force the latter to fight, the latter need not flee from his home to avoid the fight thrust upon him, in order that he may justify a killing of his assailant in the enforced fight.—*State v. State*, 74 Ind. 1.

#### CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 168–171.  
See, also, 21 Cyc. pp. 820–823; note, 2 L. R. A. (N. S.) 49.

#### — Manner of repelling attack.

(Sup. 1883)

When a person in his defense purposely exceeds beyond what is reasonably necessary and does what he believes to be necessary, he is justified to act in self-defense and becomes an assaulter; and, if under such circumstances he takes the life of the assailant, he is guilty of murder.—*McDermott v. State*, 89 Ind.

(Sup. 1895)

In the absence of exceptional circumstances, a person is not justified in repelling an assault with the fist by stabbing his assailant.—*State v. State*, 142 Ind. 288, 41 N. E. 595.

(Sup. 1898)

In a prosecution for assault to commit murder, an instruction that if the prosecuting attorney made an attack on defendant, and had the weapon in his hands, nor appearance therefrom that defendant was not warranted in using a deadly weapon, was error, since it included an conceivable case of a violent attack, and without regard to differences of age and physical strength.—*Davis v. State*, 51 N. E. 928, 152 Ind. 4, 71 Am. St. Rep. 322.

(Sup. 1906)

Where a homicide was committed by the use of the fist alone, without a weapon, the defendant's right to justify the act as having been committed in self-defense was not controverted to a situation so grave that the danger averted was great bodily injury or the loss of life.—*Weston v. State*, 167 Ind. 324, 78 N. E. 1014.

#### CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 172–174.  
See, also, 21 Cyc. pp. 824, 825.

#### Defense of another.

Actions, see post, § 301.

[a] (Sup. 1877)

Persons connected by the relation of family, guardian and ward, or master and servant may defend each other against an assailant, even to the necessary taking of life.—*Waybright v. State*, 56 Ind. 122.

[b] (Sup. 1886)

The rule that a brother may lawfully defend his brother when in peril, and, if need be, take life in such defense, does not apply when both the brothers are in fault, and unite in bringing on the fatal encounter.—*Smurr v. State*, 105 Ind. 125, 4 N. E. 445.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 177–181.  
See, also, 21 Cyc. pp. 826, 827.

#### § 124. Defense of property.

Admissibility of evidence, see post, § 198.

Defense in prosecution for assault with intent to kill, see ante, § 99.

[a] (Sup. 1900)

It is not a defense that the deceased at the time of the killing, while rightfully at a place on the property of the defendant, was shot by the latter while committing petit larceny of his property.—*Bloom v. State*, 58 N. E. 81, 155 Ind. 292.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 184–188.  
See, also, 21 Cyc. pp. 830, 831.

#### § 125. Accident or misfortune.

[a] (Sup. 1906)

A justifiable assault and battery resulting in the death of the person assaulted constitutes a homicide by misadventure.—*Weston v. State*, 167 Ind. 324, 78 N. E. 1014.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 189, 190.  
See, also, 21 Cyc. pp. 831, 832; notes, 1 L. R. A. (N. S.) 991, 2 L. R. A. (N. S.) 719, 3 L. R. A. (N. S.) 1153.

### VI. INDICTMENT AND INFORMATION.

Allegations as to felonious nature of act, see INDICTMENT AND INFORMATION, § 91.

Allegations as to time of offense, see INDICTMENT AND INFORMATION, § 87.

Conclusion of indictment, see INDICTMENT AND INFORMATION, § 32.

Conviction of lesser or greater degree of offense charged, see INDICTMENT AND INFORMATION, § 189.

Designation and description of accused, see INDICTMENT AND INFORMATION, § 81.

Duplicity, see INDICTMENT AND INFORMATION, § 125.

Election between counts, see INDICTMENT AND INFORMATION, § 132.

Harmless error, see post, § 337.

Joinder of counts, see INDICTMENT AND INFORMATION, § 128.

Language and form of allegations, see INDICTMENT AND INFORMATION, § 74.

Mistakes in writing, grammar or spelling, see INDICTMENT AND INFORMATION, § 79.

Pleading matters of defense, see INDICTMENT AND INFORMATION, § 66.

Pleading matters of fact or conclusions, see INDICTMENT AND INFORMATION, § 63.

Repugnancy, see INDICTMENT AND INFORMATION, § 73.

Return and filing or record of indictment, see INDICTMENT AND INFORMATION, § 11.

Statutory form of indictment, see INDICTMENT AND INFORMATION, § 19.

### § 127. Requisites and sufficiency in general.

[a] An indictment for murder, alleging that defendants at a certain time and place feloniously, willfully and of their malice aforethought killed and murdered deceased, is sufficient, without an averment that the killing was unlawful.—(Sup. 1825) *Jerry v. State*, 1 Blackf. 395; (1877) *Beavers v. Same*, 58 Ind. 530.

[b] An indictment for murder need not allege that the defendant is of sound mind.—(Sup. 1825) *Jerry v. State*, 1 Blackf. 395; (1864) *Fahnestock v. Same*, 23 Ind. 231; (1875) *Snell v. Same*, 50 Ind. 516.

[c] (Sup. 1843)

The use of the word "murder" is essential in an indictment for murder, and cannot be supplied by any other word.—*Dias v. State*, 7 Blackf. 20, 39 Am. Dec. 448.

[d] (Sup. 1856)

An indictment stated that A., at, etc., did unlawfully, feloniously, and willfully kill, slay, and murder one B., a human being, involuntarily, by then and there shooting the said B., through the head with a certain gun, loaded, etc., which the said A. then and there had and held, in the commission of an unlawful act, to wit, in an endeavor and attempt, etc., to kill and murder one C.; and so the jurors aforesaid, etc. *Held*, that this first count, though inartificially drawn, contained the substantial requisites of an indictment for manslaughter.—*Reed v. State*, 8 Ind. 200.

Where the indictment charges that accused did unlawfully, feloniously, and willfully kill, slay, and murder a certain person and contains the substantial requisites of an indictment for manslaughter, the word "murder" as used therein may be rejected as surplusage.—*Id.*

[e] (Sup. 1857)

An indictment for murder, after the venue, court, and term, proceeding in the words following, is good: "The grand jury, etc., upon their oath charge that A., of said county, on

such a day and year, at said county, did purposely and with premeditated malice, then and there unlawfully and feloniously kill and murder B., in the peace of the state then and there being, by then and there beating and striking her, the said B., upon the head, etc., then and there inflicting divers mortal wounds and injuries upon the head, etc., of her, the said B., which caused the death of her, the said B."—*Dillon v. State*, 9 Ind. 408.

[f] (Sup. 1863)

An indictment charging that defendant "did then and there in and upon one H. M. then and there being, make an assault, and him, the said H. M., he, the said, etc., did then and there strike, beat, and wound in a rude and insolent manner, with the intent then and there the said H. M. purposely, feloniously, and with premeditated malice to kill and murder," *held* good.—*State v. Murphy*, 21 Ind. 441.

[g] (Sup. 1865)

An information for murder which informs the court that F. is in custody on a charge of felony, without indictment, "said charge being described as follows," and followed by a description of the crime of murder in the second degree, is insufficient, because it does not allege directly, in proper form, that F. did the acts with which he is charged.—*Flinn v. State*, 24 Ind. 286.

[h] (Sup. 1878)

An indictment alleging that the grand jurors, etc., present that defendant did unlawfully, etc., kill and murder deceased by then and there feloniously, etc., shooting at and against, and thereby mortally wounding deceased with a revolver loaded with gunpowder and ball, which revolver defendant held in his hands, of which mortal wound deceased instantly died, contrary to the statute, etc., is good against a motion to quash.—*Shepherd v. State*, 64 Ind. 43.

[i] (Sup. 1886)

Where the facts stated in the indictment show that a human being was purposely and with premeditated malice shot by the defendant, and that a wound was thereby inflicted from which the person shot then and there died, the offense of murder in the first degree is sufficiently charged, although the technical words "kill and murder" are omitted.—*Henning v. State*, 106 Ind. 386, 6 N. E. 803, 7 N. E. 4, 55 Am. Rep. 756.

[j] (Sup. 1889)

An indictment in two counts by the first charged that on a certain day defendant did then and there unlawfully, feloniously, purposely, and with premeditated malice, kill and murder one L. by then and there feloniously, purposely, and with premeditated malice shooting at and against and thereby mortally wounding said L. with a certain deadly weapon, to wit, a revolver, then and there loaded with gunpowder and leaden ball, which said revolver the said defendant then and there had and

his hands, of which mortal wound the then and there instantly died. The second charged that on the day and year said defendant did then and there feloniously, purposely, and with premeditated malice, at and against, mortally wounding with a certain weapon, to wit, a gun, and there loaded with gunpowder and ball, which said gun, he, the said defendant, then and there had and held in his hand, of which mortal wound the said I. then and there instantly died. *Held*, that the indictment was good.—*Kahlenbeck v. State*, 21 Ind. 460, 119 Ind. 118.

(Sup. 1903)  
 Burns' Rev. St. 1901, § 1800, requires that indictment contain a statement of the facts constituting the offense in plain and concise language, without unnecessary repetition. An indictment for murder charged that defendants, named, and at the "county and state of Indiana," feloniously and with premeditated malice, killed and murdered one G. by shooting with a deadly weapon called a "revolver," of which mortal wounding G. instantly died. *Held*, that the indictment was not objectionable for failing to describe the offense with sufficient certainty.—*Freese v. State*, 65 Ind. 915, 159 Ind. 597.

CASES FROM OTHER STATES,  
 26 CENT. DIG. Homic. §§ 192-194.  
 See, also, 21 Cyc. pp. 833-835, 837; note,  
 1 L. R. A. 208.

#### Intent.

(Sup. 1876)  
 An indictment for murder commenced by alleging that the defendant "unlawfully, feloniously, and with premeditated malice, did murder one" A. B., "a woman over the age of fourteen years, in an unlawful attack, forcibly, feloniously and against her person," "to ravish and have," etc., "carnal knowledge of her," etc., "by," etc. "purposely, unlawfully, feloniously and with premeditated malice, administering and causing to be administered unto" her "a large quantity of deadly poison." *Held*, that the purpose to kill the woman, on the part of the defendant, was sufficiently alleged.—*Bechtelheimer v. State*, 118 Ind. 128.

(Sup. 1877)  
 An indictment for murder in the first degree must aver that the killing was intentional.—*Porter v. State*, 59 Ind. 105.

CASES FROM OTHER STATES,  
 26 CENT. DIG. Homic. §§ 195, 196.  
 See, also, 21 Cyc. pp. 849, 850.

#### Deliberation and premeditation.

(Sup. 1854)  
 The words "malice aforethought," in the indictment of murder, do not necessarily imply

that the act was committed with deliberation and premeditation.—*Finn v. State*, 5 Ind. 400.

[b] (Sup. 1895)

An indictment for murder which charges that the acts which finally resulted in the death were done feloniously, and with premeditated malice, is sufficient, though it fails to allege that the killing was so done.—*Drake v. State*, 145 Ind. 210, 41 N. E. 799, 44 N. E. 188.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 199-202.

#### § 131. Description of person killed or assaulted.

Idem sonans, see NAMES, § 16.

[a] (Sup. 1843)

An indictment concluding with an allegation that the prisoner did kill and murder, omitting the name of the deceased in such conclusion, is insufficient.—*Dias v. State*, 7 Blackf. 20, 39 Am. Dec. 448.

[b] (Sup. 1864)

An indictment for murder is good, though it omits to charge that deceased was "in the peace of the state."—*Fahnestock v. State*, 23 Ind. 231.

[c] (Sup. 1878)

An indictment for murder need not allege that the person killed was a human being.—*Merrick v. State*, 63 Ind. 327.

[d] (Sup. 1906)

An affidavit for assault and battery with intent to murder is fatally defective, where the name of the assaulted person is not given or a sufficient reason for failure to give the same is not stated.—*Padgett v. State*, 167 Ind. 179, 78 N. E. 663.

An affidavit alleging an assault and battery with intent to kill W., but not alleging the person assaulted, does not state a public offense, so that, under Acts 1905, p. 646, c. 169, § 283, a motion in arrest of judgment is properly granted.—*Id.*

[e] (Sup. 1910)

Objection that indictment for murdering "Mary A. Porter" does not aver or show she was a human being is without merit.—*Porter v. State*, 91 N. E. 340.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 203-209; 27

CENT. DIG. Ind. & Inf. §§ 272-276.

See, also, 21 Cyc. pp. 837-839, 861.

#### § 134. Act or omission causing death.

[a] (Sup. 1885)

In an indictment for murder in the first degree, it is not necessary to charge an assault and battery on the body of the deceased in formal and express terms.—*Dennis v. State*, 103 Ind. 142, 2 N. E. 349.

[b] (Sup. 1889)

An indictment alleging that defendant, a railroad engineer, carelessly and negligently ran his engine into a passenger-car, thereby causing the death of P., a passenger, sufficiently charges an offense under Rev. St. 1881, § 1908, providing that "whoever unlawfully kills any human being without malice, \* \* \* either voluntarily, upon sudden heat, or involuntarily, but in the commission of some unlawful act, is guilty of manslaughter."—*State v. Dorsey*, 118 Ind. 167, 20 N. E. 777, 10 Am. St. Rep. 111.

[c] (Sup. 1900)

It is not necessary to charge, in formal and express terms, an assault or an assault and battery in an indictment for murder.—*Waggoner v. State*, 58 N. E. 190, 155 Ind. 341, 80 Am. St. Rep. 237.

#### FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. Homic. §§ 213, 214.

See, also, 21 Cyc. pp. 839-846.

### § 135. Means or instrument, and manner of use thereof.

[a] (Sup. 1851)

An indictment charging A. with murder by administering poison need not state the particular poison administered, and, if it do so state, it will not be necessary that the proof correspond.—*Carter v. State*, 2 Ind. 617.

[b] (Sup. 1859)

The kind of gun and shot used need not be specified.—*Dukes v. State*, 11 Ind. 557, 71 Am. Dec. 370.

[c, d] (Sup. 1874)

An indictment for manslaughter, charging that the defendant did, on, etc., at, etc., unlawfully and feloniously kill a person named, by then and there unlawfully and feloniously cutting, stabbing, and mortally wounding said person with a knife, etc., is sufficient. So, also, if it is charged that the instrument used was unknown to the grand jurors.—*Willey v. State*, 46 Ind. 303.

[e] (Sup. 1876)

An indictment charging that A. killed and murdered B., without stating by what acts and means, is bad, even after conviction. Hence judgment was arrested where the indictment only alleged that the accused did murder the deceased by feloniously, etc., "firing a large pistol, loaded," etc., because it did not show whether deceased was hit by the ball or died from fright, or by what manner he came to his death.—*Shepherd v. State*, 54 Ind. 25.

[f] (Sup. 1877)

An indictment for murder charged that the defendant did "unlawfully," etc., "kill and murder" A. B., by "cutting, stabbing, and mortally wounding said" A. B. "with a knife which he," the defendant, "then and there had and held in his hands," etc. *Held*, on motion to

quash, that the indictment sufficiently charged the means by which the deceased came to his death.—*Meiers v. State*, 56 Ind. 336.

[g] (Sup. 1881)

An indictment for murder sufficiently describes the manner of the killing by stating that it was done by "striking, cutting, bruising, and mortally wounding with a stone."—*Powers v. State*, 80 Ind. 77.

[h] (Sup. 1885)

When the inference from the facts charged in each count of an indictment charging murder by poisoning is that it was arsenic administered to the deceased that caused his death, the precise amount administered is immaterial.—*Epps v. State*, 102 Ind. 539, 1 N. E. 491.

[i] (Sup. 1885)

An indictment for murder, by killing one with a club, sufficient in other respects, is not bad for failing to aver that the accused held the club in his hands.—*Dennis v. State*, 103 Ind. 142, 2 N. E. 349; *Welch v. State*, 104 Ind. 347, 3 N. E. 850.

[j] (Sup. 1893)

Rev. St. 1881, § 1746, provides that an indictment for murder in the second degree need not state the manner in which, or the means by which, the death was caused, but a charge that defendant did purposely and maliciously kill the deceased without premeditation is sufficient. Section 1731 provides that an indictment shall contain "a statement of facts constituting the offense in plain and concise language." Section 1755, subd. 5, provides that the offense charged must be stated "with such a degree of certainty" that the court may pronounce judgment, on a conviction, "according to the right of the case." *Held*, that a recital in an indictment that defendant did purposely and maliciously, but without premeditation, and in an angry manner, kill and murder one L., at the time and place mentioned, did not state facts sufficient to constitute an offense, and that it was not aided by an allegation that defendant did "touch, strike, cut, and wield a knife," which defendant "in his hand then and there had and held, at, against, and into the body of" L., "from which mortal wound" L. did "thereby languish and die."—*Littell v. State*, 133 Ind. 577, 33 N. E. 417.

[k] (Sup. 1898)

An indictment charging that accused killed and murdered a certain person by shooting against him with a gun loaded with powder and leaden balls charges the death of such person by the act of accused.—*Lane v. State*, 51 N. E. 1056, 151 Ind. 511.

[l] (Sup. 1900)

An indictment which charged that the defendant unlawfully, feloniously, and with premeditated malice, administered a certain drug, to wit, hydrate of chloral, to a certain person, with intent to kill, is not objectionable because

amount of the drug administered was not known, since the charge that the act was unlawful and feloniously was enough to show that the poison was administered in sufficient quantity to accomplish the felonious intent.—*Rosenbarger v. State*, 56 N. E. 914, 154 Ind. 425.

(Sup. 1900)

Under *Burns' Rev. St.* 1894, § 1977 (Rev. St. 1881, § 1904; *Horner's Rev. St.* 1897, § 1904), declaring any person who kills another by administering poison guilty of murder, an indictment charging murder by administering poison is sufficient without a charge that it was not knowingly and voluntarily received and swallowed.—*Siple v. State*, 57 N. E. 544, 154 Ind. 647.

(Sup. 1900)

An indictment charging defendant with murder by wounding her with a revolver loaded with powder and with leaden shot, which revolver he discharged into deceased person, is sufficiently certain as to the means of killing; there being no uncertainty as to whether deceased was struck by the ball or revolver.—*Green v. State*, 57 N. E. 637, 154 Ind. 655.

(Sup. 1900)

Where the evidence before the grand jury tends to the commission of a murder by the means used in two or more modes, but leaves it doubtful in which, it is proper to present counts charging the cause of death in different ways so as to meet the facts as they may appear at the trial, and, if from the evidence before them they are in doubt as to the cause of death, a count should be framed alleging that the death was caused in some manner to them unknown.—*McGonigler v. State*, 58 N. E. 190, 155 Ind. 341, 156 Am. St. Rep. 237.

Under *Burns' Rev. St.* 1894, § 1824, cls. 4, 5; *Rev. St.* 1881, § 1755; *Horner's Rev. St.* 1897, § 1755, providing that an indictment is sufficient if the offense charged is set forth in plain and concise language, and with such a degree of certainty that the court may pronounce judgment, on a conviction, according to the right of the case, and *Burns' Rev. St.* 1894, § 1825 (Rev. St. 1881, § 1755; *Horner's Rev. St.* 1897, § 1755), declaring that no indictment shall be deemed invalid for certain defects namely, "for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant on the merits," an indictment charging that "W. did feloniously, purposely, and with premeditated malice kill and murder one C. by means and ways unknown, and, by reason of the use of said unknown means and ways, the said C. then and there died," is sufficient, since inability to state the means and ways employed to commit the murder does not prejudice any right of the defendant.—Id.

An indictment charging that defendant killed and murdered C. by means and ways un-

known, and that, by reason of the use of such unknown means and ways, said C. then and there died," sufficiently charges that defendant used said "unknown means and ways" to murder C.—Id.

[p] (Sup. 1906)

A charge that a homicide was committed by ways and means unknown to the grand jury is sufficient.—*Donahue v. State*, 74 N. E. 996, 165 Ind. 148; *Gipe v. State*, 165 Ind. 433, 75 N. E. 881, 1 L. R. A. (N. S.) 419, 112 Am. St. Rep. 238.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 215-223.

See, also, 21 Cyc. pp. 841-846.

### § 136. Wound or other injury causing death.

[a] An indictment for murder need not describe the wound by its length, breadth, or depth.—(Sup. 1843) *Dias v. State*, 7 Blackf. 20, 39 Am. Dec. 448; (1857) *Dillon v. State*, 9 Ind. 408.

[b] (Sup. 1843)

An indictment for murder must state the part of the body to which the violence was applied.—*Dias v. State*, 7 Blackf. 20, 39 Am. Dec. 448.

[c] (Sup. 1859)

Murder by means of shooting being charged, the wound need not be described.—*Dukes v. State*, 11 Ind. 557, 71 Am. Dec. 370.

[d] The Code has abrogated the common-law requirement that an indictment for murder should aver the part of the body upon which the mortal wound was inflicted.—(Sup. 1864) *Cordell v. State*, 22 Ind. 1; (1871) *Jones v. State*, 35 Ind. 122.

[e] (Sup. 1864)

An indictment for murder by shooting need not of absolute necessity specify the part of the body in which the shot took effect.—*Whelchell v. State*, 23 Ind. 89.

[f] (Sup. 1874)

An indictment for murder, charging that the defendant, by means stated, inflicted "a mortal injury, to wit, a fracture three inches long, on the head of" A., "of which said mortal injury, or fracture, the said" A., "then and there died," sufficiently shows what caused the death of the deceased.—*West v. State*, 48 Ind. 483.

To describe, in an indictment for murder, the length and depth of the wound, is no longer required. An indictment for murder, describing the mortal wounds in the following words: "Giving him, the said" A., "in and upon the head of him, the said" A., "divers and sundry mortal wounds and injuries, which are too numerous to be more particularly described by said grand jury in this indictment, of which wounds and injuries the said" A. "then and there died," is sufficient.—Id.

[g] (Sup. 1877)

An indictment for manslaughter, charging that the defendant, at, etc., on, etc., did "unlawfully and feloniously kill" the deceased, "without malice, but voluntarily, upon a sudden heat," by "striking and injuring" the deceased "on the head with a stake," which the defendant then and there had and held in his hands, "of which striking and injuring the" deceased "lingered, and lingering did die," is sufficiently certain in its description of the injury resulting in death, and charges the commission of voluntary manslaughter.—*Bruner v. State*, 58 Ind. 159.

[h] (Sup. 1893)

An indictment for murder is bad which fails to state that the death of deceased was caused by defendant's acts.—*Littell v. State*, 133 Ind. 577, 33 N. E. 417.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 224-228.

See, also, 21 Cyc. p. 846.

### § 137. Death from injury, and place and time thereof.

[a] (Sup. 1864)

An indictment for murder which alleges that accused did feloniously, purposely, and with premeditated malice unlawfully kill and murder decedent is a sufficient indictment for murder under the Code, as it shows the death of the assaulted individual; the word "murder" importing death.—*Cordell v. State*, 22 Ind. 1.

[b] (Sup. 1876)

An indictment for murder charged that the defendant "did kill and murder" the deceased, a woman, by administering to her a quantity of cantharides with intent thereby to have sexual connection with her. *Held*, that the indictment sufficiently showed that the deceased died of the poison so administered.—*Bechtelheimer v. State*, 54 Ind. 128.

[c] (Sup. 1877)

An indictment for murder charged that the defendant did "unlawfully," etc., "kill and murder" A. B. by "cutting, stabbing, and mortally wounding said" A. B. "with a knife which he," the defendant, "then and there had and held in his hands," etc. *Held*, on motion to quash, that the indictment was good, overruling the objections that it did not charge that the death resulted from the injuries inflicted, and did not describe the parts of the body which were wounded.—*Meiers v. State*, 56 Ind. 336.

[d] (Sup. 1883)

To allege that the accused did "kill and murder B." sufficiently alleges the death of B.—*Wood v. State*, 92 Ind. 269.

[e] (Sup. 1893)

An indictment for murder, which alleges that defendant inflicted a mortal wound on the body of deceased, at A. county, in the state of Indiana, at a date named, of which mortal wound he then and there died, is not open to

the objection that it does not allege in what county deceased died, if such allegation is material.—*Davidson v. State*, 135 Ind. 234, 34 N. E. 972.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 228-230.

See, also, 21 Cyc. pp. 847, 848.

### § 138. Commission of or attempt to commit other offense or unlawful act.

[a] (Sup. 1856)

A count in an indictment for homicide, charging the killing in an attempt to commit an unlawful act, without stating what the act was, is bad.—*Reed v. State*, 8 Ind. 200.

[b] (Sup. 1874)

An indictment for involuntary manslaughter must show that the defendant was in the commission of some unlawful act, and that the death resulted therefrom. Alleging in such case that the death resulted from using unlawfully, willfully, and feloniously an instrument upon a pregnant female, for the purpose of producing a miscarriage, the use of such instrument not being necessary to preserve the life of the woman is insufficient.—*Willey v. State*, 46 Ind. 363.

[c] (Sup. 1876)

An indictment for murder alleged in substance that the accused "unlawfully, feloniously, and with premeditated malice did kill and murder" the deceased, "a woman over fourteen years of age," by mingling a quantity of cantharides with wine and causing her to drink it, with intent thereby to have carnal knowledge of her "forcibly, feloniously, and against her will"; but there was no allegation that he attempted to have sexual connection with her. *Held*, that the indictment while sufficiently charging murder by administering poison, was insufficient as an indictment for murder in an attempt to commit rape.—*Bechtelheimer v. State*, 54 Ind. 128.

[d] (Sup. 1904)

*Burns' Ann. St. 1901*, § 1981, provides that whoever unlawfully kills any human being without malice, involuntarily, but in the commission of some unlawful act, is guilty of manslaughter. Section 2073 provides that it shall be unlawful for any person over the age of 10 years, with or without malice, purposely to point or aim any pistol or other firearm, either empty or loaded, towards any other person. *Held*, that an indictment charging involuntary manslaughter because of the killing of deceased by accused while he was violating section 2073, by pointing and aiming a firearm at deceased, was insufficient for failing to employ the word "purposely," or any other word of equivalent import, in describing the conduct of accused.—*Eaton v. State*, 70 N. E. 814, 162 Ind. 554.

*Burns' Ann. St. 1901*, § 1981, provides that whoever wrongfully kills any human being without malice, involuntarily, but in the commission

of some unlawful act, is guilty of manslaughter. *Held*, that an indictment must show that accused was engaged in the commission of some unlawful act from which the homicide resulted.—*Id*.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 231.

See, also, 21 Cyc. p. 840.

### § 139. Specification of grade or degree of homicide.

#### [a] (Sup. 1854)

An indictment for murder charged the prisoner with having committed the act "feloniously, willfully, and of his malice aforethought." *Held*, that as, under the Revised Statutes of 1843, murder in the first degree requires deliberate and premeditated malice, and as the phrase "malice aforethought" does not necessarily require deliberation and premeditation, the indictment contained only a charge of murder in the second degree.—*Finn v. State*, 5 Ind. 400.

#### [b] (Sup. 1859)

An indictment charging a homicide "without malice," and not averring it to be in sudden heat or in the commission of an unlawful act, is bad.—*Dukes v. State*, 11 Ind. 557, 71 Am. Dec. 370.

#### [c] (Sup. 1876)

An indictment charging an intentional killing by administering poison charges murder in the first degree, although malice is not alleged.—*Bechtelheimer v. State*, 54 Ind. 128.

#### [d] (Sup. 1877)

An indictment for murder in the first degree charged that on, etc., the defendant "did then and there unlawfully, feloniously, purposely and with premeditated malice kill and murder" one A. B., "by then and there feloniously, purposely, and premeditated malice, shooting and mortally wounding the body and person of said" A. B., "with a gun loaded with gun-powder and leaden balls, which he," the defendant, "then and there in his hands had and held," etc. *Held*, on motion in arrest, that the indictment is sufficient.—*Veatch v. State*, 56 Ind. 584, 26 Am. Rep. 44.

#### [e] (Sup. 1877)

Where an indictment for manslaughter charged that defendant did unlawfully and feloniously kill deceased without malice, but voluntarily upon a sudden heat by striking and injuring deceased on the head with a stake which defendant then and there held in his hands, of which striking and injuring deceased lingered and lingering did die, was sufficient to sustain a conviction of involuntary manslaughter.—*Bruner v. State*, 58 Ind. 159.

#### [f] (Sup. 1884)

An indictment for manslaughter, simply charging that defendant did, at a certain time and place, "unlawfully kill A. B.," is bad for uncertainty in not charging either voluntary or

involuntary manslaughter.—*State v. Lay*, 93 Ind. 341.

#### [g] (Sup. 1887)

Under the statutes there is a plain distinction between voluntary and involuntary manslaughter; and an indictment charging that the defendant did "unlawfully, feloniously, and willfully, touch, beat, bruise, and strike down upon a brick pavement, in a violent manner, and with great force, C. H., from which striking down and the falling upon the pavement he, the said C. H., then and there and thereby received a mortal wound on his head," charges involuntary, and not voluntary, manslaughter.—*Brown v. State*, 110 Ind. 486, 11 N. E. 447.

#### [h] (Sup. 1898)

An indictment that accused "did then and there unlawfully, feloniously, purposely, and with premeditated malice unlawfully kill and murder G., by then and there feloniously, purposely, and with premeditated malice, shooting at and against the said G.," charges murder in the first degree with sufficient certainty to enable the court, on conviction, to pronounce judgment, and without unnecessary repetition, within Burns' Rev. St. 1894, § 1824, cls. 4, 5 (Horner's Rev. St. 1897, § 1755).—*Lane v. State*, 51 N. E. 1056, 151 Ind. 511.

#### [i] (Sup. 1910)

An indictment charging that accused purposely, feloniously, and with premeditated malice killed a person named charges murder in the first degree.—*Stout v. State*, 92 N. E. 161.

An indictment charging the commission of murder by accused while engaged in perpetrating a burglary charges murder in the first degree.—*Id*.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 232-235.

See, also, 21 Cyc. pp. 854-858.

### § 141. Assault with intent to kill.

Description of person assaulted, see ante, § 131.

#### [a] (Sup. 1838)

A charge of an assault and battery with intent to kill is a nullity so far as the intent is concerned. To be of any validity, the intent must be charged to be "to murder."—*Sweetser v. State*, 4 Blackf. 528.

#### [b] (Sup. 1866)

Where an indictment for assault and battery with intent to commit murder did not charge that the offense was committed willfully, feloniously, and of malice aforethought, it was properly quashed.—*State v. Wilson*, 7 Ind. 516.

#### [c] (Sup. 1860)

An indictment charged that F. and 12 other persons (naming them) at a certain time and place made an assault on M., "and then and there with pistols, guns, rocks, and clubs, which they, the said F., etc., in their hands then and there had and held," did willfully strike, beat, and bruise said M., with intent to kill.

*Held*, that the indictment sufficiently charged the use of all the weapons to each defendant.—*State v. Farley*, 14 Ind. 23.

An indictment charged that F. and 12 other persons (naming them) at a certain time and place made an assault on M., "and then and there with pistols, guns, rocks, and clubs, which they, the said F., etc., in their hands then and there had and held," did willfully strike, beat, and bruise said M., with intent to kill. *Held*, that a battery was sufficiently charged.—*Id.*

[cc] (Sup. 1861)

Under an indictment for assault with intent to kill, charging the shooting of a pistol, the manner in which the pistol was loaded and the possibility of death being produced by its discharge, considering the materials of the loading and the distance of the firing, would seem to be matters of evidence arising on the trial, and not matters of averment.—*Rice v. State*, 16 Ind. 298.

[d] (Sup. 1861)

An indictment charged that the defendant did "unlawfully and feloniously \* \* \* touch and strike one A., with intent then and there unlawfully and feloniously and with premeditated malice to kill and murder said A." etc. *Held*, that the phrase "with intent" sufficiently expressed the word "purposely" in the statutory definition of murder, and that the word "feloniously" was, in its connection, identical with the word "purposely."—*Carder v. State*, 17 Ind. 307.

[e] (Sup. 1864)

An indictment charging that "the defendant did unlawfully and feloniously make and perpetrate an assault upon the body of one B. by, with the intention then and there him, the said B., feloniously, purposely, and of his premeditated malice to kill and murder, by then and there firing and shooting at him, the said B., a pistol loaded and charged with powder and leaden balls," etc., is good.—*Wall v. State*, 23 Ind. 150.

[f] (Sup. 1866)

An indictment charged that A. "on," etc., "at," etc., "did unlawfully strike, beat, bruise and wound one B., with a knife, with premeditated malice, and with the intention to kill and murder him, the said B. did then and there stab, cut and wound him, the said B. with a large knife, then and there held in his hands," etc., "with the intention of committing a felony." *Held*, that the charge of premeditated malice was applicable to the battery only.—*State v. Miller*, 27 Ind. 15.

An indictment charged that A. "on," etc., "at," etc., "did unlawfully strike, beat, bruise, and wound one B. with a knife with premeditated malice, and with the intention to kill and murder him, the said B., did then and there stab, cut and wound him, the said B., with a large knife, then and there held in his hands," etc., "with the intention of committing a felony." *Held*, that the indictment did not suffi-

ciently charge the intent to commit the particular felony.—*Id.*

An indictment charging that defendant did then and there "stab, cut, and wound him, the said A.," etc., sufficiently charges a battery.—*Id.*

[g] (Sup. 1874)

An indictment for an assault and battery with intent to murder is sufficient, if it describes the assault and battery in the language of the statute creating that offense, and charges the felony intended in the language of the statute defining the crime of murder. A specific description of the assault and battery is not necessary.—*Williams v. State*, 47 Ind. 568.

There is no rule that, to make a good and sufficient charge in an indictment for an assault and battery with intent to murder, the indictment must charge the defendant with doing such acts as are in their nature and character calculated to cause death. The nature and character of the assault and battery become material, as a matter of evidence, to be considered by the jury in connection with the other evidence, in determining whether the intent charged is established; but, as a matter of pleading, it is sufficient to charge the assault and battery generally, without a specific description of the character of the acts.—*Id.*

[h] (Sup. 1876)

Where defendant is charged with an assault and battery "with intent to kill," he is charged merely with an assault and battery.—*Harris v. State ex rel. Brownlee*, 54 Ind. 2.

[i] (Sup. 1876)

A charge that defendant did make an assault "at and against" the said A., etc., with intent, etc., sufficiently charges the battery, by virtue of the word "against."—*State v. Prather*, 54 Ind. 63.

[j] (Sup. 1877)

An averment, in an indictment for assault and battery with intent to murder, that defendant wounded the injured party by "wounding" him with a pistol loaded with gunpowder and leaden balls, sufficiently avers that the injured party was hit by the substance with which the pistol was loaded.—*Jarrell v. State*, 58 Ind. 293.

[k] (Sup. 1877)

An indictment for assaulting W. by unlawfully attempting to shoot him with a gun, then and there loaded, etc., which the accused then and there had in his hands, with intent to kill W., is insufficient for want of showing that the accused had present ability to inflict injury, which, under 2 Rev. St. 1876, p. 439, is an essential element in assault.—*State v. Hubbs*, 58 Ind. 415.

[l] (Sup. 1878)

An indictment against A., for an assault upon B. with intent to commit murder, charged that A. on, etc., at, etc., "did feloniously at-

tempt to commit a violent injury upon the person of B., he, the said A., having then and there a present ability to commit said injury by then and there feloniously, purposely, and with premeditated malice shooting at and against the said B. with a certain pistol, commonly called a 'revolver,' then and there loaded with gunpowder and leaden balls, which the said A. then and there in both his hands had and held, with intent then and there and thereby him, the said B., feloniously, purposely, and with premeditated malice to kill and murder." *Held*, that the indictment was sufficient.—*Agee v. State*, 64 Ind. 340.

[m] (Sup. 1879)

An affidavit and information for assault with intent to murder, which allege that the defendant is in the custody of the sheriff and no grand jury in session, and which define the assault in substantial accordance with the language of the statute, are good, though they do not allege that the assault was "unlawfully" made, or show the then present ability of the defendant to commit said assault.—*Shinn v. State*, 68 Ind. 423.

An affidavit and information charging that an assault with intent to kill was made "feloniously," sufficiently allege that it was made "unlawfully."—*Id.*

[n] (Sup. 1881)

An indictment for assault and battery with intent to commit murder, which omits an averment or contains an insufficient averment that the offense was committed with "malice," is sufficient as a charge of assault and battery with intent to commit voluntary manslaughter.—*Pierce v. State*, 75 Ind. 190.

An indictment for assault and battery with intent to commit murder, which omits an averment or contains an insufficient averment that the offense was committed with "malice," is sufficient as a charge of assault and battery with intent to commit voluntary manslaughter.—*Id.*

An indictment for an assault with intent to kill is sufficient to sustain the verdict and judgment therefor, whether considered as charging an attempt to commit murder, or only to commit voluntary manslaughter, where the verdict finds defendant guilty "as charged in the indictment."—*Id.*

[o] (Sup. 1881)

A charge that defendant did make an assault and shoot a pistol, loaded, etc., with intent the said B., to kill and murder, sufficiently charges an assault and battery, though it fails to charge an assault, because no averment of "present ability" is made.—*Hays v. State*, 77 Ind. 450.

[p] (Sup. 1886)

An indictment charging that the accused "did, in a rude, insolent, and angry manner, unlawfully touch, strike, shoot, and wound" (stating the manner of the shooting) one K.,

"with the intent then and there and thereby, him, the said K., feloniously, unlawfully, purposely, and with premeditated malice, to kill and murder," is good on motion in arrest of judgment.—*Keeling v. State*, 107 Ind. 563, 8 N. E. 559.

[q] (Sup. 1889)

An indictment for assault with intent to murder, which alleges that defendant touched one W. "with intent then and there him, the said W., feloniously, willfully, purposely, and with premeditated malice, to kill and murder," sufficiently alleges an intent to commit murder in the first degree.—*State v. Jenkins*, 120 Ind. 268, 22 N. E. 133.

[r] (Sup. 1890)

An indictment charging that defendant did unlawfully and feloniously touch and wound deceased by discharging into his person the contents of a pistol loaded with powder and ball, with the intent thereby him feloniously, purposely, and with premeditated malice to kill and murder, is not bad for failure to charge that the touching and wounding was done purposely and maliciously.—*Plake v. State*, 121 Ind. 433, 23 N. E. 273, 16 Am. St. Rep. 408.

[s] (Sup. 1890)

Under Rev. St. 1881, § 1910, which declares that "whoever, having the present ability to do so, unlawfully attempts to commit a violent injury on the person of another is guilty of an assault," an information which charges that defendant "did unlawfully and feloniously attempt to commit a violent injury upon the person of \* \* \*, then and there having the present ability to commit said injury, by then and there, feloniously, purposely, and with premeditated malice, holding in his two hands two large stones, with intent then and thereby him, the said \* \* \*, feloniously, purposely, and with premeditated malice, to kill and murder," is sufficient to sustain a conviction for assault with intent to kill.—*Freel v. State*, 125 Ind. 166, 25 N. E. 178.

[t] (Sup. 1891)

In a criminal action for assault and battery with intent to commit a felony, the information was as follows: "\* \* \* One A. did then and there unlawfully, feloniously, willfully, and purposely, and with premeditated malice, in a rude, insolent, and angry manner, touch one B. with intent then and thereby her, the said B., feloniously, willfully, purposely, and with premeditated malice to kill and murder. \* \* \*" *Held*, that the assault and battery with intent to commit murder was sufficiently charged.—*Vaughan v. State*, 128 Ind. 14, 27 N. E. 124.

[u] (Sup. 1893)

Since Rev. St. 1881, § 1746, provides that an indictment for murder in the second degree need not set forth the manner in which or the means by which death was caused, an indictment for an assault with intent to com-

mit murder in the second degree need not set forth the manner or means.—*Baker v. State*, 134 Ind. 657, 34 N. E. 441.

[v] (Sup. 1894)

An indictment alleged that defendant did "feloniously, purposely, and with premeditated malice, and in a rude, insolent, and angry manner, touch, bruise, lacerate, and wound the body and person of [complainant,] by then and there, feloniously, purposely, and with premeditation, shooting off and discharging at and against the said [complainant] a certain shotgun then and there loaded with gunpowder and leaden shot and slugs, with the intent, then and there and thereby, him, the said [complainant,] feloniously, purposely, and with premeditated malice, to kill and murder." *Held* sufficient to charge assault and battery with intent to murder in the first degree.—*Bass v. State*, 136 Ind. 165, 36 N. E. 124.

[w] (Sup. 1895)

Where the actual commission of an injury is charged, it is not necessary to allege a present ability to commit it.—*Chandler v. State*, 141 Ind. 106, 39 N. E. 444.

In order to constitute a good charge of assault with intent to commit a felony, it must be alleged that defendant had the ability to commit the injury alleged.—*Id.*

Rev. St. 1894, §§ 1983, 1984 (Rev. St. 1881, §§ 1910, 1911), provide that "whoever, having the present ability to do so, unlawfully attempts to commit a violent injury on the person of another, is guilty of assault," and that "whoever in a rude, insolent or angry manner unlawfully touches another is guilty of an assault and battery." An information for assault with intent to murder recited that "S. C. \* \* \* did then and there commit a violent injury upon the person of B. D., by then and there unlawfully, feloniously, purposely, and with premeditated malice, shooting the said B. D. with a certain revolver, \* \* \* with intent," etc. *Held* that, having charged the actual commission of an injury, the information was sufficient, without alleging a present ability to commit it, and that the words, "unlawfully, feloniously, purposely, and with premeditated malice," sufficiently import that the injury was done in a "rude, insolent or angry manner."—*Id.*

[x] (Sup. 1895)

An indictment charged that defendants, "in and upon one K., did then and there unlawfully, feloniously, purposely, and with premeditated malice, make an assault, and him, the said W. K., did then and there at and against the said W. K., did feloniously, purposely, and with premeditated malice shoot a certain pistol and revolver then and there loaded with gunpowder and leaden balls, which they, the said" defendants "then and there in both their hands had and held, with intent then and there and thereby, him, the said W. K., feloniously, purposely, and with premeditated malice to kill and murder, con-

trary to the form of the statute," etc. *Held*, that the indictment was sufficient to charge defendants with assault with intent to murder, as against a motion in arrest of judgment.—*Ellis v. State*, 141 Ind. 357, 40 N. E. 801.

[y] (Sup. 1896)

An allegation that defendant shot and wounded C. is sufficient to charge the present ability of defendant to carry his intention into effect.—*Voght v. State*, 145 Ind. 12, 43 N. E. 1049.

An information charging that defendant unlawfully and feloniously committed a violent injury on the person of C., by shooting and wounding him with a pistol loaded with gunpowder and a leaden ball, which defendant had and held in his hands, with intent, etc., to kill, sufficiently charges an assault with intent to kill.—*Id.*

[z] (App. 1906)

Where an assault and battery is well charged in an indictment for assault and battery with intent to commit murder, it is not necessary to aver that defendant had the present ability to commit the injury.—*Guy v. State*, 77 N. E. 855, 37 Ind. App. 691.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 237-249.

See, also, 21 Cyc. pp. 860-863.

## § 142. Issues, proof, and variance.

*Idem* sonans, see NAMES, § 16.

[a] (Sup. 1843)

A count for murder by wounding must state the part of the body to which the violence was applied, but the proof need not correspond with such statement.—*Dias v. State*, 7 Blackf. 20, 39 Am. Dec. 448.

[b] (Sup. 1859)

Evidence as to a gunshot wound is admissible as bearing upon the question whether it was inflicted by shooting, as alleged, although the indictment does not describe the wounds.—*Dukes v. State*, 11 Ind. 557, 71 Am. Dec. 370.

[c] (Sup. 1877)

One charged in an indictment with voluntary manslaughter cannot be convicted upon proof that he was guilty of involuntary manslaughter.—*Bruner v. State*, 58 Ind. 159.

[d] (Sup. 1877)

Where an indictment for murder alleges death to have been caused by blows inflicted with several different instruments, proof that death was caused by a blow inflicted with any one of them is sufficient.—*Beavers v. State*, 58 Ind. 530.

[e] (Sup. 1900)

Evidence of an assault and battery is admissible on a trial for assault with intent to murder, under Burns' Rev. St. 1894, § 1982, prescribing the penalty for an assault or an assault and battery with intent to commit a fel-

ony.—*Enlow v. State*, 57 N. E. 539, 154 Ind. 664.

[f] (Sup. 1907)

On a trial for homicide, where there was prima facie evidence of a conspiracy between defendants to deprive deceased of his property, in furtherance of which the homicide was committed, and the indictment charged defendants with murder, an allegation charging them with a conspiracy is not essential to admit evidence proving the conspiracy.—*Cook v. State*, 169 Ind. 430, 82 N. E. 1047.

FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. Homic. §§ 250-259.

See, also, 21 Cyc. pp. 869-874.

## VII. EVIDENCE.

Cross-examination as to collateral matters, see WITNESSES, § 270.

Cross-examination of accused, see WITNESSES, § 277.

Limitation of cross-examination to subjects of direct examination, see WITNESSES, § 269.

Questions on cross-examination, see WITNESSES, § 280.

Redirect examination of witness, see WITNESSES, § 286.

Scope of cross-examination, see WITNESSES, § 268.

### (A) PRESUMPTIONS AND BURDEN OF PROOF.

#### § 145. Intent.

[a] (Sup. 1856)

The intent to commit murder may be inferred from defendant's act of shooting into a crowd, because every man is supposed to intend the necessary consequences of his own acts.—*Walker v. State*, 8 Ind. 290.

[b] If a party does an act with a dangerous or deadly weapon, which, from its nature and the way it is done, may naturally, probably, or reasonably produce death, or jeopardize life, the law attributes to such an act an intent to kill.—(Sup. 1869) *Clem v. State*, 31 Ind. 480; (1869) *Murphy v. Same*, Id. 511; (1895) *Deilkes v. Same*, 141 Ind. 23, 40 N. E. 120; (1896) *Voght v. Same*, 145 Ind. 12, 43 N. E. 1049.

[c] The use of a deadly weapon is presumptive, but not conclusive, evidence of an intent to kill.—(Sup. 1869) *Clem v. State*, 31 Ind. 480; (1870) *Bradley v. Same*, Id. 492.

[d] (Sup. 1869)

In the absence of direct evidence (such as prior threats, or a preparation for the consummation of the deed, and lying in wait with a deadly weapon), if the assault and battery is perpetrated with a deadly weapon used in such a manner as to be reasonably calculated to destroy life, the intent to kill may be inferred as

a fact from the act itself.—*Kunkle v. State*, 32 Ind. 220.

[e] (Sup. 1894)

On trial for an assault with intent to murder, the intent need not be proved by positive evidence, but may be inferred from the deliberate use of a deadly weapon.—*Walker v. State*, 136 Ind. 663, 36 N. E. 356.

[f] (Sup. 1896)

A man is presumed in law to intend the natural and probable consequences of his own act, and hence if one purposely shoots another with a deadly weapon at or near a vital part, and in such manner that death will probably ensue, and all the other elements of the crime concur, the jury would be justified in believing that defendant intended to kill even if death did not ensue, and if the defendant himself claimed that he did not intend to kill.—*Newport v. State*, 39 N. E. 926, 140 Ind. 299.

[g] (Sup. 1897)

An intent to kill may be inferred from the fact that defendant threw the prosecutor from a rapidly moving train in a manner reasonably calculated to destroy life.—*Anderson v. State*, 46 N. E. 901, 147 Ind. 445.

[h] (Sup. 1903)

Where it appears from the proof that defendants, without provocation, attacked the prosecuting witness with a hatchet, inflicting a wound upon his head and face which laid him up for several weeks, the jury is authorized to infer that the assault was made with a felonious intent.—*Starr v. State*, 67 N. E. 527, 160 Ind. 661.

[i] (Sup. 1904)

Where an assault and battery is committed with a deadly weapon, such as a knife, which is deliberately used in such a manner as to be reasonably calculated to destroy life, the intent to kill may be inferred by the jury from the act itself.—*Larkin v. State*, 71 N. E. 959, 163 Ind. 375.

[j] (Sup. 1910)

Under a rule that one is presumed to intend the natural and probable consequences of his deliberate act, a homicide is prima facie willful and premeditated where death results from the voluntary use of a deadly weapon in such manner that it will likely produce death.—*Rigsby v. State*, 91 N. E. 925.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 262-264

See, also, 21 Cyc. p. 875.

#### § 146. Malice.

[a] (Sup. 1868)

Where one person unlawfully and purposefully kills another, malice, in the absence of rebutting evidence, is presumed from the act; but where no express malice is shown, and it appears that the act, though voluntary, was the result of a sudden heat, or transport of passion,

upon a sufficient provocation, it rebuts the presumption of malice, which is an essential ingredient of the crime of murder in the first or second degree, and reduces the offense to manslaughter.—*Ex parte Moore*, 30 Ind. 197.

[b] (Sup. 1869)

Words only, however abusive and insulting they may be, cannot constitute such sufficient provocation to rebut the presumption of malice arising from the act in such a case, and reduce the offense from murder to manslaughter.—*Murphy v. State*, 31 Ind. 511.

[c] (Sup. 1871)

Where a homicide is committed in the heat of passion, caused by sufficient provocation of the person slain, the law does not necessarily imply malice from the use of a deadly weapon.—*Miller v. State*, 37 Ind. 432.

[d] (Sup. 1875)

Malice is not necessarily implied from an intent to inflict a personal injury. An act, to be malicious, must either be wicked or wrongful.—*Field v. State*, 50 Ind. 15.

[e] (Sup. 1883)

One charged with murder cannot complain of an instruction that a homicide by an intentional use of a deadly weapon in such manner as to produce death is presumed to have been committed carelessly and maliciously, unless done in self-defense or sudden heat of passion, caused by such provocation as by law reduces the killing to manslaughter.—*McDermott v. State*, 89 Ind. 187.

[f] (Sup. 1886)

If an act is unlawful, and is of such a character as that the known consequences of it would naturally be to produce great bodily harm or to endanger the life of the person, the law will infer malice.—*Boyle v. State*, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218.

[g] (Sup. 1899)

Where a homicide is perpetrated by the intentional use of a deadly weapon in such manner as is likely to, and does, produce death, the law presumes such homicide was committed purposely and maliciously, unless it was done in self-defense, or upon a sudden heat occasioned by such provocation as is adequate in law to reduce the killing to the grade of manslaughter.—*Bridgewater v. State*, 55 N. E. 737, 153 Ind. 560.

[h] (Sup. 1904)

It was not error to charge that the law presumed malice from use of a deadly weapon, and cast on the accused the onus of repelling such presumption, unless the evidence showed there was no malice; and that, when malice was shown and unrebutted, a conviction must be for murder.—*Coolman v. State*, 72 N. E. 568, 163 Ind. 503.

Though malice is not conclusively presumed from the use of a deadly weapon, malice may

be inferred from the intentional use of a deadly weapon in such a manner as to cause death.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 265-271.

See, also, 21 Cyc. pp. 877-880; note, 4 L. R. A. (N. S.) 934.

§ 149. Cause of death.

[a] (Sup. 1881)

The presumption of innocence does not raise a presumption that the reagents employed in the chemical tests used to discover poison were impure.—*Dyer v. State*, 74 Ind. 594.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 274.

§ 151. Excuse or justification.

[a] (Sup. 1882)

An instruction in a trial for murder that, "if the evidence given by defendant has been sufficient to raise a reasonable doubt of the defendant's sanity, then the general question of his sanity is presented, and then if, on the whole evidence on both sides, a reasonable doubt exists of his sanity, he is entitled to the benefit of that doubt," is erroneous, as defendant was entitled to an acquittal if the doubt was created solely by the state's evidence.—*McDougal v. State*, 88 Ind. 24.

[b] (Sup. 1908)

On the issue of self-defense, the burden of proving beyond a reasonable doubt that defendant was at fault in the first instance rests on the prosecution.—*Lawson v. State*, 171 Ind. 431, 84 N. E. 974.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 276-278.

See, also, 21 Cyc. pp. 883, 884.

(B) ADMISSIBILITY IN GENERAL.

Admissions by accused, see CRIMINAL LAW, §§ 406, 407.

Application of rule as to confidential communications between husband and wife, see WITNESSES, § 188.

Best and secondary evidence, see CRIMINAL LAW, §§ 400, 402.

Confessions, see CRIMINAL LAW, §§ 517-538.

Declarations by co-conspirators and codefendants, see CRIMINAL LAW, §§ 422-427.

Declarations by decedent, see CRIMINAL LAW, § 415.

Declarations of accused, see CRIMINAL LAW, § 413.

Demonstrative evidence, see CRIMINAL LAW, § 404.

Documentary evidence, see CRIMINAL LAW, §§ 429-447.

Evidence admissible by reason of admission of similar evidence by adverse party, see CRIMINAL LAW, § 390.

Evidence given at preliminary examination, or at former trial, see CRIMINAL LAW, § 547.

Evidence in rebuttal, see CRIMINAL LAW, 684.

Experiments, see CRIMINAL LAW, § 388.

Harmless error in admission of evidence, see post, § 338.

Harmless error in exclusion of evidence, see post, § 339.

Hearsay evidence, see CRIMINAL LAW, § 421.

Opinion evidence, see CRIMINAL LAW, §§ 448-491.

Proof of venue, see CRIMINAL LAW, § 564.

Remoteness, see CRIMINAL LAW, § 384.

Res gestæ, see CRIMINAL LAW, §§ 362-368.

#### § 154. Identity of deceased.

Identity of accused, see post, § 170.

##### [a] (Sup. 1877)

It is proper on a murder trial to admit in evidence a photograph, and evidence concerning it, for the purpose of identifying the deceased.—Beavers v. State, 58 Ind. 530.

##### [b] (Sup. 1878)

It is not error, on the trial of a defendant indicted for murder, to admit evidence that a body claimed to be that of the deceased is the body of a human being.—Merrick v. State, 63 Ind. 327.

##### [c] (Sup. 1901)

Where the body of a murdered girl was not found for several weeks, but was then in such condition that her father and others stated that they recognized her, they may testify to such recognition, as well as to the peculiar marks and points of resemblance.—Keith v. State, 61 N. E. 716, 157 Ind. 376.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 285.

See, also, 21 Cyc. pp. 887, 888.

#### § 155. Intent, malice, deliberation, and premeditation.

Harmless error, see post, § 338.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 286-302.

See, also, 21 Cyc. pp. 888-900.

#### § 157. — Previous quarrels and ill feeling.

On issue of self-defense, see post, § 189.

##### [a] (Sup. 1884)

On trial of a husband for assault with intent to murder his wife, conversations between them relative to their domestic disagreements are admissible against him.—Doolittle v. State, 93 Ind. 272.

##### [b] (Sup. 1884)

Where one is charged with murdering his wife, evidence of quarrels between them, even four years before, is admissible.—Koerner v. State, 98 Ind. 7.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 288-292.

See, also, 21 Cyc. pp. 894-897.

#### § 158. — Previous threats and expressions of ill will by accused.

##### [a] (Sup. 1850)

On an indictment for assault with intent to murder, the state may properly show that defendant, shortly before making the assault, said he expected to kill somebody before he left town, as showing his intent.—Read v. State, 2 Ind. 438.

##### [b] (Sup. 1884)

Threats against life are admissible against an accused, but their remoteness from the time of the homicide is a circumstance to be considered in determining the weight and effect to be assigned to them.—Goodwin v. State, 96 Ind. 550.

##### [c] (App. 1884)

To authorize proof of threats, whether general or special, on a trial for murder it is only necessary to show that decedent is within the scope of the threats uttered.—Parker v. State, 35 N. E. 1105, 136 Ind. 284.

##### [d] (Sup. 1900)

Where, on a murder trial, the defense was that a person other than defendant had done the killing, testimony as to threats made by such person, though not admissible of themselves, yet, in connection with evidence that such other person was guilty, was admissible as showing his motive and disposition to commit the crime.—Green v. State, 57 N. E. 637, 154 Ind. 655.

##### [e] (Sup. 1902)

On a prosecution against one for the murder of his son-in-law, it appeared that defendant's wife and one of his children lived with deceased and his wife, defendant's daughter; that some of deceased's relatives were also there; and that defendant sent some vegetables and other foods to deceased's house for defendant's children. *Held*, that testimony of declarations made by defendant, while talking about having furnished "grub" for his children, that there were some laying around eating it up; that there were some sons of bitches who walked the road that he could hardly stand; but that (slapping his hand on his pocket) "he had the tools there to stop it with,"—was admissible, as referring to deceased by description, and to show defendant's feelings towards him.—Wheeler v. State, 63 N. E. 975, 158 Ind. 687.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 293-296.

See, also, 21 Cyc. pp. 890-892.

#### § 162. Commission of or participation in act by accused in general.

##### [a] (Sup. 1877)

In a murder trial, it is proper to admit evidence concerning a supposed spot of blood

on defendant's coat, together with a test of physicians with reference thereto.—*Beavers v. State*, 58 Ind. 530.

#### FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. Homic. § 303.

See, also, 21 Cyc. pp. 900-905.

### § 163. Character and habits of parties.

Harmless error, see post, § 338.

On issue of self-defense, see post, § 188.

#### [a] (Sup. 1842)

The defendant, on the trial of an indictment for murder, examined a witness respecting his character, who referred in his testimony to rumors that had followed the defendant as to his character in a neighborhood where he had formerly lived. *Held*, that the counsel for the state might thereupon cross-examine the witness respecting the defendant's general character in his neighborhood as to his former conduct.—*Beauchamp v. State*, 6 Blackf. 299.

#### [b] (Sup. 1864)

It is not improper to show defendant's business at the time of the killing.—*Fahnestock v. State*, 23 Ind. 231.

It is not error for the court, in a trial for murder, to refuse to allow the defendant's counsel to ask a witness the question whether he knows the general character of the deceased when he was intoxicated from the report of his neighbors.—*Id.*

#### [c] (Sup. 1877)

On trial of an indictment for assault and battery with intent to murder, it is not competent to show the general character of the assaulted party for violence, etc., by evidence of specific acts of violence committed by him upon persons to whom he had ill will.—*Pratt v. State*, 56 Ind. 179.

#### [d] (Sup. 1884)

In a prosecution for homicide, it was proper to refuse to permit a witness to answer the question: "If the defendant was different from other people in his manner of living or acting or speaking or eating, state in what respect."—*Goodwin v. State*, 96 Ind. 550.

#### [e] (Sup. 1885)

On trial for murder, though evidence of the previous good character for peace and quietness of the defendant is admissible, evidence of his previous moral character is not.—*Walker v. State*, 102 Ind. 502, 1 N. E. 856.

It is not necessarily error to admit evidence of the occupation, place of residence, family relations, and general surroundings of the deceased in a trial for murder. These facts may be material and may shed light on the question of motive.—*Id.*

[f] Evidence of the character of a defendant on trial for murder must be confined to testimony of his character for peace and quietude.—(Sup. 1889) *Kahlenbeck v. State*, 119 Ind. 118,

21 N. E. 460; (1892) *Hall v. Same*, 132 Ind. 317, 31 N. E. 536; (1893) *Carr v. Same*, 135 Ind. 1, 34 N. E. 533, 41 Am. St. Rep. 408, 20 L. R. A. 863.

#### [g] (Sup. 1890)

Whether accused is a brave man or a coward is immaterial on a trial for murder.—*Keyes v. State*, 122 Ind. 527, 23 N. E. 1097.

#### [h] (Sup. 1890)

Where the theory of the defense is that the cause of the homicide was deceased's attempt to outrage defendant's wife, and that of the prosecution is that it was deceased's attempt to prevent defendant from beating his wife, it is reversible error to allow a witness, who has testified to defendant's general bad moral character, to state that he has heard of defendant beating his wife.—*Drew v. State*, 124 Ind. 9, 23 N. E. 1098.

#### [i] (Sup. 1905)

Where defendant in homicide was the aggressor in the conflict which resulted in the death of deceased, deceased's character was not in issue, and evidence of his general reputation as a dangerous and violent man was inadmissible.—*Osburn v. State*, 73 N. E. 601, 164 Ind. 262.

#### [j] (Sup. 1910)

On prosecution for homicide, testimony by the officer who had defendant in his custody that defendant, in speaking of witnesses against him, said, "We have showed up some of them, and before we get through we will show up some more of them, and when I get out of this I will get even with some—for making me wear these handcuffs," was wrongfully admitted, not being competent as going to show that defendant was a man of violence and was vindictive.—*Miller v. State*, 91 N. E. 930.

#### FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. Homic. §§ 310-317; 14 CENT. DIG. Crim. Law. §§ 841-843.

See, also, 21 Cyc. pp. 905-910; notes, 20 L. R. A. 609, 2 L. R. A. (N. S.) 102, 3 L. R. A. (N. S.) 352; note, 124 Am. St. Rep. 1018.

### § 164. Physical condition of parties.

#### [a] (Sup. 1893)

In a murder case it appeared that deceased was defendant's uncle. Defendant, an unmarried man, resided with him a while, during which time deceased deeded him 80 acres of land, the deed providing that he should maintain the uncle during his life. Afterwards, owing to disagreement, defendant went about three miles distant to live, and an action was soon commenced to set aside such deed. Not long thereafter deceased was found in his stable, with his ribs broken, having been suffocated. The theory of the state was that defendant murdered deceased at the house, and carried the body to the stable, to create the impression that he was killed by the horses.

*Hdd*, that evidence that deceased was old and feeble, and that defendant was young and stout, was properly admitted.—*Davidson v. State*, 135 Ind. 254, 34 N. E. 972.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. § 318.

See, also, 21 Cyc. p. 911.

**§ 165. Personal relations of parties.**

[a] (Sup. 1877)

On trial of a husband for the murder of his wife, parol evidence of the pendency of an action by the wife against the husband for a divorce is admissible to show the state of feeling existing between the parties.—*Binns v. State*, 57 Ind. 46, 26 Am. Rep. 48.

[b] (Sup. 1893)

Upon trial of a man charged with the murder of his wife it is proper to show what relations existed between them, and how he treated her, and also his conduct while in jail, and how regularly he took his meals while there.—*Siberry v. State*, 133 Ind. 677, 33 N. E. 681.

[c] (Sup. 1893)

On a prosecution for murder, where one of the questions was the relations of defendant to deceased, his wife, his relations to their child were not admissible in evidence.—*Pettit v. State*, 34 N. E. 1118, 135 Ind. 393.

[d] (Sup. 1895)

On a prosecution of a man for the murder of his wife, it is proper to show the character of the relations existing between them.—*Siberry v. State*, 149 Ind. 684, 39 N. E. 936, 47 N. E. 458.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. § 319.

See, also, 21 Cyc. pp. 912, 913.

**§ 166. Motive.**

[a] (Sup. 1874)

On a trial of an indictment for murder, it is error to admit in evidence against the defendant a transcript of the pleadings and papers in an action of divorce by the deceased against defendant pending in court and undetermined at the time of the alleged murder.—*Binns v. State*, 46 Ind. 311.

[b] (Sup. 1877)

The record of a divorce suit by a wife against her husband, including an order for the payment of alimony by defendant, for a receiver of his property, etc., is not competent, on a trial of the husband for murder of his wife, as tending to show motive.—*Binns v. State*, 57 Ind. 46, 26 Am. Rep. 48.

[c] (Sup. 1884)

On a trial for an assault by a husband with intent to murder his wife, evidence that he married her under a false name, which fact became the cause of domestic troubles is admissible against him.—*Doolittle v. State*, 93 Ind. 272.

[d] (Sup. 1889)

On prosecution for murder, it was competent, in order to show motive, to prove that defendant lived with deceased and his wife, having been taken by them as a member of their family, and that a young woman whom defendant wished to marry had said that she would not marry him while deceased and his wife lived, and that a short time after deceased was found dead some unknown person committed an assault with intent to kill his wife.—*Benson v. State*, 21 N. E. 1109, 119 Ind. 488.

[e] (Sup. 1891)

On the trial of a man as accessory before the fact of the murder of his child, it is competent for the state to show by the mother that she was pregnant as the result of an illicit intercourse with defendant, since such fact tends to render probable her statement that he advised and encouraged her to murder the child.—*Sage v. State*, 127 Ind. 15, 26 N. E. 667.

[f] (Sup. 1893)

Evidence as to the property deceased owned, and its value, was admissible on the question of motive.—*Davidson v. State*, 135 Ind. 254, 34 N. E. 972.

It was also proper to admit in evidence a deed from deceased to defendant, in consideration of which the latter agreed to support the former during his life.—*Id.*

[g] (Sup. 1893)

On the prosecution of a husband on a charge of having killed his wife as the result of a loss of affection for her, and infatuation for another woman, an affectionate letter written by the wife to the husband is admissible to disprove the existence of such a motive for committing the crime.—*Pettit v. State*, 135 Ind. 393, 34 N. E. 1118.

[h] (Sup. 1897)

Admission of testimony of witness that he had called another's attention to the fact that he had seen defendant go after dark into the yard where lived the young woman, improper relations with whom were attempted to be shown as a motive for defendant's killing his wife (evidence of no significance by itself, but which, in connection with all the other circumstances, might be of some importance and relevancy), is not error.—*Hinshaw v. State*, 47 N. E. 157, 147 Ind. 334.

[i] (Sup. 1901)

Where, on a prosecution for murder of a woman in her home, the motive having been robbery, it appeared that one jointly indicted with accused, and who, the testimony tended to show, was present when the crime was committed, had stated a few days before the crime that he was going to "pull off a peach"; that there was an old lady who was afraid of banks, and had lots of money in the house, and lived alone; that accused knew where the money was,—it was proper to admit testimony that it

was generally known that deceased had money.—*Musser v. State*, 61 N. E. 1, 157 Ind. 423.

[j] (Sup. 1907)

On a trial for homicide committed by accused and others conspiring to kill decedent, it is competent for the state to give evidence of prior assaults by them on decedent while trying to deprive him of his property, as tending to show the motive which prompted accused and his co-conspirators to commit the offense.—*Sanderson v. State*, 169 Ind. 301, 82 N. E. 525.

[k] (Sup. 1908)

On a prosecution for murder of defendant's husband, evidence of improper relations existing between her and another at and before the time of the homicide are admissible to show motive.—*Lawson v. State*, 171 Ind. 431, 84 N. E. 974.

[l] (Sup. 1910)

Statements of defendant tending to show illicit relations of defendant with women during his married life, and so lack of affection and regard for his wife, and disregard of his conjugal relations, is competent to show motive, on a prosecution for murder of his wife.—*Porter v. State*, 91 N. E. 340.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 320-331.

See, also, 21 Cyc. pp. 914-920.

**§ 167. Threats, preparations, and previous attempts.**

Admissibility to show intent or malice, see ante, § 158.

Harmless error, see post, § 339.

[a] (Sup. 1872)

The threats of the accused made previous to the homicide are admissible against him.—*Cluck v. State*, 40 Ind. 263.

[b] (Sup. 1883)

The fact that the threats by accused against the life of deceased were made 30 years before the homicide affects their weight and not their admissibility.—*Goodwin v. State*, 96 Ind. 550.

[c] (Sup. 1886)

On the trial of a prosecution for the murder of the successful suitor of a lady by one who has been rejected, evidence of the lady that the accused had threatened to kill any one else whose company she received, is admissible.—*Brown v. State*, 105 Ind. 385, 5 N. E. 900.

[d] (Sup. 1894)

On a trial for murder, where it appears that deceased had used the telephone in his store to call up the police to arrest defendants on a prior occasion, threats of a general character made by one of them, that he would get even with all connected with his arrest, are broad enough to include deceased, and are admissible against defendant.—*Parker v. State*, 136 Ind. 284, 35 N. E. 1105.

[e] (Sup. 1901)

On the trial of defendant for murdering a girl, it was not error to exclude the testimony of a witness that he (witness) was to marry her two days after the supposed date of the murder, and that on that day he was looking for her with threats to kill her if she did not marry him; there being no proof or offer of any overt act on his part.—*Keith v. State*, 61 N. E. 716, 157 Ind. 376.

[f] (Sup. 1903)

Where defendant overtook prosecutor and his brother as they were driving along a highway, and committed an unprovoked assault on them, evidence of defendant's declaration, while driving along the highway before he overtook prosecutor, that he would kill the son of a bitch, was not incompetent on the ground that no person was designated as the object of the threat.—*Starr v. State*, 67 N. E. 527, 160 Ind. 661.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 332-340.

See, also, 21 Cyc. pp. 921-924; note, 17 L. R. A. 654; note, 89 Am. St. Rep. 691.

**§ 168. Ability and opportunity.**

[a] (Sup. 1878)

Where an indictment for murder charged the killing to have been caused by the infliction of mortal wounds, it was not error to admit evidence that weapons with which such wounds might have been inflicted were carried by the defendant on the alleged day of the murder.—*Merrick v. State*, 63 Ind. 327.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 304.

**§ 169. Circumstances preceding act.**

Harmless error, see post, § 338.

[a] (Sup. 1871)

It is not competent, on a trial for murder, to prove against the accused declarations of the deceased made previous to the encounter, and not in the presence and hearing of the accused.—*Cheek v. State*, 35 Ind. 492.

[b] (Sup. 1878)

On the separate trial of defendant, indicted with several others for the murder of one with whose family defendants were having trouble over property, it appearing that long before the murder, but subsequent to the beginning of their enmity deceased and his house had been severely injured by missiles exploded by defendant, it is proper to show that after such explosions deceased and his family never went out at night, but kept the house securely locked, and slept upstairs; such evidence tending to show, their malice continuing, why defendants had not sooner accomplished their purpose.—*Jones v. State*, 64 Ind. 473.

[c] (Sup. 1879)

On a trial for murder by the discharge of a pistol while being wrenched from deceased's hands by defendant and others, defendant could not properly be allowed, for the purpose of showing that certain wounds upon deceased's person, not contributing to his death, had been received prior to the assault, to prove that deceased had been intoxicated, violent, and quarrelsome during the day on which he was killed.—*Patterson v. State*, 66 Ind. 185.

[d] (Sup. 1881)

In a prosecution for murder, testimony of a third person that he told the prisoner to take a brick and look for the deceased *held* admissible, if the prisoner's conduct showed that he acted upon the suggestion.—*Fisher v. State*, 77 Ind. 42.

[e] (Sup. 1885)

In a prosecution for homicide, evidence that a witness had difficulty with the deceased a short time before the homicide, that he thereupon appealed to the defendant for the loan of his revolver to use on deceased, that defendant declined to loan his revolver to the witness, was irrelevant.—*Walker v. State*, 1 N. E. 856, 102 Ind. 502.

[f] (Sup. 1889)

The theory of the prosecution being that defendant decoyed deceased into the woods to kill and rob him, and certain merchandise, such as deceased was peddling, being found in defendant's trunk after his arrest, evidence that defendant stated, several days before the homicide, that he bought similar articles of a peddler, is not part of the *res gestæ*, and is inadmissible.—*Kahlenbeck v. State*, 119 Ind. 118, 21 N. E. 460.

[g] (Sup. 1908)

On a trial for murder of defendant's wife, there was no error in excluding a remark made by her some weeks before, or that defendant had been advised, shortly before his wife's death, to pack up and leave, or of loud, angry, and profane language in the house the night before.—*Ludwig v. State*, 170 Ind. 648, 85 N. E. 345.

#### FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. Homic. §§ 341-350.

See, also, 21 Cyc. pp. 925-932.

#### § 170. Identity and presence of accused.

[a] (Sup. 1906)

In a prosecution of defendant, a colored man, for shooting his wife with a revolver, evidence that witness sold the revolver to a colored man at her father's store on a certain day just prior to the killing was material, though she was unable to identify defendant as the purchaser.—*Smith v. State*, 74 N. E. 983, 165 Ind. 180.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 305; 14 CENT. DIG. Crim. Law, § 768.

#### § 171. Nature of act and attendant circumstances in general.

[a] (Sup. 1893)

It is not error to permit the state to show the condition of things at the house immediately after deceased's body was found.—*Davidson v. State*, 135 Ind. 254, 34 N. E. 972.

It is not error to allow the state to show the jury the position in which the body of deceased was found.—*Id.*

[b] (Sup. 1901)

Where, on a trial for murder, the state's evidence all pointed to the commission of the crime at a certain time and place, when and where deceased was last seen alive, testimony of a witness that four weeks thereafter, but before the body was discovered, when five miles from there, he heard blows, and a woman's voice begging some one not to strike or kill her, is not admissible.—*Keith v. State*, 61 N. E. 716, 157 Ind. 376.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 351-358.

See, also, 21 Cyc. pp. 924, 932-936.

#### § 172. Commission of or attempt to commit other offense or unlawful act.

[a] (Sup. 1886)

Upon the trial of a defendant charged with the murder of a citizen, not an officer, who was pursuing him, testimony was adduced tending to prove that the accused was a member of a gang of pickpockets who were plundering citizens assembled at a political meeting. *Held*, that it was competent to prove that pockets were picked by the gang of which the accused was a member, although such evidence tended to establish a distinct crime.—*Kennedy v. State*, 107 Ind. 144, 6 N. E. 305, 57 Am. Rep. 99.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 372, 373.

See, also, 21 Cyc. pp. 944, 945.

#### § 174. Subsequent inculpatory or exculpatory circumstances.

[a] (Sup. 1877)

It is not error on a murder trial to admit testimony as to defendant's dodging, trembling, and confusion, when met by the witness before and at the time of his arrest; nor as to a witness having seen a man in the country some time before the homicide, who resembled the accused; and concerning a satchel and its contents found near the spot where deceased's dead body was found.—*Beavers v. State*, 58 Ind. 530.

[b] (Sup. 1878)

J. was indicted with L. and three others for the murder of M. L. pleaded guilty. On the separate trial of J., *held*, that testimony was admissible as to J.'s conduct after the killing in relation to L.'s arrest on a charge of larceny, and J.'s furnishing L. with money to leave the state; this tending to show the relations between them.—*Jones v. State*, 64 Ind. 473.

Where, on a trial for murder, a witness denies facts exculpatory of defendant which he swore to on the preliminary examination, evidence is admissible, as explaining such discrepancy, that threats were made by defendant to a third person, which were intended to be and were communicated to the witness, with a view of influencing such testimony.—*Id.*

On the separate trial of defendant, indicted with others for the murder of one with whom they were having trouble over an estate, testimony is admissible that after the killing defendant requested witness to propose a settlement with deceased's family, and made vague threats of ill consequences in case of their non-compliance.—*Id.*

[c] (Sup. 1881)

Where, in a prosecution for murder, the flight of the prisoner has been proved, it is proper for him to account for such flight by showing the manner of the persons present towards him, and that they followed and threatened him with violence.—*Batten v. State*, 80 Ind. 394.

On a prosecution for murder, it was proper to permit the state to show all that occurred after the homicide, in respect to the flight and pursuit of the accused, until the time of his subsequent arrest.—*Id.*

[d] (Sup. 1897)

There being circumstances to show that defendant, charged with the murder of his wife, after committing the murder, went into a woodshed, and threw articles from the window thereof, evidence of the finding thereafter of mammalian blood on the window sill is admissible.—*Hinshaw v. State*, 47 N. E. 157, 147 Ind. 334.

[e] (Sup. 1901)

On a prosecution for murder committed in furtherance of robbery, it was proper to admit evidence that one jointly indicted with defendant, and who, the evidence tended to show, was present at the commission of the crime, had in his possession, shortly after the crime, money of the same kind and denomination as shown to have been in possession of deceased.—*Musser v. State*, 61 N. E. 1, 157 Ind. 423.

[f] (Sup. 1904)

In a prosecution of a man for the murder of a child, whose body was found in a cistern under the kitchen of his house, the exclusion of

evidence that accused had tendered his horse and team, to be used in searching for the child, is proper.—*Dunn v. State*, 70 N. E. 521, 162 Ind. 174.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 359-371; 14 CENT. DIG. Crim. Law, § 778.

See, also, 21 Cyc. pp. 937-944.

#### § 175. Cause of death.

Competency of contradictory evidence, see WITNESSES, § 406.

[a] (Sup. 1881)

In a prosecution for homicide, the state was properly permitted over defendant's objection to ask a surgeon whether the wound received by the deceased was or was not a mortal wound.—*Batten v. State*, 80 Ind. 394.

[b] (Sup. 1885)

In a prosecution for homicide committed by poisoning, where arsenic was found in the stomach of deceased, and the question is raised whether bismuth administered to him by his attending physician during the illness contained traces of arsenic, it is admissible for the physician to testify that he administered the same bismuth to other patients without ill effects.—*Epps v. State*, 102 Ind. 539, 1 N. E. 491.

In a prosecution for homicide committed by poisoning, where arsenic was found in the stomach of deceased, and the question is raised whether bismuth administered to him by his attending physician during the illness contained traces of arsenic, the testimony of a chemist who analyzed the bismuth taken from the same package as that administered is admissible.—*Id.*

[c] (Sup. 1892)

On a trial for murder, defendant's offer to prove by a witness that he had drunk liquor with deceased out of a bottle marked "Poison," taken from deceased's barn, where deceased drank that given him by defendant, and that deceased said that he marked it "Poison" so that his hired men would not drink it, and that he had other bottles at the same place, was properly rejected, it not appearing when this occurred, or that he had bottles there at the time of his death, or that he had other bottles there in reality containing poison, and from which he might have drunk by mistake.—*Hall v. State*, 132 Ind. 317, 31 N. E. 536.

[d] (Sup. 1898)

An offer to prove that deceased had taken large quantities of chloral four or five months before his death is properly rejected where no evidence was offered to connect his death with the use of the chloral.—*Shields v. State*, 49 N. E. 351, 149 Ind. 395.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 375-378.

See, also, 21 Cyc. pp. 946-948.

**§ 177. Suicide.**

[a] (Sup. 1892)

Evidence offered by defendant of isolated facts relative to deceased's financial condition and domestic troubles, and which would not show any suicidal tendency, was properly excluded.—*Hall v. State*, 132 Ind. 317, 31 N. E. 536.

FOR CASES FROM OTHER STATES,  
SEE 26 CENT. DIG. HOMIC. § 303.

**§ 178. Incriminating others.**

[a] (Sup. 1878)

Where one of several indicted for murder has pleaded guilty, another of defendants, on his separate trial, cannot show that another person not indicted has admitted that he procured the killing of deceased, where there is no evidence of any act implicating such person in the murder.—*Jones v. State*, 64 Ind. 473.

[b] (Sup. 1893)

Defendant offered evidence that soon after the body was discovered, a tramp, who had been stopping about three weeks in the neighborhood, appeared at deceased's premises, demanded that the body be taken to the house, and attempted to exercise supervision over it; that he said that it should not remain in the barn longer, and that the coroner's jury would not know anything about it anyway; that on account of his conduct he was threatened with arrest; that he had been accused of robbery, and the officers were looking for him; and that on the night of the murder he was not at the house where he usually stayed. *Held*, that such evidence was properly excluded.—*Davidson v. State*, 135 Ind. 254, 34 N. E. 972.

FOR CASES FROM OTHER STATES,  
SEE 26 CENT. DIG. HOMIC. §§ 307-309.

**§ 179. Insanity.**

Harmless error, see post, § 338.

[a] (Sup. 1871)

On the trial of one for murder of his wife, he offered to prove that the deceased had for a long time been having adulterous intercourse with one B. and others, and that he (the defendant) had for a long time been cognizant of the adulterous conduct of his wife. *Held*, that the offered evidence, in the absence of evidence tending to show the actual insanity of the defendant, was incompetent as tending to show insanity.—*Sawyer v. State*, 35 Ind. 80.

[b] (Sup. 1901)

Where, in a prosecution for murder, the defense is insanity, evidence that at defendant's former place of residence he was known as "crazy John Rinkard" is inadmissible to show insanity.—*Rinkard v. State*, 62 N. E. 14, 157 Ind. 534.

FOR CASES FROM OTHER STATES,  
SEE 26 CENT. DIG. HOMIC. § 380.  
See, also, 21 Cyc. p. 948.

**§ 181. Passion and provocation.**

[a] (Sup. 1871)

Evidence that the person killed had entered into a combination with a third person to induce the defendant's wife to elope, and that the facts tending to prove such combination had lately come to the knowledge of the defendant, is competent.—*Cheek v. State*, 35 Ind. 492.

[b] (Sup. 1881)

Evidence that deceased, on being remonstrated with by witness for visiting defendant's wife, replied that he should go there as much as he pleased, and that he was not afraid of defendant, or of his shooting, *held* inadmissible; such statements not having been communicated to the accused.—*Combs v. State*, 75 Ind. 215.

Testimony of the wife of one charged with murder that deceased had coerced her into an act of adultery, and that she told defendant the night before the homicide that all the rumors and reports he had heard were true, is inadmissible in the absence of any proof that he knew of such act of adultery, or of what such rumors or reports consisted.—*Id.*

FOR CASES FROM OTHER STATES,  
SEE 26 CENT. DIG. HOMIC. §§ 383-385.  
See, also, 21 Cyc. pp. 950, 951.

**§ 182. Unlawful character of act of deceased, and resistance by accused.**

[a] (Sup. 1887)

Where, upon the trial of an indictment for assault and battery with intent to murder, there is no claim that the act was done in self-defense, and it appears that it was committed by the use of a deadly weapon in repelling an alleged trespass of a character not justifying the use of such a weapon, evidence that the injured person had some time previously burned certain property in which the accused had an interest, and that it was the knowledge of this, which had been communicated to him, that caused him to resort to such means to repel the trespass, is inadmissible.—*Rauch v. State*, 110 Ind. 384, 11 N. E. 450.

FOR CASES FROM OTHER STATES,  
SEE 26 CENT. DIG. HOMIC. § 386.  
See, also, 21 Cyc. p. 951.

**§ 186. Self-defense.**

FOR CASES FROM OTHER STATES,  
SEE 26 CENT. DIG. HOMIC. §§ 390-420.  
See, also, 21 Cyc. pp. 954-971.

**§ 187. — In general.**

[a] (Sup. 1887)

On a trial for assault with intent to murder, defendant was permitted to state that his object in shooting at the prosecuting witness was to scare him, and that he did not intend to kill him when he shot at him. *Held* sufficient-

ly explicit both as to the motive which induced the shooting, and as to the intention with which it was done, to show that the same was inconsistent with any theory of self-defense.—*Rauck v. State*, 11 N. E. 450, 110 Ind. 384.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 390, 390½.

See, also, 21 Cyc. pp. 954, 961, 962, 969, 971.

**§ 188. — Character and habits of person killed or assaulted.**

[a] (Sup. 1859)

Where the defense is self-defense, the character of the deceased, especially if known to the defendant, is material, and may be shown by the state.—*Dukes v. State*, 11 Ind. 557, 71 Am. Dec. 370.

[b] (Sup. 1891)

In a trial for assault with intent to kill, where defendant claims self-defense, he may show assaults made by the prosecuting witness on other persons.—*Bowlus v. State*, 130 Ind. 227, 28 N. E. 1115.

In rebuttal of evidence of threats by the person assaulted, and assaults by him on third persons, the state may show his general reputation for peace.—*Id.*

[c] (Sup. 1892)

On a prosecution for assault and battery with intent to kill, testimony that eight or nine years prior to the difficulty the injured person used a knife on the witness, and that knowledge of the fact was brought to the defendant prior to the difficulty for which he was on trial, was admissible.—*Smith v. State*, 31 N. E. 807, 132 Ind. 145.

[d] (Sup. 1892)

Where defendant, on trial for murder, testifies that deceased assaulted him, and that he apprehended great injury from the assault, the peaceable character of deceased may be shown in rebuttal.—*Fields v. State*, 134 Ind. 46, 32 N. E. 780.

[e] (Sup. 1899)

Where the defendant testified that he killed deceased in self-defense, while the latter was committing an apparently felonious assault on him, the prosecution may, without defendant's consent, and though no evidence has been introduced against deceased to show that his reputation for peaceableness is bad, show that deceased had the reputation of being a peaceable man.—*Thrawley v. State*, 55 N. E. 95, 153 Ind. 375.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 391-397.

See, also, 21 Cyc. pp. 956-960; notes, 2 L. R. A. (N. S.) 102, 3 L. R. A. (N. S.) 352.

**§ 189. — Previous quarrels and ill feeling.**

[a] (Sup. 1863)

In justifying a homicide in defense of person, property, etc., it is competent for the defendant to give in evidence any facts tending to show the character of the attack he resisted, the intention with which it was made, and that he had reasonable grounds to believe it was necessary to do what he did in resisting it; and to this end he may show the relations that had existed between himself and the deceased for an indefinite period before the killing.—*De Forest v. State*, 21 Ind. 23.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 398.

See, also, 21 Cyc. p. 962.

**§ 190. — Previous threats by person killed or assaulted.**

[a] (Sup. 1859)

On a trial for murder, defendant may show that deceased in a secret society had threatened defendant's life, though it did not appear whether the defendant knew of the threats.—*Dukes v. State*, 11 Ind. 557, 71 Am. Dec. 370.

[b] (Sup. 1877)

In the absence of any showing as to the time when the alleged offensive conduct of deceased occurred, testimony, offered by one charged with murder, as to threats, insulting and abusive language, and disrespectful treatment of defendant by deceased, and that the latter had challenged defendant to fight, is properly excluded.—*Gillooley v. State*, 58 Ind. 182.

[c] (Sup. 1883)

On a trial for murder, evidence of threats by the deceased told to the defendant just before the fatal encounter, which was begun by deceased, as also similar warnings by others at the same time, are admissible.—*Wood v. State*, 92 Ind. 269.

[d] (Sup. 1886)

On a trial for assault with intent to murder, it having been proved that the person assaulted first attacked defendant, evidence of previous threats made by him is admissible to illustrate the character of the attack, although they were never communicated to the accused.—*Leverich v. State*, 105 Ind. 277, 4 N. E. 852.

[e] (Sup. 1887)

On the trial of an indictment for murder, where the accused pleads self-defense, and there is evidence tending to show a standing feud between the families of the accused and the deceased, statements of the deceased's father, made in the deceased's presence, and to which he listened in silence, to the effect that, if the accused's family did not look after themselves, deceased would shoot some of them, are admissible as tending to establish any matter in controversy at the trial, and not only for the purpose of impeaching the credibility of deceased's father, who had denied making such state-

ments on cross-examination.—*Mayfield v. State*, 110 Ind. 591, 11 N. E. 618.

[f] (Sup. 1891)

In a trial for assault with intent to kill, where defendant claims that he acted in self-defense, he may testify as to threats made by the prosecuting witness.—*Bowlus v. State*, 130 Ind. 227, 28 N. E. 1115.

[g] (Sup. 1898)

Testimony of threats of violence by the deceased against the accused, without proof of overt acts to carry the threats into execution, is inadmissible.—*Ellis v. State*, 52 N. E. 82, 152 Ind. 326.

Threats made by deceased, which were not communicated to defendant before the homicide, are inadmissible.—*Id.*

[h] (Sup. 1900)

Where defendant claimed that at the time of the alleged felonious assault he believed, from appearances, that the prosecuting witness was advancing with a gun, until he turned, when defendant saw it was an umbrella, and stopped firing, it was error to exclude evidence of a prior altercation between the parties, and a threat by the witness to take defendant's life.—*Enlow v. State*, 57 N. E. 539, 154 Ind. 604.

[i] (App. 1906)

On a prosecution for assault and battery with intent to commit murder, where it does not appear that prosecuting witness made an attack on defendant, or that defendant was in any imminent danger of great bodily harm, there is no reversible error in excluding evidence of threats against defendant by prosecuting witness not communicated to defendant prior to the commission of the offense.—*Guy v. State*, 77 N. E. 855, 37 Ind. App. 691.

[j] (Sup. 1908)

In a prosecution for homicide, testimony of accused that a certain person had heard deceased make a threat respecting defendant was properly excluded where it was not shown how defendant learned of the incident he proposed to relate or that his conduct at the time of the homicide was influenced by such threat.—*Duncan v. State*, 171 Ind. 444, 86 N. E. 641.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 399-413.

See, also, 21 Cyc. pp. 962-968; notes, 17 L. R. A. 654, 3 L. R. A. (N. S.) 523, 526; notes, 1 Am. Dec. 373, 61 Am. Dec. 53; note, 89 Am. St. Rep. 691.

§ 193. — Possession and use of weapons by person killed or assaulted.

[a] (Sup. 1871)

On a trial for murder, evidence of the possession of a knife by the deceased a short time before the date of the occurrence which resulted in his death is proper for the consideration

of the jury, and also evidence of the threats made by the deceased, whether known to the defendant or not, and either when exhibiting the knife or at other times.—*Holler v. State*, 37 Ind. 57, 10 Am. Rep. 74.

[b] (Sup. 1898)

Where defendant, accused of murder, testified that deceased was attempting to throw a stone at him, evidence that deceased did not have a stone was proper rebuttal.—*Lillard v. State*, 50 N. E. 383, 151 Ind. 322.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 416.

§ 194. — Imminence and apprehension of danger to accused.

[a] (Sup. 1882)

Where self-defense was pleaded to an indictment for murder, *held*, that the prisoner might testify as to his belief that his life was in danger.—*Duncan v. State*, 84 Ind. 204.

[b] (Sup. 1884)

On a trial for murder, wherein defendant pleaded in self-defense that when he shot deceased the latter was striking at him with a knife, evidence that the night before deceased told defendant of two felonious assaults which he had committed, and that he preferred a knife to a pistol, as more effective, *held* admissible, as showing that defendant had ground for believing that the attack on him was felonious.—*Boyle v. State*, 97 Ind. 322.

[c] (Sup. 1899)

Evidence of decedent's reputation for peaceableness, where it is shown that deceased and defendant had been neighbors for a long time, is competent on the question of the honesty of defendant's belief that he was in imminent peril.—*Thrawley v. State*, 55 N. E. 95, 153 Ind. 375.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 417-419.

See, also, 21 Cyc. pp. 969-971.

§ 198. Defense of property.

[a] (Sup. 1859)

In justifying a homicide in defense of personal property, etc., the defendant may give in evidence any facts tending to show the character of the attack which he resisted, the intention with which it was made, and that he had reasonable grounds to believe that it was necessary to go to the extent he did in resisting it.—*Dukes v. State*, 11 Ind. 557, 71 Am. Dec. 370.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 423.

See, also, 21 Cyc. p. 972.

(C) DYING DECLARATIONS.

Reception in evidence, see post, § 267.

### § 201. Condition of person making declaration.

Question for court or for jury, see post, § 218.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 429-438.

See, also, 21 Cyc. pp. 976-978.

### § 202. — Danger and imminence of death.

[a] (Sup. 1880)

The fact that deceased, who was wounded in the mouth, was able, at the time of making dying declarations, to get up out of bed, go to the window, and explain the situation by signs, and go back to bed without assistance, *held* not a valid objection to their admissibility.—*Jones v. State*, 71 Ind. 66.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 429.

See, also, 21 Cyc. p. 976; note, 56 L. R. A. 381.

### § 203. — Sense of impending death.

[a] (Sup. 1899)

Where the statements of a person are offered in evidence as his dying declarations, the proof must clearly show that the declarant was in fact at the very point of death, and that he was fully aware of that fact, not as a matter of conjecture or apprehension, but as an inevitable fact. He need not have declared that he expected to die, but his condition must have been such that, of necessity, such an impression must have existed in his mind.—*Morgan v. State*, 31 Ind. 193.

Where deceased was wounded by two small pistol balls, one in the jaw (not dangerous) and the other in the abdominal cavity, and after being wounded pursued his assailant a quarter of a mile, and after returning home said that he was in a "bad fix," and sent for a doctor, saying that he "believed he would die," and had "given up all hopes," but the doctor was not satisfied that the wounds were fatal, and deceased repeatedly sent for the doctor on that day and the following one, on which he died, the declarations made on the first day do not sufficiently appear to have been made under a sense of impending death to be admissible.—*Id.*

[b] (Sup. 1878)

To render dying declarations admissible in evidence, it must be shown that the declarant was fully persuaded that his death was rapidly approaching, and was so near that all motives to falsity were superseded by the strongest motives to strict veracity; and the proof should clearly show to the trial judge that this condition existed.—*Watson v. State*, 63 Ind. 548.

[c] (Sup. 1890)

Where, when a statement was written and signed, the deceased was suffering from a gunshot wound, from the effect of which he died in a few hours, and at the time he made the declarations it was his solemn conviction that

he must die in a very short time, it is admissible as a dying declaration, so far as it relates to the *res gestæ*.—*Archibald v. State*, 122 Ind. 122, 23 N. E. 758.

[d] (Sup. 1905)

Where it appears that in the afternoon deceased expressed a belief that she would not get well, that she gradually grew worse until the physician had abandoned hope of her recovery, and that at midnight, when the declarations were made, she was very weak and unable to speak more than a few words, and that she died early the following morning, the trial court was justified in holding that the declarations were made under a sense of impending death, without a hope of recovery.—*Gipe v. State*, 75 N. E. 881, 165 Ind. 433, 1 L. R. A. (N. S.) 419, 112 Am. St. Rep. 238.

The character of the wound of one assaulted, and who receives injuries from which he dies, may of itself warrant the inference that dying declarations made by him were under a sense of certain and speedy death.—*Id.*

[e] (Sup. 1907)

In determining whether dying declarations were made by the declarant under the sense of approaching death, the court may take into consideration the condition of the declarant and the nature of his injuries.—*Williams v. State*, 168 Ind. 87, 79 N. E. 1079.

To make the declaration of decedent competent against his assailant, it must appear that decedent, at the time of the utterance, was under a sense of impending death without hope of recovery.—*Id.*

Though decedent did not in terms state he believed he was at death's door, where two or three hours after being shot, he told witness he was "all in," that he was "a goner," that defendant had made "a sieve" of his "insides," and his facial expression indicated great suffering, his statements were admissible as dying declarations.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 430-437.

See, also, 21 Cyc. p. 976; note, 56 L. R. A. 382.

### § 204. — Time intervening before death.

[a] (Sup. 1880)

Dying declarations *held* admissible, although deceased lingered for 11 days after he made them.—*Jones v. State*, 71 Ind. 66.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 438.

See, also, 21 Cyc. p. 978; notes, 56 L. R. A. 421, 1 L. R. A. (N. S.) 419.

### § 205. Circumstances attendant on making of declaration.

[a] (Sup. 1906)

A dying declaration is admissible in evidence in a murder case, although not made in

the presence of defendant.—*Shenkenberger v. State*, 57 N. E. 519, 154 Ind. 630.

[b] (Sup. 1900)

Where a dying declaration was admitted in evidence, the declarant's statement that she was mortally wounded, and about to die, was admissible to show the surrounding circumstances, that the jury might determine what credit should be given the declaration.—*Green v. State*, 57 N. E. 637, 154 Ind. 655.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 443.

## § 206. Making and form of declaration.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 439-441.

See, also, 21 Cyc. p. 979; note, 56 L. R. A. 423.

## § 207. — In general.

[a] (Sup. 1880)

Where deceased communicated dying declarations by signs to A. in response to questions, and A. repeated them to B., who wrote them down, and they were afterwards read over to deceased who said they were correct and signed the paper, such written statement is competent to go to the jury.—*Jones v. State*, 71 Ind. 66.

[b] (Sup. 1898)

The fact that a dying declaration has been reduced to writing does not preclude evidence of unwritten dying declarations made on other occasions.—*Lane v. State*, 51 N. E. 1056, 151 Ind. 511.

Where several dying declarations are made at different times, all are admissible.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 439.

See, also, 21 Cyc. p. 979.

## § 214. Subject-matter and relevancy.

[a] (Sup. 1880)

Dying declarations cannot be taken as proof of previous threats by defendant against deceased; but where such declarations were reduced to writing, and contained a statement of the existence of such threats, *held*, that the remainder of the declaration was not rendered inadmissible thereby.—*Jones v. State*, 71 Ind. 66.

[b] (Sup. 1881)

Dying declarations are admissible to prove what was done at the time of the commission of the unlawful act which caused the death, but not to prove what occurred before or afterwards.—*Montgomery v. State*, 80 Ind. 338, 41 Am. Rep. 815.

[c] (Sup. 1882)

In a prosecution for homicide, testimony of the accused that deceased, the morning after the fatal injury, had said that accused had not hit him with a rock the night before, but that another person had, was properly excluded.—*Powers v. State*, 87 Ind. 144.

[d] (Sup. 1886)

The name of the person who committed the homicide, as well as the name of his victim, may be proved by the dying declarations of the deceased.—*Boyle v. State*, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 448-450.

See, also, note, 56 L. R. A. 369.

## § 215. Competency of declaration as evidence.

[a] (Sup. 1874)

On a trial for murder, declarations of the deceased, made when in extremis, consisting of expressions of opinion as to who it was that fired the fatal shot, based on previous threats and what had previously occurred between the deceased and the accused, are inadmissible.—*Binns v. State*, 46 Ind. 311.

[b] (Sup. 1880)

Deceased, a few minutes after the shooting, said, "Prince Jones shot me." *Held* clearly mere narrative, and not admissible as a dying declaration.—*Jones v. State*, 71 Ind. 66.

[c] (Sup. 1881)

Where defendant was charged with abortion under Rev. St. 1881, § 1923, and it appeared that the woman died in consequence thereof, it was error for the court to admit in evidence as a part of her dying declaration her statement that "the operation was performed for the purpose of producing an abortion," it being the statement of a conclusion.—*Montgomery v. State*, 80 Ind. 338, 41 Am. Rep. 815.

[d] (Sup. 1884)

Where a dying declaration offered in evidence was in the form of questions and answers, it was not inadmissible because in one of the questions decedent was asked what reason, if any, had the man for shooting him, to which he responded, "Not any that I know of," on the ground that it was a mere expression of opinion.—*Boyle v. State*, 97 Ind. 322.

[e] (Sup. 1886)

The dying declaration of the deceased was taken in the form of questions and answers; and he was asked, "What reason, if any, had the man for shooting you?" to which he answered: "Not any that I know of. He said he would shoot my damned heart out." *Held* to be admissible, and not the expression of an incompetent opinion.—*Boyle v. State*, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218.

[f] (Sup. 1896)

Deceased's dying declaration that he made no attempt to injure accused is admissible, being a statement of fact, and not an opinion.—*Lane v. State*, 51 N. E. 1056, 151 Ind. 511.

[g] (Sup. 1900)

A dying declaration of a deceased person to the effect that she knew that her mother-in-law (defendant) had poisoned her, and that that

was the way she met her death, is, in form, the statement of a fact, and not an expression of opinion, and is admissible.—*Shenkenberger v. State*, 57 N. E. 519, 154 Ind. 630.

In a prosecution for murder, where defendant is charged with poisoning her daughter-in-law, the dying declaration of deceased in reference to her impending death, that "it was a strange death to die, to be poisoned by her mother-in-law," is merely the statement of a fact, and hence is admissible.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 451-456.

See, also, 21 Cyc. pp. 987-991; note, 56 L. R. A. 375.

### § 216. Preliminary evidence.

[a] (Sup. 1900)

A written statement of deceased, made the night before she died, declared: "I realize that I must die; that I am mortally wounded. I say, as I am about to die, that [accused] shot me." The uncontradicted testimony was that deceased said when making the statement she knew she could not live long, and seemed very weak, and had to "stop between her talk." *Held*, that sufficient predicate was laid for the admission of such statement as a dying declaration.—*Green v. State*, 57 N. E. 637, 154 Ind. 655.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 457.

See, also, 21 Cyc. pp. 982-986.

### § 217. Method of proof.

[a] (Sup. 1846)

The substance of a dying declaration may be given, if the witness cannot give the precise language.—*Ward v. State*, 8 Blackf. 101.

[b] (Sup. 1900)

In a murder case, it is not error to overrule an objection to testimony of the dying declaration of deceased on the ground that the written statement is the best evidence, where there has been no evidence that decedent's declarations were reduced to writing.—*Shenkenberger v. State*, 57 N. E. 519, 154 Ind. 630.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 462.

See, also, 21 Cyc. p. 996.

### § 218. Determination of question of admissibility.

[a] (Sup. 1884)

It is the duty of the court to determine, in the first place, the admissibility of declarations sought to be introduced as dying declarations.—*Doles v. State*, 97 Ind. 555.

[b] (Sup. 1907)

Whether a dying declaration was made under a sense of impending death or not is a question for the trial court and not for the jury.—*Williams v. State*, 168 Ind. 87, 79 N. E. 1079.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 458, 459.

See, also, 21 Cyc. p. 986.

### § 220. Contradiction and corroboration.

[a] (Sup. 1900)

On a prosecution for homicide, statements made by the deceased, though not dying declarations, were admissible to impeach her dying declaration introduced by the state, notwithstanding defendant had been allowed to introduce another and contradictory dying declaration by way of impeachment.—*Green v. State*, 57 N. E. 637, 154 Ind. 655.

A dying declaration introduced by defendant stated that a woman was the murderer rather than defendant, whom declarant had accused in a former statement, and the state's evidence was that the shot was fired from a small-caliber revolver, and that the assassin spoke in an assumed voice that sounded as much like a woman's as like a man's, and had on man's attire, including a long overcoat. *Held*, that in such a state of the evidence defendant was entitled to show that the woman had a small revolver repaired shortly before the homicide; that in the evening of the killing she was seen to leave her home disguised as a man, with a long overcoat, and go in the direction of the scene of the tragedy.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 461.

See, also, 21 Cyc. p. 994.

### § 221. Effect.

[a] (Sup. 1884)

It is for the jury to determine on the weight or credibility of dying declarations.—*Doles v. State*, 97 Ind. 555.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 463, 464.

See, also, 21 Cyc. p. 992.

## (D) PROCEEDINGS AT INQUEST.

### § 222. Admissibility in general.

[a] (Sup. 1885)

In a trial for murder, the truth or untruth of the reply, "I don't know," made by an assistant prosecuting attorney to the query put to him by the defendant, at the coroner's inquest, as to whether her signing her testimony would "clear" or "criminate her," is not material as evidence in the trial, when it appears that such reply was made after such statement had been completed and taken down, and that no threats or inducements had been made to urge the making of such statement.—*Epps v. State*, 102 Ind. 539, 1 N. E. 491.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 465.

See, also, 21 Cyc. p. 994; note, 68 L. R. A. 285.

**§ 223. Testimony and statements of accused.**

[a] (Sup. 1833)

In a murder case the voluntary statements made by defendant at the coroner's inquest, and signed by him, are admissible against him, without introducing all the proceedings at the inquest.—*Davidson v. State*, 135 Ind. 254, 34 N. E. 972.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. § 466.

See, also, 21 Cyc. p. 994; note, 70 L. R. A. 33.

**§ 226. Method of proof.**

[a] (Sup. 1878)

On a trial for murder, where the defendant has testified in his own behalf, the written statement of the testimony given by him at the coroner's inquest is admissible to contradict him.—*Woods v. State*, 63 Ind. 353.

Since the law presumes that a coroner holding an inquest has complied with 2 Rev. St. p. 20, in reducing all the testimony to writing, parol evidence thereof is inadmissible, unless the proper foundation for secondary evidence has been laid.—*Id.*

[b] (Sup. 1880)

Where the proceedings before a coroner are so irregular that the written examination is not admissible in evidence, it is competent to prove by parol what was testified to before him.—*Brown v. State*, 71 Ind. 470.

On a prosecution for homicide, the record of the testimony taken before the coroner at the inquest of the body of the deceased is inadmissible where the testimony of the witnesses had not been signed by them as required by statute.—*Id.*

[c] (Sup. 1832)

Parol evidence of the testimony given at a coroner's inquest is not admissible whenever the record can be used.—*Robinson v. State*, 87 Ind. 292.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. § 469.

See, also, 21 Cyc. p. 996.

**(E) WEIGHT AND SUFFICIENCY.**

Effect of dying declarations, see ante, § 221.  
Reasonable doubt, see CRIMINAL LAW, § 561.

**§ 228. Corpus delicti.**

[a] (Sup. 1855)

It is not essential to a conviction for murder that the body of the deceased be found.—*Stocking v. State*, 7 Ind. 326.

[b] (Sup. 1874)

On a trial for murder, evidence was given of the finding of the skeleton of a human being of the sex of the person charged to have been murdered and corresponding to his size. *Held*,

that this was sufficient evidence of the corpus delicti to justify the admission of circumstantial evidence to identify the skeleton as that of the murdered party, as well as to show the cause and manner of his death.—*McCulloch v. State*, 48 Ind. 109.

[c] (Sup. 1885)

In a prosecution for homicide, it is unnecessary to prove that the deceased was a human being.—*Epps v. State*, 1 N. E. 491, 102 Ind. 539.

[d] (Sup. 1904)

Evidence in a prosecution for homicide examined, considered, and *held* to sufficiently prove the corpus delicti.—*Dunn v. State*, 70 N. E. 521, 162 Ind. 174.

In a prosecution for homicide, it is not necessary to the proof of the corpus delicti that the body of the decedent should furnish evidence that death was caused by criminal means.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. §§ 471-476.

See, also, 21 Cyc. pp. 996-1001; note, 68 L. R. A. 33.

**§ 230. Intent.**

[a] (Sup. 1884)

Where, after a violent attack, death soon ensued, the jury were justified in finding an intent on the part of the assailant to kill.—*Luck v. State*, 96 Ind. 16.

[b] (Sup. 1896)

On trial for assault with intent to kill, the evidence showed that defendant, on starting for a dance in town, had taken his revolver with him, expressing his intention "to have a time"; that he had interfered in a quarrel between his brother and C., the prosecuting witness, threatening C., and at the same time putting his hand in his pistol pocket; that C. had charge of the door of the dance, and, defendant and his brother coming to the door and finding it locked, defendant's brother broke in the panel, whereupon C. opened the door; that defendant used a vile epithet to C., for locking the door, and advanced towards him with his hand raised, when C. knocked him down and defendant shot him. *Held*, that the evidence was sufficient to warrant the jury in finding felonious intent on the part of the defendant.—*Voght v. State*, 145 Ind. 12, 43 N. E. 1049.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. § 478.

See, also, 21 Cyc. p. 1001.

**§ 232. Deliberation and premeditation.**

[a] (Sup. 1886)

It is not error to instruct the jury that premeditation may be inferred from express malice, evidenced by threats and the seeking of an opportunity to kill the deceased.—*Boyle v. State*, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218.

It is not error to charge the jury that the uttering of threats, and the effort to secure an opportunity to kill the deceased, may be regarded as evidence of premeditation.—Id.

FOR CASES FROM OTHER STATES,  
SEE 26 CENT. DIG. Homic. § 480.  
See, also, 21 Cyc. p. 1003.

**§ 234. Commission of or participation in act by accused.**

[a] (Sup. 1868)

It is not enough to sustain a conviction for murder upon circumstantial evidence that the mystery of the crime cannot be solved from the evidence except upon the supposition of the defendant's guilt. The facts proved must be susceptible of explanation upon no reasonable hypothesis consistent with his innocence.—Schusler v. State, 29 Ind. 394.

[b] (Sup. 1877)

Although, upon a trial for murder, the evidence is merely circumstantial, yet, if there is no hypothesis by which, in the order of natural causes and effects, the circumstances proved can be explained consistently with the innocence of the defendant, the evidence is sufficient to justify his conviction.—Beavers v. State, 58 Ind. 530.

[c] (Sup. 1878)

Evidence that deceased was killed by a gunshot in the night, fired into his house through a window; that he and defendant had fought and were enemies; that there was tracks of a man and a horse across the fields between deceased's and defendant's houses the day after the killing; that the horse's tracks showed a peculiar shoe, unused in the country; that such shoes had been put the day before on a horse kept on defendant's place; that the man's tracks were made by new boots with large heels; that defendant wore such boots; that defendant remarked, when told of the killing, that "someone has killed" deceased "on my credit"; that he resisted arrest, denied his name, and, when arrested, had in his possession firearms and other weapons and a mask of muslin,—sufficiently supports a verdict of guilty of murder.—Shepherd v. State, 64 Ind. 43.

[d] (Sup. 1879)

An instruction that, if the jury should have a reasonable doubt as to whether the defendant made certain tracks leading to a window where the deceased stood when shot, they should find him not guilty of the murder charged, was properly refused, since other evidence might have established his guilt.—Binns v. State, 66 Ind. 428.

[e] (Sup. 1880)

An instruction that no act of defendant after the commission of a murder by another could "establish" his guilt is erroneous, since such acts might be considered as establishing his participation, though they could not make

him a participator.—Wade v. State, 71 Ind. 535.

[f] (Sup. 1882)

Admissions that deceased was facing a window from which shots were fired, and that defendant stood about six feet to his right, do not enable the court to say that defendant could not have fired the fatal shot, which is shown to have entered the body near the center of the breastbone, and ranged backward and downward to the lumbar vertebrae.—Burchfield v. State, 82 Ind. 580.

[g] (Sup. 1893)

On prosecution for homicide, evidence examined, and held insufficient to sustain a conviction.—Plummer v. State, 34 N. E. 968, 135 Ind. 308.

[h] (Sup. 1897)

Defendant was charged with the murder of his wife. The corpus delicti was proved. The murder was in the night. Defendant and his wife were alone together in the house during the evening, and no one else was found there when, after the murder, he gave the alarm. He then stated that burglars had entered the house, and had shot his wife while she was lying by his side in bed. He had received several wounds, but none of them were dangerous, and all the evidence tending to support his statements was such as he could have fabricated. Held, that circumstantial evidence, the facts proved being numerous and all consistent with the commission of the crime by defendant, and inconsistent with his statements, which they showed beyond a reasonable doubt to have been fabrications, and tending also to show a motive, was sufficient to warrant the jury in finding to a moral certainty that every hypothesis except that of defendant's guilt was excluded.—Hinshaw v. State, 47 N. E. 157, 147 Ind. 334.

[i] (Sup. 1900)

Evidence on a trial for murder that the refusal of deceased, an inmate of a house of prostitution, to cohabit with accused, aroused his resentment and jealousy; that shortly before the homicide he declared that he would "fix her"; that he went to a house where she lived, armed with a revolver, and, after a short and seemingly friendly interview, shot her, and then fired twice at himself; and that while she lay dying he said he had "fixed her"—was sufficient to sustain a conviction for murder in the first degree.—Blume v. State, 56 N. E. 771, 154 Ind. 343.

[j] (Sup. 1901)

Evidence considered, and held sufficient to justify a conviction for murder.—Keith v. State, 61 N. E. 716, 157 Ind. 376.

[k] (Sup. 1908)

Evidence held to sustain a conviction for murder in the first degree on the theory that accused and his wife and son conspired to kill the decedent, though the homicide was actually

committed by the son alone.—*Williams v. State*, 170 Ind. 630, 85 N. E. 113.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. §§ 482-493; 14 CENT. DIG. Crim. Law, §§ 1127-1138.  
See, also, 21 Cyc. pp. 1005-1010.

**§ 237. Insanity.**

[a] (Sup. 1862)

If a jury have a reasonable doubt whether one on trial for murder was sane at the time of the commission of the act, then they must have a reasonable doubt as to whether he purposely and maliciously committed the crime.—*Polk v. State*, 19 Ind. 170, 81 Am. Dec. 382.

[b] In a prosecution for murder, evidence considered, and held insufficient to show that accused was insane at the time of the crime.—(Sup. 1902) *Wheeler v. State*, 63 N. E. 975, 158 Ind. 687; (1903) *Jackson v. Same*, 67 N. E. 690, 161 Ind. 36; (1903) *Hoover v. Same*, 68 N. E. 591, 161 Ind. 348.

[c] (Sup. 1903)

Evidence in prosecution for murder, consisting of the testimony of defendant's daughter as to acts indicating defendant's mental aberration, and of expert testimony as to probable insanity based thereon, considered, and held insufficient to overthrow a verdict of guilty, although uncontradicted.—*Freeze v. State*, 65 N. E. 915, 159 Ind. 597.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. § 500.  
See, also, 21 Cyc. p. 1011.

**§ 239. Passion and provocation.**

[a] (Sup. 1875)

Where it is proved that the defendant in an indictment for assault and battery with intent to kill struck the injured party, but that he had no grudge against him or quarrel with him, and no motive to kill him, and that he was excited from some cause, and while in that condition he received, or thought he received, a blow from the injured party, such circumstances will tend to show that the blow struck by the defendant was given in the heat of passion and without an intent to kill.—*Field v. State*, 50 Ind. 15.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. § 502.  
See, also, 21 Cyc. p. 1012.

**§ 241. Excuse or justification in general.**

[a] (Sup. 1893)

On a trial for murder it is error to instruct the jury to find defendant guilty unless it is found beyond a reasonable doubt that the killing was justifiable on the ground of self-defense, or unless it is found beyond a reasonable doubt that defendant was of unsound mind at the time, as the instruction required defendant to prove his innocence in those re-

spects beyond a reasonable doubt, the homicide being established.—*Plummer v. State*, 135 Ind. 308, 34 N. E. 968.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. § 504.  
See, also, 21 Cyc. pp. 1012-1015.

**§ 244. Self-defense.**

[a] (Sup. 1866)

Where deceased was killed in a saloon by defendant in presence of deceased's father and brother, and deceased when he entered the saloon was uninjured, but when he emerged had two pistol-shot wounds in his head, where five shots were fired in the saloon, of which defendant fired only four, and one shot was fired at him as he ran from the saloon, and deceased's father and brother swear that defendant did all the shooting and that the homicide was unprovoked, defendant's guilt does not clearly appear.—*Ex parte Heffren*, 27 Ind. 87.

[b] (Sup. 1904)

Upon a trial for murder, the use of a deadly weapon being proved, and the prisoner relying on self-defense to excuse him for the use of the weapon, the burden of showing such excuse is on the prisoner, and to avail him such defense must be proven by a preponderance of the evidence.—*Coolman v. State*, 72 N. E. 568, 163 Ind. 503.

[c] (App. 1906)

On a prosecution for assault and battery with intent to commit murder, evidence examined, and held insufficient to show that the prosecuting witness made an attack on defendant or that defendant was in any imminent danger of great bodily harm.—*Guy v. State*, 77 N. E. 855, 37 Ind. App. 691.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. §§ 507-509.

**§ 250. Degree of homicide in general.**

[a] (Sup. 1859)

Evidence held sufficient to support a conviction for murder.—*French v. State*, 12 Ind. 670, 74 Am. Dec. 229.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. §§ 515-517.  
See, also, 21 Cyc. p. 1016.

**§ 251. Degree of murder.**

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. §§ 518-538.  
See, also, 21 Cyc. pp. 1016-1019.

**§ 253. — First degree.**

[a] Evidence held to sustain conviction of murder in the first degree.—(Sup. 1880) *Brown v. State*, 70 Ind. 576; (1903) *Dunn v. Same*, 70 N. E. 521, 162 Ind. 174; (1904) *Spaulding v. Same*, 70 N. E. 243, 162 Ind. 297; (1907) *Cook v. State*, 82 N. E. 1047, 169 Ind. 430.

## [b] (Sup. 1886)

When all the other elements of murder in the first degree are proved beyond a reasonable doubt, proof of previous threats and efforts to kill will make out a case of murder in the first degree.—*Boyle v. State*, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218.

## [c] (Sup. 1894)

Defendant was at outs with deceased and his family about a fence which defendant claimed the right to maintain. There were suits, civil and criminal, between them, and then they went about armed. Finally, defendant, from his own premises, shot deceased on his premises, no words having passed between them. There was evidence that defendant had threatened deceased's life, and afterwards said he had taken it deliberately. The defense attempted to show self-defense; that deceased was trying to draw his weapon when defendant shot him; and the evidence was very conflicting. *Held*, that the supreme court would not set aside a conviction of murder in the first degree.—*Robinson v. State*, 138 Ind. 490, 38 N. E. 45.

## FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 523-532.

See, also, 21 Cyc. p. 1017.

## § 254. — Second and lesser degrees.

## [a] (Sup. 1881)

Evidence that the accused was at home, and that deceased had followed him there with the intention of forcing him into a fight, and that, in the altercation which followed, the accused had fatally stabbed deceased as the latter was making an assault upon him, *held* not to warrant a conviction of murder in the second degree.—*Miller v. State*, 74 Ind. 1.

## [b] (Sup. 1893)

Defendant armed himself with a loaded pistol, and remarked that he might kill some one that night. Afterwards he met deceased in a saloon, and when they went out, both being partly intoxicated, deceased fell, and defendant abused him as he lay on the ground. Deceased arose, saying that he would not take that from any one, and started towards defendant, who, when about 12 feet away, shot him. The evidence conflicted as to whether deceased had a stone in his hand. *Held*, that a verdict of murder in the second degree was sustained.—*Lillard v. State*, 50 N. E. 383, 151 Ind. 322.

## [c] (Sup. 1900)

Where defendant, who was sitting in a buggy near the sidewalk, on seeing the deceased pass along the street, began to abuse him by calling him vile names, and in the ensuing quarrel fired a fatal shot at deceased, and, as the latter staggered and retreated, arose in his buggy, and deliberately fired a second shot at the deceased, a verdict of murder in the second degree will not be disturbed as not supported by the evidence.—*Harris v. State*, 58 N. E. 75, 155 Ind. 265.

## [d] (Sup. 1908)

Where defendant, after an altercation with deceased, purposely did an act to hasten death, malice may be inferred, and a verdict of murder in the second degree is supported.—*Ludwig v. State*, 170 Ind. 648, 85 N. E. 345.

## FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 533-538.

See, also, 21 Cyc. p. 1019.

## § 255. Degree of manslaughter.

## [a] (Sup. 1890)

The evidence showed that an altercation took place between deceased and accused, the latter being in front of the door of his boarding house and deceased several feet away; and there was some evidence that deceased snapped a revolver at accused, who thereupon went into the house, and, without being pursued, returned with a gun, and without further provocation immediately shot deceased. *Held*, that a verdict for manslaughter would not be disturbed.—*Meredith v. State*, 122 Ind. 514, 24 N. E. 161.

## [b] (Sup. 1891)

Defendant was convicted of manslaughter. The evidence showed that he and his wife had parted; that shortly before the killing he had taken from her possession their infant son; that at a church she asked to see the child, which he refused to allow her to do; that his wife then seized the child, and he struck her, whereupon her father and two brothers assaulted him, and, as he was attempting to leave the church they followed him, got him down in the corner, and were all assaulting him, when he shot and killed one of the brothers; that before he shot he cried for help, and tried to defend himself by using his revolver as a club; that defendant had the reputation of being a good, law-abiding citizen. *Held*, that the evidence did not support the verdict.—*Coryell v. State*, 130 Ind. 51, 29 N. E. 369.

## [c] (Sup. 1896)

It appeared that defendant and his partner in the saloon business had quarreled in the afternoon, and that defendant had said to a third person that he was going to have a settlement in the morning, and, if his partner "didn't settle square, he'd kill him"; that, after the quarrel, defendant's partner put him out of the saloon, locked the door, and drove away with the key; that, in the evening, while defendant and others were sitting behind the saloon, a shot was fired from the rear window over defendant's head; that defendant went around to the front, whereupon a second shot came from within; and that defendant, who stood concealed, fired as soon as the front door opened, and killed the person who emerged, who proved to be defendant's partner. Defendant claimed he thought it was a burglar. *Held* to warrant a conviction for manslaughter.—*Pigg v. State*, 145 Ind. 560, 43 N. E. 309.

[4] (Sup. 1897)

Two eyewitnesses of the homicide, who were friendly to defendant, testified that his wife said to him, while he was playfully snapping a broken revolver at her, "You can't make me finch," to which defendant replied, "I can with the other," and, taking another revolver, pointed it at his wife, and clicked it several times, when it went off and killed her. Others testified that defendant told them substantially the same story after the shooting, but the latter denied that he pointed the weapon at deceased or that the alleged remarks were made by himself and her, and claimed that he was carrying the weapon to the bureau when it was discharged. *Held* sufficient to sustain a conviction for involuntary manslaughter.—*Siberry v. State*, 149 Ind. 684, 39 N. E. 936, 47 N. E. 458.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 539-541.

See, also, 21 Cyc. p. 1021.

### § 257. Assault with intent to kill.

[a] (Sup. 1834)

In a prosecution for an assault with a felonious intent to kill, evidence that accused had in his hands at the time the assault was committed a loaded pistol, that he fired three shots from such pistol, one of which passed through the door behind which the person assaulted then was, was sufficient to authorize the court to find, not only the unlawful attempt of the accused, but his present ability to commit the particular felony charged in the indictment.—*Murphy v. State*, 97 Ind. 579.

[b] (Sup. 1891)

On a trial for assault with intent to kill, where the evidence shows that defendant armed himself and sought to provoke a fight with the man whom he shot, and the latter testifies that defendant fired the first shot, a judgment of guilty will not be disturbed.—*Mellen v. State*, 130 Ind. 598, 29 N. E. 369.

[c] (Sup. 1899)

Evidence that defendants declared they would kill the prosecuting witness, and that they perpetrated a vicious assault and battery on him, whereby he was severely injured, is sufficient to support a conviction of an assault with intent to kill, and that he was not killed is no reason to acquit of a felonious intent.—*Clinton v. State*, 55 N. E. 420, 153 Ind. 540.

[d] (Sup. 1903)

Where it was proved that defendant attacked prosecutor with a hatchet without provocation, inflicting a wound on his head, which disabled him for several weeks, the manner of the attack, the weapon used, and the location and character of the wound were sufficient to authorize the jury to infer that the assault was made with intent to murder.—*Starr v. State*, 67 N. E. 527, 160 Ind. 661.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 543-552.

See, also, 21 Cyc. p. 1021.

## VIII. TRIAL.

Grounds for continuance, see CRIMINAL LAW, §§ 589-598.

Right to trial by jury, see JURY, § 24.

Right to trial by jury, waiver, see JURY, § 29.

Separation of jury, see CRIMINAL LAW, § 854.

### (A) CONDUCT IN GENERAL.

Harmless error, see post, § 336.

### § 262. Presence and use of articles connected with offense.

[a] (Sup. 1883)

In a murder case, it is proper to permit the jury to see and handle a weapon with which it is alleged the crime was committed.—*McDonel v. State*, 90 Ind. 320.

[b] The clothing worn at the time by deceased may be exhibited to the jury.—(Sup. 1884) *Story v. State*, 99 Ind. 413; (1893) *Davidson v. State*, 135 Ind. 254, 34 N. E. 972.

[c] (Sup. 1905)

In homicide, where the testimony was such as to present a question for the jury as to whether the wounds inflicted upon deceased were made by defendant's naked fists or by some hard instrument, like a knife, it was proper to exhibit to the jury a knife which was taken from defendant after he was placed in jail.—*Osburn v. State*, 73 N. E. 601, 164 Ind. 262.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 557.

See, also, 21 Cyc. p. 1024.

### § 263. Reception of evidence.

Necessity for limiting consideration of testimony, see CRIMINAL LAW, § 673.

Necessity for preliminary proof, see CRIMINAL LAW, § 681.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 558-561.

See, also, 21 Cyc. pp. 1025, 1026.

### § 267. — Use of dying declarations.

[a] (Sup. 1834)

It is in the discretion of the court whether evidence laying the foundation for the admission of dying declarations shall be given in the presence of the jury.—*Doles v. State*, 97 Ind. 555.

[b] (Sup. 1890)

Where a dying declaration is objected to as an entirety, without specifying the particular statements which do not relate to the res gestæ, it is not error to overrule the objection, where it contains relevant statements.—*Archibald v. State*, 122 Ind. 122, 23 N. E. 758.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 561.

See, also, 21 Cyc. p. 1026.

(B) QUESTIONS FOR JURY.

Competency of dying declarations, see ante, § 218.

§ 268. Questions of law or of fact in general.

[a] (Sup. 1907)

In a prosecution for murder, evidence held to require the submission of the question of guilt to the jury.—*Sanderson v. State*, 169 Ind. 301, 82 N. E. 525.

FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. Homic. § 562.

See, also, 21 Cyc. pp. 1026, 1029, 1030.

§ 269. Elements of offense.

[a] (Sup. 1880)

In a prosecution for assault with intent to murder, the intention of the accused is for the jury.—*Kunkle v. State*, 32 Ind. 220.

FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. Homic. § 563.

See, also, 21 Cyc. p. 1027.

§ 276. Self-defense.

[a] (Sup. 1877)

On the trial of a defendant indicted for murder, the evidence showed that he, being disabled in one arm, had procured a pistol to defend himself against a threatened assault of an able-bodied man, and that, while standing on a public street, leaning against a building, surrounded by an excited crowd, he had been threatened by another person, and then struck by a third, the deceased, whom he had at once shot and killed. Held, under the evidence in a prosecution for homicide, that no question as to the duty of the defendant to retreat was presented to the jury.—*Runyan v. State*, 57 Ind. 80, 26 Am. Rep. 52.

[b] (Sup. 1898)

Evidence showed that deceased came to the door of a house where defendant boarded about 10 p. m., and, on defendant's receiving him at the door, he expressed a desire to stay all night; stating that the woman with whom the defendant boarded had told him that she was going to keep boarders. Defendant then went back into the house, and returned and told deceased the woman could not keep him. The deceased insisted on staying. Defendant then asked deceased if he was not sent there, and, not getting a satisfactory answer, again asked him, to which deceased replied, "No." Defendant closed the door, and, as he did so, deceased threw a beer bottle, striking the house about three feet from the door. Defendant immediately went to his bedroom, and, securing his revolver, went to the front door, opened it, and fired at once at the deceased, who was on the outside of the closed front gate about 15 feet away. There was evidence that the defendant had caused his landlady's husband to procure a divorce from her, and she testified that she and the defendant had discussed the probability of

her former husband sending some one to her house to find out how they were living. There was no evidence that the deceased attempted to enter the house, but the defendant claimed that he made a movement as if to shoot or throw at him when he opened the door, and that on this he fired the fatal shot. Held, that it was for the jury to determine whether defendant had reasonable ground to apprehend that his life was in danger, or that he was in danger of great bodily harm from deceased.—*Ellis v. State*, 52 N. E. 82, 152 Ind. 328.

FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. Homic. § 569.

See, also, 21 Cyc. p. 1028; note, 3 L. R. A. (N. S.) 535.

§ 282. Grade or degree of offense.

[a] (Sup. 1877)

The question whether a manslaughter committed by an accused was voluntary or involuntary is one of fact for the jury.—*Bruner v. State*, 58 Ind. 159.

FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. Homic. § 574.

See, also, 21 Cyc. p. 1030.

§ 282½. Extent of punishment.

[a] (Sup. 1878)

On a prosecution for assault with intent to kill, it was within the province of the jury to fix the punishment of the accused, and, if it was within the law, it cannot be disturbed as being excessive.—*McCulley v. State*, 62 Ind. 428.

FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. Homic. § 575.

See, also, 21 Cyc. p. 1030.

(C) INSTRUCTIONS.

Application of instructions to case, see CRIMINAL LAW, § 814.

Assumption as to facts, see CRIMINAL LAW, § 761.

As to alibi, see CRIMINAL LAW, § 775.

As to circumstantial evidence, see CRIMINAL LAW, § 784.

As to credibility of witnesses, see CRIMINAL LAW, § 785.

As to declarations of codefendants, see CRIMINAL LAW, § 779.

As to determination of questions of law as invading province of jury, see CRIMINAL LAW, § 766.

As to inferences from evidence, see CRIMINAL LAW, § 759.

As to presumptions and burden of proof, see CRIMINAL LAW, § 778.

As to principals, see CRIMINAL LAW, § 792.

As to reasonable doubt, see CRIMINAL LAW, § 789.

As to rules of evidence, see CRIMINAL LAW, § 777.

As to weight and sufficiency of evidence, see CRIMINAL LAW, §§ 763, 764.  
Construction and effect of charge as a whole, see CRIMINAL LAW, § 822.  
Harmless error in failure or refusal to give instructions, see post, § 341.  
Harmless error in giving instructions, see post, § 340.  
Inadvertent errors, see CRIMINAL LAW, § 821.  
Opinion of court as to facts, see CRIMINAL LAW, § 762.  
Requests, see CRIMINAL LAW, § 824.  
Requests for further or more specific instructions, see CRIMINAL LAW, § 825.  
Requests for instructions already given, see CRIMINAL LAW, § 829.  
Time for asking instructions, see CRIMINAL LAW, § 826.

**§ 283. Province of court and jury in general.**

[a] (Sup. 1873)

The court instructed, on a trial for murder, as follows: "Remember that you are each responsible for the verdict you shall render, not forgetting, however, that no man can safely consider himself infallible; that no number of minds can agree upon a multitude of facts, such as this case presents, without some yielding of the judgment of individuals upon the evidence, some deference to the opinion of others, without what some might call compromise of different views. No man who is unwilling to do this within reasonable limits, and without a sacrifice of conscience, ought to have a place in the jury box or be a member of a deliberative body." *Held*, where the indictment was for murder in the first degree, and the evidence was all circumstantial and tended to prove murder in the first degree only, and there was a verdict of guilty of murder in the second degree, with a recommendation to executive clemency, that the charge was erroneous.—*Clem v. State*, 42 Ind. 420, 13 Am. Rep. 369.

[b] (Sup. 1877)

A charge to the jury, on a trial for murder, should call the attention of the jury to all the material facts necessary to be proved. An instruction commencing, "We will now direct your attention to the question whether the defendant gave Hannah" (the deceased) "strychnine with a criminal intent," *held* to be erroneous, as liable to be understood by the jury to assume the disputed point whether he gave her poison at all, leaving to them only the question of intent.—*Snyder v. State*, 59 Ind. 105.

[c] (Sup. 1883)

It is not error in a murder case to give the jury a careful and impartial admonition as to the importance of the case, as well to the rights of defendant as to the interests of society.—*Stout v. State*, 90 Ind. 1.

[d] (Sup. 1892)

An instruction that, unless the jury were satisfied beyond a reasonable doubt that defendant killed deceased, they should find him

not guilty, although not to be commended, in leading to the possible inference that, if thus satisfied, they were to find him guilty, does not contain a positive misstatement, and, where the killing is admitted, is not misleading.—*Fields v. State*, 134 Ind. 46, 32 N. E. 780.

Such an instruction, followed by the statement that if the jury were thus satisfied, and there remained a reasonable doubt as to whether the killing was with premeditated malice, defendant could not be found guilty in the first degree, is erroneous, as an affirmative pregnant, leaving the jury to infer that, in the absence of doubt, they should find him guilty.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 576-583.

See, also, 21 Cyc. pp. 1031-1035.

**§ 284. Corpus delicti.**

[a] (Sup. 1877)

On the trial of a defendant indicted for the alleged murder of a person whose dead body was found at a certain place, an instruction is correct which states that the questions for the determination of the jury are whether the deceased had been killed at such place, and whether such killing was murder or manslaughter, and that, if the deceased "was not so killed," they must find the defendant not guilty.—*Beavers v. State*, 58 Ind. 530.

[b] (Sup. 1880)

On trial for murder by willfully changing a switch on a railroad track, it was admitted by the defense that the death of deceased was caused by the wreck, which was caused by some person or persons changing the switch. *Held*, that these admissions did not justify the court in charging that "a great crime has been committed," since the admissions might be true, and the criminal intent be lacking in the person who changed the switch.—*Jackman v. State*, 71 Ind. 149.

[c] (Sup. 1881)

In a prosecution for murder, it is error to charge that, the wounding of deceased by defendant having been admitted, it only remains, as far as the corpus is concerned, to find from the evidence that the wound was fatal, since, to constitute the crime of murder, several circumstances must be shown, in addition to the mere infliction of a fatal wound.—*Batten v. State*, 80 Ind. 394.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 584.

See, also, 21 Cyc. p. 1035.

**§ 285. Elements of offense in general.**

[a] (Sup. 1881)

On indictment for poisoning, the court instructed the jury to convict if they were satisfied, etc., that the poison was administered by defendant, "as charged," with the purpose, etc., to kill and murder, and that death ensued "as alleged." *Held*, that the jury were sub-

stantially told that they were required to be satisfied that the crime was committed at the place charged in the indictment.—*Dyer v. State*, 74 Ind. 594.

[b] (Sup. 1884)

In a prosecution for murder, it was not error to instruct that if the jury believed, to the exclusion of all reasonable doubt, that accused committed the homicide as charged in the indictment, the precise hour at which it might have been done and the condition of the body as to being cold or warm were immaterial.—*Koerner v. State*, 98 Ind. 7.

[c] (Sup. 1885)

Where, in a prosecution for homicide from arsenical poisoning, the last sickness of the deceased immediately following his symptoms of arsenical poisoning was within a week's duration, it was not error for the court to omit to charge that death must have resulted within a year and a day after the poison was administered in order to justify a conviction.—*Epps v. State*, 1 N. E. 491, 102 Ind. 539.

FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. Homic. § 585.

See, also, 21 Cyc. p. 1035.

**§ 286. Intent, malice, deliberation, and premeditation.**

Harmless error, see post, § 340.

[a] (Sup. 1879)

An instruction, in a trial for murder, that if the killing was done unintentionally during an affray, or intentionally in hot blood engendered by the combat without malice, the crime was no more than manslaughter, was vitiated by the addition, "If the person who does the killing entertained malice towards his victim, and out of such malice slew him, his crime would be murder, notwithstanding his blood was heated in the combat."—*Patterson v. State*, 66 Ind. 185.

In a trial for murder, an instruction that if, in an unprovoked assault, the person assaulted is intentionally and unlawfully slain by his assailant, the latter is guilty of murder, notwithstanding his blood may have become so heated as to carry him beyond his original purpose, is erroneous, as it leaves out the elements of malice and premeditation.—*Id.*

[b] (Sup. 1883)

A verdict of guilty of murder in the second degree will be set aside for an erroneous definition of the crime in the charge, in that all reference to purpose and malice is omitted.—*Brooks v. State*, 90 Ind. 428.

[c] (Sup. 1886)

It is not error for the court, in its instructions on a trial for murder, to inform the jury what facts may be considered as evidence of premeditation.—*Henning v. State*, 106 Ind. 386, 6 N. E. 803, 7 N. E. 4, 55 Am. Rep. 756.

[d] (Sup. 1893)

A charge that "among" the usual evidences of premeditation are previous difficulty, ill will, and hatred, previous threats to kill, and previous preparation to take life, is not open to the objection that it does not enumerate all the evidences of premeditation, since it does not purport to do so.—*Davidson v. State*, 135 Ind. 254, 34 N. E. 972.

[e] (Sup. 1900)

Where, after the deceased had been fatally wounded by the first shot fired by defendant, and while he was staggering away at a distance of from 20 to 40 feet, defendant stood up in his buggy, and deliberately fired a second shot at deceased, and the evidence as to whether such shot took effect was conflicting, it was proper to instruct the jury that the firing of the second shot might be considered, in connection with the other circumstances, as tending to show malice.—*Harris v. State*, 58 N. E. 75, 155 Ind. 265.

[f] (Sup. 1910)

In a murder trial, an instruction that a mortal wound given with a deadly weapon in the previous possession of the slayer, without any or upon slight provocation, is *prima facie* willful and premeditated, was warranted by evidence that after a trifling drunken quarrel over a card game, in which there were no threats or attempted violence, accused walked several blocks to procure a deadly knife, with which, after returning to the place of quarrel, he stabbed decedent three times; the last wound being inflicted after decedent fell.—*Rigsby v. State*, 91 N. E. 925.

FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. Homic. §§ 586-591.

See, also, 21 Cyc. pp. 1035-1040.

**§ 287. Motive.**

[a] (Sup. 1902)

An instruction, on a prosecution for murder, that, though a motive to commit the crime might be shown as a circumstance tending to fix the crime on defendant, proof of motive was not essential to conviction, but that motive might be inferred from the commission of the crime itself, if the commission thereof by defendant and his sanity at the time of such act were proved beyond a reasonable doubt, was a correct exposition of the law on the subject of motive.—*Wheeler v. State*, 63 N. E. 975, 158 Ind. 687.

[b] (Sup. 1910)

The absence of motive for the killing of defendant's wife, in a case in which all the evidence for conviction is circumstantial, is a circumstance to be considered in his favor; and he is entitled to an instruction to that effect, there being evidence to support his theory of no motive.—*Porter v. State*, 91 N. E. 340.

FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. Homic. § 592.

See, also, 21 Cyc. p. 1040.

**§ 288. Nature and circumstances of act.**

[a] (Sup. 1858)

An instruction on a trial for homicide that if the jury find that the person inflicting the mortal wound was guilty of manslaughter only, and did not find that defendant inflicted the wound, and it was not proved that he was present aiding and assisting in giving the fatal blow, defendant could not be convicted, was erroneous as leading the jury to confine the aiding and assisting to the act of inflicting the fatal blow.—*Stipp v. State*, 11 Ind. 62.

[b] (Sup. 1893)

On a prosecution for murder, it was proper to permit the state, in support of its theory that deceased had been murdered at his dwelling, and afterwards been carried to a barn and deposited near the horses for the purpose of creating the impression that he had been killed by the horses, to show all things in any way forming part of the transaction from which an inference of guilt or innocence might be drawn, and the condition of things at the house of deceased immediately after the body was found.—*Davidson v. State*, 34 N. E. 972, 135 Ind. 254.

[c] (Sup. 1907)

In a prosecution for homicide, where circumstances and evidence tended to prove a preconcerted arrangement on the part of defendant and his codefendants to deprive deceased of his property, and that this led to the murder, the state was entitled to have instructions given to the jury fully presenting its view of the case as shown by the evidence.—*Cook v. State*, 169 Ind. 430, 82 N. E. 1047.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. § 593.

See, also, 21 Cyc. p. 1041.

**§ 291. Cause of death.**

[a] (Sup. 1872)

Where a general instruction has been given which limits defendant's responsibility to the effect of the blow given by him, and relieves him of responsibility for disease as cause of death, it is not error to refuse an instruction that sets out the particular facts relied on by defendant and applies to them that principle.—*Harvey v. State*, 40 Ind. 516.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. § 596.

See, also, 21 Cyc. p. 1043.

**§ 292. Elements of assault with intent to kill.**

Harmless error, see post, § 340.

[a] (Sup. 1866)

On the trial of an indictment for assault with intent to murder, the court instructed the jury that if they should find from the evidence, to the exclusion of a reasonable doubt, that the defendant intended to kill the prosecuting witness at the time, yet they would be warranted

under the law in acquitting the defendant of the intent to kill, if it was manifest and clear from the evidence that, because of the manner in which the gun was loaded or because of the distance between the defendant and the prosecuting witness, "it was physically impossible that death could possibly have resulted from the use of the means employed." *Held*, that the charge was too favorable to the defendant, and he had no right to complain of it.—*Kunkle v. State*, 32 Ind. 220.

[b] (Sup. 1877)

Where, on a prosecution for assault and battery with intent to murder, it appears that the injured party, being unarmed, had, after attacking the defendant, fled for safety from the defendant, who was armed and also aided by another, it is not available, as cause for a new trial, that an instruction to the jury in relation to the duty of the defendant when the injured party had retreated did not refer to the fact as to whether such retreat was or was not made in "good faith."—*Jarrell v. State*, 53 Ind. 293.

[c] (Sup. 1878)

In a prosecution for assault with intent to kill, a charge that, if the jury are satisfied that defendant unlawfully attempted to commit a violent injury upon the person assaulted, and then and there had a present ability to commit it as charged, "then does the evidence convince you beyond a reasonable doubt that such assault was perpetrated with intent to commit the felony mentioned in the indictment?" is not objectionable on the ground that the jury would reasonably infer that they should find defendant guilty if he attempted any violent injury upon the assaulted party, and had the ability, and intended to commit the injury charged.—*McCulley v. State*, 62 Ind. 428.

[d] (Sup. 1883)

In a prosecution for assault and battery with intent to kill, an instruction that, to convict, it must be proved beyond a reasonable doubt that at this county, within two years prior to filing the information, defendant committed an assault and battery on the person of C., and that at the time of the assault and battery he intended to kill said C., stated a correct proposition.—*Beller v. State*, 90 Ind. 448.

[e] (Sup. 1895)

On a trial for assault with intent to kill, an instruction that the mere fact that death did not ensue, or the mere statement of the defendant that he did not intend to kill the prosecuting witness, would not justify the jury in finding that defendant did not so intend; and that if one purposely shoots another with a deadly weapon, near a vital point, and in such manner that death would probably ensue, all the other elements of the crime concurring, the jury will be justified in believing that defendant intended to kill, though defendant himself claimed that he did not intend to kill, is not a charge

on the weight of evidence.—*Newport v. State*, 140 Ind. 299, 39 N. E. 926.

[I] (Sup. 1903)

Where defendant committed an assault and battery on prosecutor immediately after having assaulted prosecutor's brother, an instruction that if defendant engaged in a combat with prosecutor and his brother at the same time, and on the first assault by one of them with his fists only defendant used a deadly weapon on both, the use of such weapon without withdrawing or attempting to withdraw from the contest was not excusable, was not erroneous in requiring a withdrawal or attempt to withdraw from the contest both with prosecutor and his brother.—*Starr v. State*, 67 N. E. 527, 160 Ind. 661.

Where an information charged defendant with assault and battery with intent to murder, an instruction that, if the jury found from the evidence beyond a reasonable doubt that defendant unlawfully committed an assault and battery on prosecutor with intent to commit a felony—that is, with intent to commit murder in the first or second degrees, or manslaughter—or an assault and battery only, that it was their duty to find him guilty as charged, was not objectionable as in effect charging that, if the jury found defendant guilty of an assault and battery with intent only to commit that offense, they should find him guilty of assault and battery with intent to kill.—Id.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 597-603.

See, also, 21 Cyc. pp. 1043-1045.

### § 293. Matters of defense in general.

[a] (Sup. 1876)

Where a defendant was on trial for having committed murder in the first degree by administering poison, it was error for the court to refuse to instruct the jury trying the cause that if they found that the poison was administered to the deceased, a woman, only to excite her sexual passions, and thereby enable the defendant to carnally know her, and without any purpose or intention to kill her, they could not find the defendant guilty of murder.—*Bechtelheimer v. State*, 54 Ind. 128.

[b] (Sup. 1910)

On a prosecution for an assault and battery with intent to kill and murder, it appeared that prosecuting witness was physically very much the superior of defendant, and that the shooting by defendant did not take place until he had been knocked down by the prosecuting witness, and that the difficulty arose from the fact that defendant was present at the place of business of the prosecuting witness on invitation of officers armed with a search warrant to search for intoxicating liquor; defendant having been active as an anti-saloon man. *Held*, that an instruction that, if defendant was guilty beyond a reasonable doubt, his previous good character for peace and quietude could not avail him, except on the question of his credibility as

a witness, was erroneous, as such evidence properly affected, not only the question of guilt or innocence, but the question of the fine.—*Hundley v. State*, 91 N. E. 225.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 604.

See, also, 21 Cyc. p. 1045.

### § 294. Insanity or intoxication.

As to opinions of medical experts, see CRIMINAL LAW, § 783.

Harmless error, see post, § 340.

[a] (Sup. 1877)

An instruction, on a murder trial, that intoxication does not excuse or mitigate crime, and that although the mind may be stimulated by intoxicating liquors, and the person intoxicated made bolder and more reckless in consequence of the intoxication, yet that fact will not excuse the commission of a crime, although it would be legally excused if defendant's mind at the time of the killing was so diseased and disordered by the use of liquor that there was an absence of want of intention to commit a crime in the act of killing, is not erroneous, in the absence of any request for further instructions.—*Gillooley v. State*, 58 Ind. 182.

[b] (Sup. 1884)

On the issue of insanity, in a homicide case, it is proper to instruct the jury that it is their duty to carefully scrutinize the evidence in support of insanity.—*Sanders v. State*, 94 Ind. 147.

[c] (Sup. 1884)

In a prosecution for homicide, an instruction is properly refused that it will be proper for the jury to inquire what motive consistent with sanity is shown by the evidence to have existed in the mind of the accused for taking the life of deceased, and, if there is a want of such motive for the alleged crime, the fact that it was done under circumstances which rendered detection and arrest inevitable, if it was so done, are important points of consideration, as it directed the jury that the fact that the homicide was openly committed was one of importance equal to that of the absence of motive.—*Goodwin v. State*, 96 Ind. 550.

In a prosecution for homicide, in which the defense of insanity is interposed, an instruction assuming that the fact that the accused was confined in a hospital for the insane was prima facie evidence of insanity was properly refused.—Id.

In a prosecution for homicide, in which insanity was interposed as a defense, an instruction was properly refused that the conduct of the accused while in the hospital for the insane should not be considered on the question of his mental condition at that time, unless his sanity was proved beyond a reasonable doubt by other evidence.—Id.

In a prosecution for homicide in which the defense of insanity was interposed, an instruc-

tion in the language of Rev. St. 1881, § 2544, that any person is of unsound mind who is an idiot, non compos mentis, a lunatic, or a monomaniac or a distracted person, is properly refused, as the words used in the definition were general, and the signification of some of them indefinite, and would have tended to confuse the jury.—Id.

[d] (Sup. 1888)

Mental capacity, whether strong or weak, does not affect the question of punishment, and, on a prosecution for homicide, it was not error to strike out of an instruction a portion thereof which told the jury that there should be an acquittal in case of a proof of actual insanity, "however partial it may be."—Warner v. State, 16 N. E. 189, 114 Ind. 137.

[e] (Sup. 1900)

Where the sanity of the accused is in issue on a trial for murder, an instruction that a man with ordinary will power, unimpaired by disease, is required to govern his passion, and if he yields, and purposely and maliciously slays another, he cannot escape the penalty on the ground of mental incapacity, is not objectionable.—Blume v. State, 56 N. E. 771, 154 Ind. 343.

Where jealousy was the motive for the homicide, an instruction that absence of motive might be considered as a circumstance in support of defendant's plea of insanity was properly refused, as inapplicable to the facts.—Id.

[f] (Sup. 1902)

On a prosecution for murder, wherein the defense was insanity, the court instructed that, if insanity is of chronic character, it is presumed to continue until the contrary appears, but if caused by a weakened physical condition, etc., or "strong passions, violent temper," or some other temporary cause, and lucid intervals appear, there is no presumption of continuance. The evidence showed that defendant had been so abusive and unkind to his wife on account of unfounded jealousy that she had to leave him; that she thereafter came back to live with him, and he continued his abuse, on one occasion attacking her with a chair, so that she had to leave him again; and that on one occasion defendant made violent threats against persons charged by him with eating food sent by him for the use of his children. *Held*, that there was sufficient evidence of violent temper to justify the reference thereto in the instruction.—Wheeler v. State, 63 N. E. 975, 158 Ind. 687.

[g] (Sup. 1903)

An instruction that, though there may be some mental derangement, still if accused at such time had mental capacity sufficient to adequately comprehend the nature and consequences of his acts, and a mind sufficient to deliberate and premeditate and to form an intent on and purpose to kill—an unimpaired will power sufficient to control an impulse to commit crime—he is not entitled to an acquittal upon the ground of mental incapacity, was not objectionable, as reflecting on the defense, or suggesting

justification for a verdict of guilty.—Hoover v. State, 68 N. E. 591, 161 Ind. 348.

[h] (Sup. 1905)

On the issue of insanity in homicide, a charge that defendant should be acquitted if he was of unsound mind when the offense was committed, although all the essential elements of murder or manslaughter were established, was properly refused, as the element of criminal intent is necessarily involved in all crime, and one capable of entertaining a criminal attempt cannot in law be deemed a person of unsound mind.—Osburn v. State, 73 N. E. 601, 164 Ind. 262.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 605; 14 CENT. DIG. Crim. Law, §§ 1824, 1830.

See, also, 21 Cyc. pp. 1046, 1047.

§ 297. Excuse or justification in general.

[a] (Sup. 1908)

In a prosecution for homicide, an instruction on the issue of justification, which, after enumerating certain facts and circumstances shown by the evidence, states that the jury must consider such facts and circumstances in connection with "all the evidence and the facts and circumstances as shown by the evidence surrounding and leading up to the killing," is not open to the objection that it fails to enumerate all the facts and circumstances which the jury might consider on such issue.—Duncan v. State, 171 Ind. 444, 86 N. E. 641.

The rule that, where the court undertakes to enumerate the facts and circumstances connected with an offense, the enumeration must be complete, is not applicable to an instruction given in a homicide case on defendant's claim of justification.—Id.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 611.

See, also, 21 Cyc. p. 1049.

§ 300. Self-defense.

Harmless error, see post, § 340.

[a] (Sup. 1884)

It is not error for the court to refuse to charge the jury that, if they believe from the evidence that the defendant killed the deceased when there was a reasonable apprehension on his part that the deceased was about to inflict upon him great bodily harm, they should acquit the defendant, as such instruction ignores several circumstances that might control it, such as provocation by defendant.—Fahnestock v. State, 23 Ind. 231.

[b] (Sup. 1871)

Where, in a prosecution for homicide, there was doubt as to which of the blows was mortal, it was proper to instruct that if the blows which caused the death of the deceased were given in self-defense, and other blows were afterwards given which were not given in self-defense, not mortal, defendant was not guilty.—Miller v. State, 37 Ind. 432.

[c] (Sup. 1874)

Where there is evidence tending to show that the defendant acted in self-defense, it is error to instruct the jury that, if the death of a human being be produced by a deadly weapon in the hands of another, the presumption is that the party using such weapon intended, and is guilty of, murder, and that to remove this presumption and reduce the killing to manslaughter it devolves on the defendant to show that it was under great provocation, such as endangered the life of, or would have resulted in great bodily harm to, the party using such weapon.—*Kingen v. State*, 45 Ind. 518.

[d] (Sup. 1875)

It is error to instruct the jury in a homicide case that to acquit either of the codefendants on the ground of self-defense, they should have feared and had reasonable cause to fear death or great bodily harm at the hands of the deceased.—*Hicks v. State*, 51 Ind. 407.

[e] (Sup. 1875)

In a homicide case it is error to charge that "there can be no successful setting up of the plea of self-defense unless the necessity for taking life is actual, present, and urgent; in a word, unless the taking of his adversary's life is the only reasonable resort of the party who kills his antagonist, and he is compelled to do so in order to save his own life or person from great harm and severe calamity," and that "self-defense can only be resorted to in a case of absolute necessity."—*Wall v. State*, 51 Ind. 453.

[f] (Sup. 1877)

In a manslaughter case, in which there was evidence of justification and self-defense, the court charged that if two persons strike another at the same time, one of whom administered the blow with a deadly weapon, and the other with his hand unarmed, and death resulted from the blows so inflicted, then, if the death was occasioned by the parties so striking, upon sudden heat or involuntarily, but in the commission of some unlawful act, both parties would be guilty of manslaughter, and the jury should find defendant guilty if the evidence convinced them beyond a reasonable doubt that defendant contributed, by blows administered at the time, to deceased's death. *Held*, that such instruction was erroneous, as wholly ignoring the question of justification or self-defense.—*Waybright v. State*, 56 Ind. 122.

[g] (Sup. 1880)

In homicide, a charge that the jury may consider evidence of deceased's intoxication and of his violent and quarrelsome disposition as justifying defendant in attempting to disarm deceased in case they should find that defendant did not first assault deceased, and provided deceased used or threatened to use the pistol otherwise than in the necessary and proper defense of his person, was sufficiently favorable to defendant.—*Patterson v. State*, 70 Ind. 341.

[h] (Sup. 1881)

In a trial for assault with intent to kill, the court struck from a requested charge defining the right of self-defense the words, "The defendant insists that he acted in self-defense on the occasion mentioned in the indictment." *Held* no substantial error.—*Presser v. State*, 77 Ind. 274.

While it is more accurate in defining the right of self-defense in an instruction to say that the act of defendant in inflicting an injury on his assailant would be "excusable" under the proper circumstances, the use of the word "justifiable" in that connection will not be regarded as substantial error.—*Id.*

In a prosecution for assault with intent to kill, a requested instruction that "if you find from the evidence that, while the defendant was peaceably attending the last presidential election, he was violently assaulted by B. and others, he had the right, without retreating, to repel force by force; and if, in the exercise of his right of self-defense, his principal assailant was injured, he was justifiable"—was properly modified by inserting after the word "was" to words "without fault on his part."—*Id.*

[i] (Sup. 1883)

Where defendant on a prosecution for homicide claimed to have done the killing in self-defense, he could not complain of an instruction that where a homicide is perpetrated by an intentional use of a deadly weapon, in such manner as is likely to, and actually does, produce death, the law presumes such homicide was committed purposely and maliciously, unless it was done in self-defense, or in a sudden heat, caused by such provocation as by law reduces the killing to the grade of manslaughter.—*McDermott v. State*, 89 Ind. 187.

Where defendant, on a prosecution for homicide, claimed that the killing was done in self-defense, a charge that it was not necessary that the defendant should have believed it necessary to take the life of the assailant in order to reasonably defend himself, but it is sufficient to excuse the defendant if the death of his assailant resulted from the defendant's reasonable defense of himself, was as favorable to defendant as he had a right to ask.—*Id.*

[j] (Sup. 1884)

The modification of instructions that a person might take life to avoid "very considerable" harm, by the use of the word "great" instead, is no error.—*Rehymer v. State*, 95 Ind. 140.

[k] (Sup. 1892)

The court instructed the jury to acquit in case there was any reasonable hypothesis consistent with innocence which did not contradict credible evidence in the case; and instructed also, on the subject of self-defense, that if defendant, being without fault, believed himself in imminent danger of great bodily harm, and could think of no less dangerous means of pre-

venting the same than the use of the weapon employed, he would be justified in making such use of it as then appeared necessary. This was followed by a statement that they were to be very careful on this point; that deceased's right to life was just as sacred as defendant's right of self-defense. *Held* objectionable, because ambiguous, and not affirmatively stated, and because undue prominence was given to the necessity for deliberation.—*Fields v. State*, 134 Ind. 46, 32 N. E. 780.

[l] (Sup. 1895)

Deceased was killed by a stone alleged to have been thrown by defendant. Defendant testified that deceased's attack upon him was unprovoked and violent, that he advanced upon defendant as the latter was retreating, and that defendant thought deceased was going to hit him; but he also claimed that a third person threw the stone. *Held*, that there was no error in instructing as to self-defense, though defendant objected thereto.—*Reed v. State*, 141 Ind. 116, 40 N. E. 525.

[m] (Sup. 1896)

On a prosecution for murder in the first degree, the defense was self-defense, and the court instructed that, in order to justify a homicide on the ground of self-defense, a person injured or assailed must employ all reasonable means within his power consistent with his safety to avoid the danger, and avert the necessity of taking life, that he must even retreat, if retreat be safe and practical, but that where one is attacked and his life is in danger, or he is in danger of great bodily harm, and retreat is not safe or practical, he is not obliged to retreat. *Held*, that the instruction was erroneous.—*Page v. State*, 40 N. E. 745, 141 Ind. 236.

[n] (Sup. 1899)

A charge on self-defense was not vitiated by addition of the words, "The law does not permit a person to revenge himself in any case."—*Rains v. State*, 52 N. E. 450, 152 Ind. 60.

[o] (Sup. 1900)

Where there was evidence that the accused believed from appearances that the prosecuting witness was advancing with a gun, until he turned, just as the last shot was fired, when the accused saw it was an umbrella, whereupon he stopped firing, it was error to refuse to charge that if accused honestly believed that he was being violently assaulted with a dangerous weapon and that he was in danger of receiving great bodily harm, then his right of self-defense intervened, though it afterwards developed that the supposed danger was not real.—*Enlow v. State*, 57 N. E. 539, 154 Ind. 664.

[p] (Sup. 1901)

Where, in a prosecution for an assault and battery with intent to commit murder, there was no evidence that the prosecuting witness

was making or attempting to make any assault on the accused at or immediately before the assault charged, and there was no evidence that the manner and actions of the prosecuting witness were such as to cause the accused to believe, and that he did believe, he was in danger of losing his life or of suffering great bodily harm from the prosecuting witness unless he committed the acts charged, the accused was not entitled to have the law of self-defense given to the jury.—*Braxton v. State*, 61 N. E. 195, 157 Ind. 213.

[q] (Sup. 1902)

The court instructed that if the jury found that the accused was not assailed and not in danger of great bodily harm, and that no attempt had been made by the deceased or by those associated with him to commit a felony on accused's property or on his habitation by surprise or violence, and that no attempt had been made to commit a felony, and that he had no reason to believe, and did not believe, that his life was in danger or that he was in danger of bodily harm, and that he had no reason to believe that an attempt to commit a felony had been made, and that he saw some persons on the sidewalk and fired in their direction, intending to frighten them, and killing deceased, the shooting would not be justifiable. *Held*, that the instruction was not erroneous, in that it made the law of self-defense, depend on the intent of the assailant, rather than upon what the person assailed might believe was the intent of the assault.—*Harmon v. State*, 62 N. E. 630, 158 Ind. 37.

On a prosecution for murder, the defense being self-defense, the evidence showed that, stones having been thrown against the house of accused, he came out on the porch, and, addressing persons in front of the house (among them, deceased), stated that if any more stones were thrown he would use a shotgun, and that, more stones being thrown, he came out with a gun and started in pursuit of deceased and his companions, and shot and killed deceased. Accused testified that just before firing the shot more stones were thrown at him. The court instructed that, in the exercise of the right of self-defense, a person must act honestly; that a person assaulted must not provoke an attack in order that he may have an apparent excuse for killing his adversary. *Held*, that the instruction was not erroneous as devoid of any relevancy to the issues or evidence in the case.—*Id.*

The court instructed that if they found deceased and his companions mischievously threw stones against accused's house, but without any purpose or intent to commit a felony, and that no felony was attempted, such conduct on their part was merely a misdemeanor. *Held*, that the instruction was not erroneous as depriving accused of the benefit of the rule that an apparent danger is sufficient to justify the exercise of the right of self-defense.—*Id.*

[r] (Sup. 1904)

Where, in a prosecution for murder, it appeared that deceased had retreated to a wall, and was calling on defendant's sister to desist from stoning him, when defendant, who had not been present at the previous difficulty, rushed at deceased, and stabbed him once, inflicting a mortal wound, a requested instruction relating exclusively to the right of self-defense was properly refused.—*Spaulding v. State*, 70 N. E. 243, 162 Ind. 297.

[s] (Sup. 1905)

Where, on a prosecution for assault with intent to kill, it was shown that defendant attempted to interview a witness against him in a civil action; that the attorney for the party endeavored to protect the witness; that defendant attempted to push the attorney aside; that prosecuting witness, on seeing the difficulty, started toward defendant, who began a retreat, followed by prosecuting witness; that shortly afterwards shots were fired by both, and both were injured, but the evidence was conflicting as to who first fired—it was error to refuse to charge that, if defendant withdrew from the attempt to secure an interview with the witness, and the prosecuting witness advanced toward him and gave him grounds for reasonable apprehension that he was in danger of suffering great bodily injury, he had the right of self-defense.—*Eby v. State*, 74 N. E. 890, 165 Ind. 112.

[t] (Sup. 1908)

In a prosecution for homicide, an instruction requested by defendant that if defendant was in a public alley in the rear of the premises occupied by deceased, though he was there for the purpose of seeking sexual intercourse with deceased's wife, such fact would afford no legal excuse or justification for an attack on him by deceased, was properly refused, as it left out of view the question whether defendant's conduct provoked the difficulty; the fact that defendant was in a public alley not improving his situation under the circumstances.—*Duncan v. State*, 171 Ind. 444, 86 N. E. 641.

In a prosecution for homicide committed by defendant while he was lurking about the premises occupied by deceased for the purpose of seeking sexual intercourse with deceased's wife, an instruction that decedent had the right to protect, by reasonable means, the honor and sanctity of his home from the defendant, and all other persons who might seek to bring it into disrepute by debauching his wife, was not misleading and erroneous.—*Id.*

In a prosecution for homicide, an instruction on the law of self-defense that, if upon the facts and circumstances shown by the evidence it appears beyond a reasonable doubt that, in taking the life of deceased, defendant was not honestly and in good faith exercising the right of self-defense, he cannot be acquitted

on that ground, is not subject to the objection that it tends to confuse the jury, and to cast suspicion on the doctrine of self-defense.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 614-632.

See, also, 21 Cyc. pp. 1050-1059.

## § 301. Defense of another.

[a] (Sup. 1877)

On a trial for manslaughter, the court charged that if a person strike another with an unweaponed hand, in a rude, insolent, and angry manner, and the person struck falls to the ground, and by reason of the fall death results, caused by his head or person coming in contact with hard substances, the person striking will be guilty of manslaughter if the blow was given without malice, express or implied, or in a sudden heat, and not in defense of his person, property, "or his nearest and dearest relations, his family." *Held*, that such instruction was erroneous, because vague and misleading, and there was no evidence to which the quoted part was applicable.—*Waybright v. State*, 56 Ind. 122.

[b] (Sup. 1904)

Where, in a prosecution for murder, it appeared that deceased had retreated to a wall and was calling on defendant's sister to desist from stoning him, when defendant, who had not been present at the previous difficulty, rushed at deceased and stabbed him once, inflicting a mortal wound, a requested instruction relating exclusively to defendant's right to defend a relative or member of his family from unlawful attack was properly refused.—*Spaulding v. State*, 70 N. E. 243, 162 Ind. 297.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 624, 633.

See, also, 21 Cyc. p. 1060.

## § 305. Principals and accessories.

[a] (Sup. 1878)

2 Rev. St. 1876, p. 388, § 66, provides that any person who counsels, aids, or abets in the commission of an offense may be charged and convicted in the same manner as if he were a principal. In homicide the court charged that the jury should consider whether it was necessary in order to establish defendant's guilt that the state should show that "defendant and those indicted with him" should have left town on a certain day, and further charged that, if defendant was a guilty participant in the homicide, they should find him guilty, although they might also find that the alibi asserted by him "as it regards himself and his confederates" may be true. *Held* that, construing the word "confederates" as equivalent to "those indicted with him," the charge was not erroneous, as defendant would have been guilty if he participated in the commission of the crime by others

with whom he was not indicted.—*Jones v. State*, 64 Ind. 473.

FOR CASES FROM OTHER STATES,  
SEE 26 CENT. DIG. Homic. § 637.  
See, also, 21 Cyc. p. 1062

### § 306. Grade or degree of offense.

Refusal to charge statutory rule as to convicting accused of lowest degree when in doubt, see CRIMINAL LAW, § 795.

FOR CASES FROM OTHER STATES,  
SEE 26 CENT. DIG. Homic. §§ 638-661.  
See, also, 21 Cyc. pp. 1063-1080.

### § 308. — Murder.

Harmless error, see post, § 340.

[a] (Sup. 1855)

In a prosecution for murder, an instruction that "to kill a man purposely and with premeditated malice, or to kill a man in the commission of or the attempt to commit a crime—such as a robbery or arson—is murder in the first degree. And it is no difference (in the attempt to commit arson) whether he is killed before the fire reaches him or he is burned to death," was proper.—*Stocking v. State*, 7 Ind. 326.

[b] (Sup. 1883)

An instruction defining homicide and commenting on excusable and justifiable homicide, and on murder and manslaughter, though not directly applicable to the facts, was not ground for reversal if it was not calculated to mislead and confuse the jury, to the prejudice of the defendant.—*Stout v. State*, 90 Ind. 1.

[c] (Sup. 1899)

An instruction that, if a person arms himself with a deadly weapon, and seeks another with intent of satisfying a grudge, and by use of the deadly weapon kills the other, who, in the quarrel resulting from the meeting, neither uses, nor manifests any intention of using, a weapon of any kind, the crime is murder in the first degree, is not erroneous as ignoring the elements of malice, premeditation, provocation, and excuse, as they are implied.—*Thrawley v. State*, 55 N. E. 95, 153 Ind. 375.

[d] (Sup. 1910)

An instruction that a mere finding beyond a reasonable doubt that accused killed decedent would not justify a conviction of murder was properly refused as being too narrow.—*Rigsby v. State*, 91 N. E. 925.

FOR CASES FROM OTHER STATES,  
SEE 26 CENT. DIG. Homic. §§ 642-648.  
See, also, 21 Cyc. pp. 1066-1068.

### § 309. — Manslaughter.

Harmless error, see post, §§ 340, 341.

[a] (Sup. 1876)

On the trial of an indictment for murder, the court, in its charge to the jury stated: "If

you should find from the evidence beyond a reasonable doubt that the defendant, without malice, either express or implied, and with no intent to murder, unlawfully, involuntarily killed the decedent," naming him, "this would be manslaughter"—the context of the charge giving the full statutory definition of manslaughter. *Held*, that the defendant could not complain of the omission, in the portion of the charge quoted, of the words, "but in the commission of some unlawful act."—*Kelley v. State*, 53 Ind. 311.

[b] (Sup. 1882)

An instruction defining manslaughter as the unlawful killing of a human being, without malice, express or implied, either voluntary, or in sudden heat, or involuntary, but in the commission of an unlawful act, is not erroneous for failure to distinguish between the offenses of voluntary and involuntary manslaughter.—*Powers v. State*, 87 Ind. 144.

[c] (Sup. 1884)

An instruction as to the law of voluntary manslaughter which omits to advert to the voluntary element is erroneous.—*Norton v. State*, 98 Ind. 347.

[d] (Sup. 1887)

Upon the trial of an indictment charging, in the first count, voluntary manslaughter, and in the second, involuntary manslaughter, it is not error, available to the accused, for the court, where there is no evidence of an intention to kill on the part of the accused, and the theory of his defense is that the killing was unintentional, to instruct the jury that there could be no conviction for voluntary manslaughter under the first count, and that the defendant, if guilty at all, was guilty under the second count.—*Brown v. State*, 110 Ind. 486, 11 N. E. 447.

[e] (Sup. 1896)

A charge that, under the indictment for murder in the first degree, the jury may find defendant "guilty of either voluntary or involuntary manslaughter," is not ground for reversal, though the statute does not recognize voluntary and involuntary manslaughter as distinct crimes.—*Pigg v. State*, 145 Ind. 560, 43 N. E. 300.

[f] (Sup. 1898)

An instruction as to voluntary manslaughter which left out the word "unlawfully" before "took the life of deceased as charged in the indictment" is not open to objection, where the indictment charged the unlawful, felonious, and intentional killing, and the means used.—*Shields v. State*, 49 N. E. 351, 149 Ind. 395.

[g] (Sup. 1899)

An instruction that voluntary manslaughter is the unlawful killing of a human being, without malice, voluntarily, on a sudden heat, as where, on provocation, the passion has been aroused, and the act is committed before it has cooled, is erroneous; for it fails to qualify "provocation" with the term "adequate or

sufficient."—*Bridgewater v. State*, 55 N. E. 737, 153 Ind. 560.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 649-656.

See, also, 21 Cyc. pp. 1069-1076.

### § 310. — Assault with intent to kill.

[a] (Sup. 1880)

In a prosecution for assault with intent to kill, a charge that the indictment contains a charge of a simple assault, and defendant, though presumed to be innocent of either offense, may, under the indictment, be found guilty either of an assault simply or of the felony charged therein, is not subject to the objection of failing to distinctly inform the jury that defendant cannot be convicted of the felony unless he is also found guilty of the assault charged in the indictment.—*Knight v. State*, 70 Ind. 375.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 657-661.

See, also, 21 Cyc. pp. 1076-1078.

### § 311. Punishment.

Harmless error, see post, § 341.

[a] (Sup. 1862)

At a trial under an indictment for murder in the second degree, the court erroneously instructed the jury that the heaviest punishment, on a conviction for manslaughter, was imprisonment for 14 years. The jury found a verdict of murder in the second degree, and the accused was sentenced to imprisonment for life. *Held*, that the erroneous instruction might have been prejudicial to the accused, and therefore that the judgment should be reversed.—*Hoss v. State*, 18 Ind. 349.

[b] (Sup. 1878)

In the charge to the jury in a trial for murder, the judge gave an instruction, reciting the section of the statute defining the crime of murder in the first degree, and declaring the penalty therefor to be death, and also an additional instruction, referring to the former one, and reciting another section of the statute, giving the jury power to fix the penalty at imprisonment for life. *Held*, that the first instruction was correct as far as it went, and was not erroneous as an independent instruction, and that the giving of the second in effect constituted both one proper instruction.—*Achey v. State*, 64 Ind. 56.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 662, 663.

See, also, 21 Cyc. pp. 1080, 1081.

### (D) VERDICT.

Harmless error, see post, § 342.

Responsiveness of general verdict to indictment, see CRIMINAL LAW, § 881.

### § 312. Form and requisites in general.

[a] (Sup. 1824)

An indictment for murder contained two counts; the first charging the prisoner with killing a man by shooting him, and the second by assisting another in stabbing him. *Held* that, on proof of either of the charges, there might be a general verdict of guilty.—*Hudson v. State*, 1 Blackf. 317.

[b] (Sup. 1852)

Upon the trial of an indictment for murder in the first degree, a verdict will not be defective for omitting to specify that the defendant was found guilty "as charged in the indictment."—*Moon v. State*, 3 Ind. 438.

[c] (Sup. 1858)

Under an indictment charging assault with intent to murder in the first degree and assault with intent to murder in the second degree, a general verdict of guilty is good; the crimes being of the same nature.—*Frolich v. State*, 11 Ind. 213.

[d] (Sup. 1862)

A verdict for manslaughter, under an indictment for murder, need not show a state of facts constituting manslaughter.—*Carrick v. State*, 18 Ind. 409.

[e] (Sup. 1862)

In a prosecution for assault with intent to kill, a verdict, "We, the jury, find defendant guilty of an assault and battery with intent involuntarily, but in the commission of an unlawful act, to murder deceased," is invalid, since it finds defendant guilty of an act which, in the nature of things, he could not commit.—*Thetge v. State*, 83 Ind. 126.

[f] (Sup. 1886)

Where, on a trial for homicide, the jury found that two mortal wounds were inflicted by the defendant as charged in the several counts of the indictment, and that death resulted therefrom, they were authorized to find the defendant guilty as charged in both counts without determining which wound was the immediate cause of the death.—*Brown v. State*, 5 N. E. 900, 105 Ind. 385.

[g] (Sup. 1900)

A verdict finding defendant guilty of manslaughter is not vitiated by a statement therein that the defendant is about 55 years old, as the finding of age only relates to the place of punishment, and, if he is under 30 years of age, he may be transferred to the reformatory notwithstanding the verdict.—*Bloom v. State*, 58 N. E. 81, 153 Ind. 292.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 664-670.

See, also, 21 Cyc. pp. 1082-1084.

### § 313. Specification of grade or degree of offense.

Harmless error, see post, § 342.

## [a] (Sup. 1855)

On an indictment for murder in the first degree, the jury returned the verdict, "We, the jury, do say and find that T. K. is guilty in manner and form as he stands charged in the indictment, and that he shall be imprisoned in the state prison and kept at hard labor during life." *Held*, that the verdict finds T. K. guilty of murder in the first degree, and is not bad for uncertainty.—*Kennedy v. State*, 6 Ind. 485.

Where, under Act 1843, the jury under a single count charging murder in the first degree, finding the prisoner guilty of murder in the second degree the verdict should specifically name the offense for which he is found guilty.—*Id.*

## [b] (Sup. 1880)

Where a verdict of guilty of assault and battery only is returned, under an indictment for assault and battery with intent to kill, the silence of the verdict, as regards the felonious intent charged, is equivalent to an express verdict that defendant was not guilty of the felony.—*Bryant v. State*, 72 Ind. 400.

## [c] (Sup. 1884)

Where an indictment charged defendant with assault and battery with intent to commit murder in the first degree, and the verdict was, "We, the jury, find the defendant guilty of an assault and battery with intent to commit murder in the second degree; that he be imprisoned in the state prison for fourteen years and that he be fined \$1.00," there was no defect or ambiguity in the verdict, defendant being found guilty of a crime embraced in the indictment, and his punishment fixed within the provisions of Rev. St. 1881, § 1909, on which the prosecution was based.—*Doolittle v. State*, 93 Ind. 272.

## [d] (Sup. 1887)

A verdict finding the accused guilty of assault and battery with intent to commit manslaughter, but not specifying whether the intent was to commit voluntary or involuntary manslaughter, is sufficient.—*Brown v. State*, 111 Ind. 441, 12 N. E. 514.

## [e] (Sup. 1900)

Where a count of an indictment charged murder in the first degree, a verdict finding defendant guilty as charged in such count was a sufficient conviction of murder in the first degree.—*Siple v. State*, 57 N. E. 544, 154 Ind. 647.

## FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. Homic. §§ 671-675; 14 CENT. DIG. Crim. Law, § 2089.

See, also, 21 Cyc. pp. 1084, 1085.

## § 314. Assessment of punishment.

As delegation of legislative power, see CONSTITUTIONAL LAW, § 60.

## [a] (Sup. 1843)

A verdict of guilty of manslaughter must fix the punishment; otherwise, it is erroneous.—*Dias v. State*, 7 Blackf. 20, 39 Am. Dec. 448.

## [b] (Sup. 1903)

Burns' Rev. St. 1901, § 1977, provides that murder in the perpetration of robbery is murder in the first degree, and on conviction accused shall suffer death or be imprisoned for life, in the discretion of the jury. *Held*, that the jury are the exclusive judges as to which punishment shall be imposed, and their decision must stand, unless it is manifest that they have exceeded their powers.—*Jackson v. State*, 67 N. E. 690, 161 Ind. 36.

## FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. Homic. §§ 676-678.

See, also, 21 Cyc. p. 1086.

## § 315. Construction and operation.

## [a] (Sup. 1855)

On a prosecution for murder, a verdict that the prisoner was "guilty of an assault and battery, and that he be fined," was a nullity, and equivalent to a verdict of acquittal.—*Wright v. State*, 7 Ind. 324.

## [b] (Sup. 1873)

If, on an indictment for murder in the first degree, the defendant is found guilty of an inferior grade of homicide, without saying anything as to higher grade, the finding is by implication an acquittal of the higher grade.—*Clem v. State*, 42 Ind. 420, 13 Am. Rep. 369.

## [c] (Sup. 1876)

On the trial of an indictment containing two counts, the first charging a homicide committed by the defendant "personally and with premeditated malice," and the second charging the killing to have been done "purposely and with premeditated malice in the perpetration of burglary," an acquittal as to the first count, and a conviction on the second, did not acquit defendant on the whole indictment.—*Bissot v. State*, 53 Ind. 408.

## FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. Homic. §§ 679-682.

See, also, 21 Cyc. pp. 1086, 1087.

## IX. NEW TRIAL.

Obtaining new trial as waiver of acquittal of murder by conviction of manslaughter, see CRIMINAL LAW, § 193½.  
Statement of ground for new trial, see CRIMINAL LAW, § 954.

## § 319. Newly discovered evidence.

Materiality of newly discovered evidence as ground for new trial, see CRIMINAL LAW, § 940.

Newly discovered cumulative evidence as ground for new trial, see CRIMINAL LAW, § 941.

Sufficiency of newly discovered evidence to warrant grant of new trial, see **CRIMINAL LAW**, § 945.

FOR CASES FROM OTHER STATES,  
SEE 26 CENT. DIG. Homic. § 687.

## X. APPEAL AND ERROR.

Briefs, see **CRIMINAL LAW**, § 1130.

### § 324. Right of review.

Right of prosecution to review, see **CRIMINAL LAW**, § 324.

FOR CASES FROM OTHER STATES,  
SEE 26 CENT. DIG. Homic. § 692.

### § 325. Presentation and reservation in lower court of grounds of review.

Statement of grounds for new trial, see **CRIMINAL LAW**, § 1064.

[a] (Sup. 1893)

An objection that an indictment for an assault with intent to commit murder in the second degree fails to allege that the attempt to kill was without premeditation is not available, when raised for the first time in the supreme court by an assignment of error.—*Baker v. State*, 134 Ind. 657, 34 N. E. 441.

FOR CASES FROM OTHER STATES,  
SEE 26 CENT. DIG. Homic. § 693.

### § 327. Record.

[a] (Sup. 1879)

A charge in a trial for assault with intent to kill, to the effect that the intent constitutes the gist of the crime, and that in determining such intent the jury may properly consider the acts done, the words spoken, and the instrument used in making the assault, and may infer the intent if they find that a deadly weapon was used, will not be considered error on appeal, where the evidence is not contained in the record.—*Shinn v. State*, 68 Ind. 423.

[b] (Sup. 1901)

After defendant was found guilty of murder, but before sentence was pronounced, Acts 1901, p. 4, came into effect, prescribing that all sentences of death thereafter pronounced should be executed at the Michigan City prison, by the warden thereof. Defendant's motion for new trial "for errors occurring at the trial" was denied, and on appeal the only error assigned was in denying such motion. *Held*, that the question whether as to defendant such act was an *ex post facto* law is not raised by such assignment.—*Keith v. State*, 61 N. E. 716, 157 Ind. 376.

FOR CASES FROM OTHER STATES,  
SEE 26 CENT. DIG. Homic. § 695.

### § 331. Review of discretion of lower court.

[a] (Sup. 1905)

The question as to the competency of a dying declaration was one which the trial court was called on to decide before admitting the testimony, and its conclusion that the declaration was admissible is one which should not be disturbed on appeal, unless it is manifest that the facts did not warrant the conclusion.—*Gipe v. State*, 75 N. E. 881, 165 Ind. 433, 1 L. R. A. (N. S.) 419, 112 Am. St. Rep. 238.

FOR CASES FROM OTHER STATES,  
SEE 26 CENT. DIG. Homic. § 698.

### § 332. Review of questions of fact.

Review of ruling as to admissibility of a confession of murder, see **CRIMINAL LAW**, § 1158.

[a] (Sup. 1879)

A conviction for homicide fairly supported by circumstantial evidence will not be reversed on appeal.—*Binns v. State*, 66 Ind. 428.

[b] (Sup. 1833)

Where, on a prosecution for homicide, the evidence is circumstantial, but the circumstances are so clearly proved and point so conclusively to the guilt of the defendant that there appears to be no ground for reasonable doubt, a judgment will be sustained.—*McDonel v. State*, 90 Ind. 320.

[c] (Sup. 1901)

The Supreme Court will not undertake to weigh the evidence, even in a capital case.—*Keith v. State*, 61 N. E. 716, 157 Ind. 376.

Where the state claims, and the evidence strongly tends to show, that the murder was committed in the county in which the indictment was found, and the body afterwards removed to another county, where it was found, the finding of the jury that the murder was committed in the former county should not be set aside.—*Id.*

Where, on a motion for a new trial after conviction of murder, defendant's claim that certain jurors had each found and expressed an opinion of defendant's guilt, and concealed the fact on the voir dire examination, was disputed by the state, and the trial court heard affidavits and oral testimony pro and con, its findings thereon should not be disturbed.—*Id.*

Where on a trial for murder there is evidence amply supporting the verdict of guilty, and much of it is controverted by that offered by defendant, it is for the jury to decide what facts are proven beyond a reasonable doubt; and, if the inference of guilt is fairly to be drawn from the circumstances of which there is evidence, the appellate court should accept the findings of the jury in capital as in other cases.—*Id.*

[d] (Sup. 1908)

The Supreme Court will not weigh conflicting evidence and will reverse a judgment for in-

sufficient evidence only where there is a failure to support some material element of the offense charged, and on an appeal by one convicted of murder, only so much of the state's evidence as tends to sustain the finding of the trial court will be examined to determine the sufficiency of evidence.—*Williams v. State*, 170 Ind. 630, 85 N. E. 113.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. §§ 699-704.

See, also, 21 Cyc. p. 1091.

**§ 333. Harmless error.**

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. §§ 705-723.

See, also, 21 Cyc. pp. 1092-1099.

**§ 334. — In general.**

[a] (Sup. 1883)

Rev. St. 1881, § 1891, requiring the supreme court to disregard harmless errors, applies to murder cases.—*Wood v. State*, 92 Ind. 269.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. § 705.

See, also, 21 Cyc. p. 1092.

**§ 336. — Conduct of trial in general.**

[a] (Sup. 1864)

Where a prisoner is tried on an indictment for murder in the second degree, it is not material what opinions a juror may have entertained in regard to the death penalty.—*Finn v. State*, 5 Ind. 400.

[b] (Sup. 1878)

A conviction of homicide will not be reversed for the misconduct of a juror, unless it clearly appears that defendant was injured.—*Achey v. State*, 64 Ind. 56.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. §§ 554, 707.

**§ 337. — Rulings as to indictment or pleas.**

[a] (Sup. 1876)

Under an indictment for an assault, or an assault and battery, with intent to commit murder in the first degree, if the evidence justify it, there may be the same conviction as under an indictment for an assault, or an assault and battery, with intent to commit manslaughter. Therefore, where there was a trial and acquittal under a count for an assault and battery with intent to commit murder, the judgment could not be reversed for the quashing of a good count for assault and battery with intent to commit manslaughter.—*State v. Throckmorton*, 53 Ind. 354.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. § 708.

**§ 338. — Admission of evidence.**

[a] (Sup. 1879)

On a prosecution for homicide, evidence that, on a former trial for the same offense, defendant had issued subpoenas for certain witnesses, and that his attorney had conferred with such witnesses at a certain time and place, the result of which conference was not given, was irrelevant, but harmless.—*Binns v. State*, 66 Ind. 428.

[b] (Sup. 1882)

In a prosecution for homicide, any error in admitting evidence that the accused testified on his preliminary examination that he did not throw the stone that killed deceased, and did not know who threw it, was not prejudicial to accused; the evidence being favorable to him.—*Powers v. State*, 87 Ind. 144.

[c] (Sup. 1895)

On a prosecution under an indictment charging in one count involuntary manslaughter, and in another murder, the admission of evidence tending to show that deceased was true to her husband is not reversible error, especially where the conviction was for involuntary manslaughter.—*Siberry v. State*, 149 Ind. 684, 39 N. E. 936, 47 N. E. 458.

[d] (Sup. 1896)

On a trial for murder, error in admitting statements made by deceased to his wife before the shooting, tending to show premeditation and malice on defendant's part, is cured by a verdict of manslaughter, there being competent evidence to sustain the verdict.—*Pigg v. State*, 145 Ind. 560, 43 N. E. 309.

[e] (Sup. 1896)

It was prejudicial error to admit evidence as to certain praiseworthy actions of the deceased, whose reputation for peace and quiet could be shown by general reputation only.—*Stalcup v. State*, 45 N. E. 334, 146 Ind. 270.

[f] (Sup. 1897)

It is at most harmless error to allow witness for defendant, charged with murder of his wife, which he said was committed by burglars, the tracks of whom were looked for on the night of the murder, to answer the question on cross-examination whether, while dressing defendant's wounds that night, he did not say to certain of those present: "Some of you level-headed men go out and look for tracks."—*Hinshaw v. State*, 47 N. E. 157, 147 Ind. 334.

[g] (Sup. 1902)

On an issue of insanity in a murder trial, a witness was asked "whether or not the scientific idea of insanity draws the line closer than the legal idea of insanity," to which he replied that it was possibly the case; that he would not say; but that "the courts and doctors don't agree as to the definition of insanity." Held, that the question and answer were meaningless, and harmless to defendant.—*Wheeler v. State*, 63 N. E. 975, 158 Ind. 687.

[h] (Sup. 1903)

Where, on trial for murder, evidence tending to prove premeditation and malice was erroneously admitted, but malice was established by other competent evidence, and defendant was convicted of murder in the second degree only, the error was harmless.—*Ginn v. State*, 68 N. E. 294, 161 Ind. 292.

[i] (Sup. 1910)

On prosecution for homicide, a state's witness having testified that he had found a pistol on the lot east of his house adjacent to defendant's premises, and was asked on cross-examination when it was that he found it, and answered "that was the time when defendant had his troubles with his first wife, and she told me that he tried to kill her." *Held*, that the error in refusing defendant's motion to strike the answer as not responsive must be deemed to have been prejudicial.—*Miller v. State*, 91 N. E. 930.

## FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 709-713.

See, also, 21 Cyc. p. 1092.

## § 339. — Exclusion of evidence.

[a] (App. 1906)

On a prosecution for assault and battery with intent to commit murder, where evidence of threats made direct to defendant by prosecuting witness and of threats made to others and communicated to defendant was admitted, there was no reversible error in excluding evidence of threats against defendant by prosecuting witness, not communicated to defendant prior to the commission of the offense.—*Guy v. State*, 77 N. E. 855, 37 Ind. App. 691.

## FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. § 714.

See, also, 21 Cyc. p. 1092.

## § 340. — Instructions.

[a, b] (Sup. 1877)

A new trial will not be granted because of erroneous instructions as to the necessary proof to be adduced by the state to convict of assault and battery with intent to murder, where the conviction is only of an assault and battery with intent to commit manslaughter.—*Jarrell v. State*, 58 Ind. 293

[c] (Sup. 1878)

An erroneous instruction that, in fixing the punishment for manslaughter, the jury may assess a fine in addition to the imprisonment, is cured by the court's action in disregarding that portion of the verdict which assesses a fine and enters judgment for the imprisonment only.—*Veatch v. State*, 60 Ind. 291.

[d] (Sup. 1878)

Error in an instruction relating to the intent charged in an indictment for an assault and battery with intent to murder is harmless, where the verdict finds defendant guilty of only an assault and battery.—*Rollins v. State*, 62 Ind. 46.

[e] (Sup. 1879)

On prosecution for homicide on defense of insanity, the beginning sentence of an instruction that "frenzy arising solely from passions of anger and jealousy, no matter how furious, is not insanity," followed by an instruction that was not incorrect, though not stating a legal proposition, could not have injured the defendant.—*Guettig v. State*, 66 Ind. 94, 32 Am. Rep. 99.

[f] (Sup. 1879)

On a prosecution for homicide, defendant could not complain of a clerical error by which the word "not" was omitted from an instruction, making it read: "Mere words, however abusive or misleading, 'can' justify the taking of human life."—*Binns v. State*, 66 Ind. 428.

[g] (Sup. 1880)

On trial of an indictment containing counts for murder and manslaughter, resulting in a verdict of manslaughter, an instruction is harmless that states that, if the jury have a reasonable doubt as to the degree of the crime, they should give the defendant the benefit of such doubt, and convict, if at all, of the lowest degree included in such doubt.—*Patterson v. State*, 70 Ind. 341.

[h] (Sup. 1881)

On an indictment for murder, instructions that the prisoner might be convicted either of "murder in the second degree or of voluntary manslaughter," without the addition of "or involuntary," *held* not erroneous; the punishment for voluntary and involuntary manslaughter being the same.—*Fisher v. State*, 77 Ind. 42.

[i] (Sup. 1884)

As Rev. St. 1881, § 1909, provides that whoever perpetrates an assault and battery with intent to commit a felony shall be imprisoned in the state prison not more than 14 or less than 2 years, one indicted and convicted for assault and battery with intent to commit murder in the first degree, and assessed the lowest penalty, cannot complain of an erroneous charge on assault with intent to commit murder in the first degree, because it should have been on assault with intent to commit manslaughter.—*Long v. State*, 95 Ind. 481.

[j] (Sup. 1885)

Where the jury in a prosecution for murder acquitted defendant of all malice, any errors in instructions relating to premeditated malice were harmless as to defendant.—*Barnett v. State*, 100 Ind. 171.

[k] (Sup. 1889)

An instruction which omits the word "voluntary" in giving the statutory definition of murder is not fatally erroneous when the omitted word is supplied in effect in a subsequent instruction.—*Cooper v. State*, 120 Ind. 377, 22 N. E. 320.

[l] (Sup. 1896)

Where defendant was found guilty of manslaughter, he could not complain of error in

charges relating to murder.—*Pigg v. State*, 43 N. E. 300, 145 Ind. 560.

[m] (Sup. 1897)

The verbal error of using the word "murder" in an instruction in such a broad sense as to include therein manslaughter, was harmless where the jury could not have been misled as to the law of the case.—*Sutherland v. State*, 48 N. E. 246, 148 Ind. 695.

[n] (Sup. 1897)

Where the killing was admitted, an instruction that certain statements of defendant might "be considered as strong proof" against him in determining whether he committed the homicide, was harmless; the word "homicide" not necessarily importing crime.—*Siberry v. State*, 149 Ind. 684, 39 N. E. 936, 47 N. E. 458.

[o] (Sup. 1898)

Errors in instructions concerning murder in the first and second degrees are harmless, where defendant was found guilty of manslaughter.—*Shields v. State*, 49 N. E. 351, 149 Ind. 395.

[p] (Sup. 1899)

Erroneous charges on malice as an element of assault to murder did not prejudice accused, who was convicted of assault to commit manslaughter.—*Rains v. State*, 52 N. E. 450, 152 Ind. 69.

[q] (Sup. 1899)

The evidence showed that defendant, accused of assault with intent to kill, was at no time menaced or assaulted by the prosecuting witness. The evidence was conflicting as to whether accused inflicted any of the injuries. Held that, where the jury found accused guilty, the fact that the court charged as to self-defense, of which there was no evidence, was not prejudicial.—*Robinson v. State*, 53 N. E. 223, 152 Ind. 304.

Where accused was convicted of an assault with intent to commit voluntary manslaughter, that the court may have erred in defining express malice as relating to the crime of murder did not prejudice defendant.—*Id.*

[r] (Sup. 1899)

One convicted of murder in the first degree cannot complain of instructions which permitted conviction of murder in the second degree on evidence which would only warrant a conviction for manslaughter, where the instructions defining the crime of which he was convicted were correct.—*Thrawley v. State*, 55 N. E. 95, 153 Ind. 375.

[s] (Sup. 1899)

On a trial for murder, an instruction that if accused willfully killed deceased, but it was done without malice, and without premeditation, voluntarily, he was guilty of manslaughter, is not prejudicial to the accused because of the use of the word "willfully," since it renders the instruction the more favorable to him.

—*Bridgewater v. State*, 55 N. E. 737, 153 Ind. 560.

[t] (Sup. 1900)

Where there was no evidence that deceased was engaged in burglary from the defendant at the time of the shooting, an instruction as to the effect of burglary as a defense was error of which the defendant could not complain.—*Bloom v. State*, 58 N. E. 81, 155 Ind. 292.

[u] (Sup. 1901)

Where a defendant is indicted for assault with intent to commit murder in the first degree, but is convicted of an assault with intent to commit manslaughter, errors in rulings on instructions as to the law applicable to the first offense are harmless.—*Braxton v. State*, 61 N. E. 195, 157 Ind. 213.

[v] (Sup. 1903)

Where defendant was charged with assault and battery with intent to murder, and the jury found him guilty of an assault and battery with intent to commit manslaughter, any ambiguity in an instruction explaining the difference between premeditated malice as a necessary ingredient of murder in the first degree and of an assault and battery with intent to commit murder in first degree and an unpremeditated purpose to kill as an element of manslaughter and of an assault and battery with intent to commit that offense, was without prejudice.—*Starr v. State*, 67 N. E. 527, 160 Ind. 661.

[w] (Sup. 1905)

Where an indictment charged that the killing was accomplished by physical violence, an erroneous instruction authorizing a conviction of murder in the first degree, if the jury found that by reason of the acts of defendant the deceased was put in great fear and agitation, to such an extent that she lost her reason and jumped into a well, which caused her death, cannot be considered harmless, although the jury did not find the accused guilty of murder, but of involuntary manslaughter.—*Gipe v. State*, 75 N. E. 881, 165 Ind. 433, 1 L. R. A. (N. S.) 419, 112 Am. St. Rep. 238.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Homic. §§ 715-720.

See, also, 21 Cyc. p. 1094.

### § 341. — Failure or refusal to give instructions.

[a] (Sup. 1879)

On appeal from conviction for homicide, appellant cannot complain of the court's failure to instruct on involuntary manslaughter, where he requested no instruction on his subject.—*Adams v. State*, 65 Ind. 565.

[b] (Sup. 1883)

On trial for murder in the first degree, the court told the jury the penalty for that and for manslaughter, but not for murder in the second degree, of which defendant was found guilty, and the proper punishment assessed.

*Held*, that the omission was harmless.—*Smurr v. State*, 88 Ind. 504.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. § 721.

See, also, 21 Cyc. p. 1094.

**§ 342. — Verdict.**

[a] (Sup. 1886)

Under an indictment for assault and battery with intent to murder the accused may be convicted of an assault with intent to murder; and although the evidence only makes out the latter, while the finding is that of guilty of an assault and battery with intent to murder, the error is harmless, as the punishment in either case is the same under the statute.—*Keeling v. State*, 107 Ind. 563, 8 N. E. 559.

[b] (Sup. 1908)

Defendant convicted of murder in the second degree cannot complain that under the evidence he was guilty of murder in the first degree.—*Ludwig v. State*, 170 Ind. 648, 85 N. E. 345.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. § 722.

See, also, 21 Cyc. p. 1099.

**§ 347. Reduction or modification of sentence.**

[a] (Sup. 1878)

Where, on a verdict of guilty of murder in the second degree, fixing the punishment at imprisonment for life and a fine, the court, instead of disregarding the fine, enters judgment on the verdict, the supreme court will reverse as to the fine and affirm the balance of the judgment. 2 Rev. St. 1876, p. 412, § 158.—*Kennedy v. State*, 62 Ind. 136.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. § 725.

**XI. SENTENCE AND PUNISHMENT.**

Assessment of punishment by jury, see ante, § 314.

Assessment of punishment without intervention of jury, see JURY, § 24.

Execution of sentence of death, see CRIMINAL LAW, § 1219.

Instructions as to punishment, see ante, § 311.

**§ 351. Constitutional and statutory provisions.**

[a] (Sup. 1855)

The statute authorizing capital punishment for the crime of murder is not in conflict with the constitution.—*Rice v. State*, 7 Ind. 332; *Driskill v. Same*, Id. 338.

[b] (Sup. 1855)

It is competent for the legislature to confer on the jury the right to determine in each particular case whether capital punishment or imprisonment for life shall be inflicted for the crime of murder.—*Rice v. State*, 7 Ind. 332.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. § 728.

**§ 353. Entry and record of judgment.**

[a] (Sup. 1878)

Where the jury find a verdict of murder or manslaughter and assess the term of imprisonment, and, contrary to law, also assess a fine, the court, in entering judgment on the verdict, should disregard the fine.—*Veatch v. State*, 60 Ind. 291; *Kennedy v. Same*, 62 Ind. 136.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. § 730.

**§ 354. Nature and extent of punishment.**

Cruel and excessive punishment, see CRIMINAL LAW, § 1213.

Question for jury, see ante, § 282½.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. Homic. § 731.

**HORSE RACING.**

See—

GAMING, §§ 7, 8, 66, 68, 80.

Laws relating to as denial of due process of law.

CONSTITUTIONAL LAW, § 278.

Local and special laws relating to. STATUTES, § 85.

On fair grounds. AGRICULTURE, § 4.

On highway. HIGHWAYS, § 186.

Subjects and titles of acts relating to. STATUTES, § 118.

**HORSE RAILROADS.**

See STREET RAILROADS.

**HORSES.**

See—

ANIMALS.

Frightening—

HIGHWAYS, § 181.

MUNICIPAL CORPORATIONS, §§ 705, 781.

RAILROADS, §§ 305, 360, 407.

STREET RAILROADS, § 87.

Judicial notice as to. EVIDENCE, § 13.

Injuries to on railroad tracks. RAILROADS, §§ 405-451.

LIVERY STABLE KEEPERS.

Necessaries. INFANTS, § 50.

On streets and highways—

HIGHWAYS, §§ 165-186.

MUNICIPAL CORPORATIONS, §§ 701-707.

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# HOSPITALS.

## Scope-Note.

[INCLUDES institutions for cure of persons sick, wounded, insane, or otherwise afflicted, whether founded or maintained by private means, or in part or wholly by government; establishment, maintenance, regulation, and management of such institutions; and rights, duties, powers, and liabilities of managers and other officers, etc., thereof.

[EXCLUDES powers of incorporated cities, towns, etc., in respect of establishment, maintenance, etc., of hospitals (see *Municipal Corporations*); and hospitals regarded as charitable institutions (see *Charities*). For complete list of matters excluded, see cross-references, post.]

## Analysis.

- § 2. Establishment and maintenance of public hospitals.
- § 3. Regulation and supervision.
- § 4. Officers.
- § 6. Management of institution.
- § 8. Actions.

## Cross-References.

See—

ASYLUMS.

Laws relating to hospitals for insane as encroachment by legislature on executive. CONSTITUTIONAL LAW § 58.

Liability of city for acts of officers in conducting. MUNICIPAL CORPORATIONS, § 747.

Liability, etc.—(Cont'd).

Of master for negligence of hospital in treating injured servant. MASTER AND SERVANT, § 92.

Negligence in driving ambulance—MUNICIPAL CORPORATIONS, §§ 705, 751. NEGLIGENCE, § 14.

Private nuisance. NUISANCE, §§ 3, 6.

Public nuisance. NUISANCE, § 61.

### § 2. Establishment and maintenance of public hospitals.

Power of city to establish hospital, see MUNICIPAL CORPORATIONS, § 268.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Hosp. §§ 1, 2.

See, also, 21 Cyc. pp. 1108, 1107; note, 5 L. R. A. (N. S.) 1028.

### § 3. Regulation and supervision.

[a] (Sup. 1880)

Act March 14, 1867, § 53, cl. 33 (Rev. St. 1876, p. 292), authorizing the common councils of cities incorporated under the act to enforce ordinances to erect and establish market houses, engine houses, houses of refuge, and hospitals, does not authorize the council of a city to enact an ordinance to license or regulate the establishment of private hospitals erected within the city limits.—*Bessonies v. City of Indianapolis*, 71 Ind. 189.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Hosp. §§ 3, 4.

See, also, 21 Cyc. pp. 1107, 1110.

### § 4. Officers.

[a] (Sup. 1896)

Rev. St. 1894, § 3010 (Rev. St. 1881, § 2770), provides that the board of trustees of the Central Hospital for the Insane shall elect from their number a treasurer. Section 3012 (2772) provides that no money shall be paid out by them except on an itemized bill allowed by them, and that payment shall be made by an order on the treasurer, signed by the president. Section 3013 (2773) provides that the treasurer shall, before the orders become due, present to the state auditor a statement of all orders drawn, and that the auditor shall draw an order for the amount in favor of the treasurer on the state treasurer, and that the treasurer of the board shall return to the auditor each month a statement of the orders paid by him. *Held*, that where a treasurer of the board deposited money received by him from the state treasurer in a bank, subject to his check as treasurer, and the bank refused to pay the amount on his check, his successor could recover from the bank the amount of the deposit, as such successor is a trustee of an express trust, within section 252 (252), authorizing such a trustee to sue without joining with him the person for whose benefit

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the suit is prosecuted.—*Meridian Nat. Bank v. Houser*, 145 Ind. 496, 42 N. E. 753.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Hosp. §§ 5-10.

See, also, 21 Cyc. pp. 1108, 1109; note, 38 L. R. A. 211.

### § 6. Management of institution.

[a] (Sup. 1896)

The money paid to the treasurer of the board of trustees of an insane hospital is to be applied to the payments of specific claims designated and pointed out in the treasurer's statement to the Auditor of State, and, until so applied, the treasurer has the right to the possession thereof and is charged with diligence and good faith in the disbursements of the same to the persons for the payment of whose claims he has received the money. If the money is deposited in a bank, he can as such treasurer give checks to the persons or check the money out to himself and pay the same to the particular persons. It is the duty of a bank having such deposit to pay such checks, and any failure so to do is a breach of the implied agreement upon which such a deposit is made.—*Meridian Nat. Bank v. Hauser*, 42 N. E. 753, 145 Ind. 496.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Hosp. § 11.

See, also, 21 Cyc. pp. 1107, 1108.

### § 8. Actions.

Exhibits annexed to pleading, see PLEADING, § 310.

[a] (App. 1908)

A complaint alleged that defendant erected and maintained a hospital for its employes in 1900, and adopted rules governing the admission of its employes thereto, by which they were to pay certain fees out of their wages for necessary medical attention; that plaintiff, while in defendant's employment in 1903, was injured and taken to defendant's hospital, and defendant undertook to receive plaintiff in its hospital for proper treatment, but its surgeon negligently treated him, and, after an examination which showed that plaintiff was not cured, discharged him from the hospital, causing him great expense for subsequent medical attention, etc. *Held*, that the complaint was framed on a theory of tort, and was insufficient, against a demurrer, because it did not positively and directly allege that defendant owned the hospital when plaintiff was injured and discharged therefrom, and it could not be inferred from the allegation that defendant owned the hospital in 1900 that it still owned it when plaintiff was injured.—*Wabash R. Co. v. Reynolds*, 84 N. E. 992, 41 Ind. App. 678.

The complaint was insufficient on demurrer as an action for willful injury, since it did not show that plaintiff received any injury as the result of defendant's wrongful act, except such as resulted from its breach of contract,

and did not show that the dismissal was with intent to inflict, willfully and purposely, the particular injury of which plaintiff complained.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. Hosp. § 14.

See, also, note, 41 L. R. A. 324.

## HOSTILE POSSESSION.

See ADVERSE POSSESSION, §§ 58-85.

## HOSTILE WITNESS.

See—

Impeachment for interest or bias. WITNESSES, §§ 363-374.

Right of person calling to impeach. WITNESSES, § 323.

Leading questions. WITNESSES, § 244.

## HOTELS.

See—

Breach of warranty as to use of building as affecting validity of insurance policy. INSURANCE, § 278.

Discrimination as to guests by reason of race, color, or condition. CIVIL RIGHTS, § 5.

INNKEEPERS.

## HOURS.

See—

Computation of time. TIME, §§ 12, 13.

Regulations as to hour of closing place where liquor is sold. INTOXICATING LIQUORS, § 121.

## HOURS OF SERVICE.

Power to regulate, see MASTER AND SERVANT, § 10½.

## HOUSE.

See—

Breaking and entering. BURGLARY.

Burning. ARSON.

DISORDERLY HOUSE.

Nature of property in. PROPERTY, § 4.

## HOUSEBREAKING.

See BURGLARY.

## HOUSEHOLDERS.

See—

Qualifications of appraisers on execution sale. EXECUTION, § 141.

Of jurors—

GRAND JURY, § 5.

JURY, § 50.

Right to exemptions. EXEMPTIONS, § 17.

## HOUSEHOLD FURNITURE.

Construction of term as used in insurance policy, see INSURANCE, § 163.

**HOUSE OF CORRECTION.**

See REFORMATORIES.

**HOUSE OF ILL FAME.**

See DISORDERLY HOUSE.

**HOUSE OF REFUGE.**

See—

Commitment of juvenile delinquents. INFANTS, § 16.

Subjects and titles of acts establishing. STATUTES, § 119.

**HUMAN BEING.**

Allegation in indictment for murder that deceased was a human being, see HOMICIDE, § 131.

**HUMANITARIAN DOCTRINE.**

See—

Injury avoidable notwithstanding contributory negligence—

MASTER AND SERVANT, § 248.

NEGLIGENCE, § 83.

RAILROADS, §§ 278, 388, 390.

STREET RAILROADS, § 103.

**HUNTING.**

See—

Criminal trespass, indictment. TRESPASS, § 87.  
GAME.

On Sunday. SUNDAY, § 29.

**HUNTINGTON.**

Publication of ordinances of, see MUNICIPAL CORPORATIONS, § 110.

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# HUSBAND AND WIFE.

## *Scope-Note.*

[INCLUDES the marital relation; rights, powers, duties, and liabilities of married persons, as between themselves and as to others, incident to the existence of the relation or arising from conveyances or agreements in consideration or in consequence of marriage; disabilities and privileges of married women by reason of their coverture, and protection of their persons and property; and legal proceedings affecting husbands and wives and their property.

[EXCLUDES contracts to marry (see *Breach of Marriage Promise*); contracts to procure marriage or in restraint of marriage (see *Contracts*); marriage and annulment thereof (see *Marriage*); divorce and judicial separation (see *Divorce*); rights of dower (see *Dower*), curtesy (see *Curtesy*), and homestead (see *Homestead*); testamentary capacity of married women (see *Wills*); competency of husband and wife as witnesses for or against each other (see *Witnesses*); and offense of adultery (see *Adultery*) and bigamy (see *Bigamy*). For complete list of matters excluded, see cross-references, post.]

## *Analysis.*

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- § 2. What law governs.
- § 4. Support of family.
- § 5. Services and earnings of wife.
- § 6. Property of husband.
- § 7. Property of wife.
- § 9. — Real property.
- § 10. — Personal property.
- § 11. — Reduction to possession by husband.
- § 13. — Rights of husband's creditors.
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- § 15. Conveyances by husband and wife.
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- § 17. Contracts with third persons in general.
- § 18. Antenuptial debts of wife.
- § 19. Necessaries and family expenses.
- § 20. Agency of wife for husband.
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- § 25. Agency of husband for wife.

### **II. Marriage Settlements.**

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### III. Conveyances, Contracts, and Other Transactions Between Husband and Wife—Continued.

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As witness of husband or wife of party or other person interested. WITNESSES, § 106.	Enlistment of husband in military service. ARMY AND NAVY, § 18.
Of wife as witness to will making devise to husband. WILLS, § 116.	Estate of widow in devise on remarriage. WILLS, § 590.
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Course of descent of wife's property received from husband. DESCENT AND DISTRIBUTION, § 11.	Inheritance of survivor. DESCENT AND DISTRIBUTION, §§ 52–65.
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As to wife's separate property, see post, §§ 134-146.

Liabilities for counsel fees and expenses of wife in action for divorce, see DIVORCE, §§ 196, 197.

Liability of husband for support of pauper wife, see PAUPERS, § 37.

Married woman's property act as changing relation between husband and wife, see post, § 113.

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Rights of action for personal injuries, see post, § 209.

### § 1. The relation in general.

Pleading, see post, § 229.

Presumptions as to continuance of relation, see EVIDENCE, § 67.

#### [a] (Sup. 1886)

While the statutes remove, as a general rule, the disabilities of a married woman, the common-law rule that a husband and wife are to be regarded as one person still prevails.—*Barnett v. Harshbarger*, 105 Ind. 410, 5 N. E. 718.

#### [b] (Sup. 1896)

At common law a valid marriage made the husband and wife one person in law. The legal existence of the woman was suspended or merged in that of the husband.—*Henneger v. Lomas*, 44 N. E. 462, 145 Ind. 287, 32 L. R. A. 848.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 1, 2.

See, also, 21 Cyc. pp. 1143, 1144.

### § 2. What law governs.

Conveyances of married woman's separate estate, see post, § 180.

Disabilities and privileges of married women in general, see post, § 56.

#### [a] (Sup. 1898)

In the absence of any evidence of a statute on the subject, this court will presume that the

common law prevails in another state as to the rights of married women.—*Schurman v. Marley*, 29 Ind. 458.

#### [b] (Sup. 1875)

The courts of Indiana will presume that the common law is in force in Kentucky, and therefore that personal property received in payment for land sold by a married woman in that state became the property of her husband. The subsequent removal of the husband and wife to Indiana, bringing with them such personal property, does not divest the ownership of the husband.—*Lichtenberger v. Graham*, 50 Ind. 288.

#### [c] (Sup. 1878)

Personal property purchased by a married woman with her own means, and used in her husband's household, was removed by them to this state, where it was seized on an execution against a third person. *Held*, that in an action by the husband and wife to try the rights of property, where it is not alleged or proven, it will be presumed that the common-law rule, vesting such goods in the husband, prevailed in such other state, and that, for want of title in herself, she cannot recover.—*Smith v. Peterson*, 63 Ind. 243.

#### [d] (Sup. 1881)

Services rendered by the wife before marriage in another state, where it is presumed the common law prevails, belong to the husband.—*Knippenberg v. Morris*, 80 Ind. 540.

#### [e] (App. 1893)

The respective rights of husband and wife in their personal property are determined by the law of the place of the matrimonial domicile, which is presumed to be the domicile of the husband at the time of the marriage.—*Parrett v. Palmer*, 8 Ind. App. 356, 35 N. E. 713, 52 Am. St. Rep. 479.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 3, 4, 11.

See, also, 21 Cyc. pp. 1145-1147; notes, 25 L. R. A. 178, 57 L. R. A. 353, 513; note, 12 Am. Dec. 478.

### § 4. Support of family.

Criminal responsibility of husband for failure to support, see post, §§ 302-313.

Failure to support wife ground for divorce, see DIVORCE, § 31.

Liabilities for necessities and family expenses, see post, § 19.

Separation and separate maintenance, see post, §§ 277-299.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 9, 10.

See, also, 21 Cyc. pp. 1151, 1152.

### § 5. Services and earnings of wife.

Contracts between husband and wife as to services, see post, § 41.

Earnings as separate property, see post, § 126.  
Joinder of causes of action in complaint for loss of services, see ACTION, § 38.

Materiality of evidence in action by husband for services of wife, see EVIDENCE, § 144.

Opinion evidence in action for services, see EVIDENCE, §§ 471, 472.

Pleading in action for services, see post, § 229.

Right of action for loss of services, see post, § 209.

Right of action for services, see post, §§ 207, 208.

Validity of contracts by married women as to services, see post, § 82.

What law governs, see ante, § 2.

#### [a] (Sup. 1881)

The earnings of a wife during marriage belong to her husband, and, unless it is averred that he gave them to her, or that she was carrying on business with her separate property, he has the right to bring suit therefor, making her a co-plaintiff, as the meritorious cause of action. To such an action coverture of the wife is no defense.—*Cranor v. Winters*, 75 Ind. 301.

#### [b] (Sup. 1881)

Where nearly one-half of the services sought to be recovered in an action by a wife against the estate of her employer were rendered after her marriage, such earnings belonged to her husband, and were not recoverable by her, notwithstanding Act March 25, 1879, increasing the rights of married women.—*Knippenberg v. Morris*, 80 Ind. 540.

#### [c] (App. 1897)

A husband may recover for services rendered both by himself and his wife in nursing a person who was a member of his household, the services of the wife being in the line of her household duties.—*Hensley v. Tuttle*, 46 N. E. 594, 17 Ind. App. 253.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 11, 12.

See, also, 21 Cyc. p. 1153.

### § 6. Property of husband.

Conveyances by husband as bar of dower, see DOWER, § 44.

Conveyances by husband in fraud of wife's right of dower, see DOWER, § 20.

Conveyances by husband in fraud of wife's right to alimony, see DIVORCE, §§ 275, 276.

#### [a] (Sup. 1858)

In a suit by a widow to cancel a secret deed, made before marriage by her intended husband to his son by a former wife, it is competent to show that up to and after the execution of the deed the intended wife was receiving the addresses of, and was under a promise of marriage to, another man, to repel the presumption that the deed was executed while the parties contemplated marriage, and to defraud the intended wife.—*Dearmond v. Dearmond*, 10 Ind. 191.

The principle of the common law, by which the husband was entitled to receive the property of the wife to aid him in paying her debts contracted before coverture, and in supporting her during its existence, does not apply in a case by the wife against the husband.—*Id.*

If a man or woman represent to the other, as an inducement to marriage, that he or she is the owner of certain property, and the marriage, in part upon such consideration, should be consummated, a secret voluntary conveyance of such property before the marriage by one of the parties, would, it seems, be a fraud upon the other. But evidence that the property was conveyed before the parties contemplated marriage would tend to repel the inference of fraud.—*Id.*

#### [b] (Sup. 1859)

A note made payable to husband and wife on a loan made by him is, in legal effect payable to the husband, and he may sue on it.—*Leedy v. Crumbaker*, 13 Ind. 523.

#### [c] (Sup. 1882)

Where the husband's lands are sold to satisfy his individual debts, the wife is entitled under the act of March 11, 1875, to have her portion set off, and the purchaser's interest sold to satisfy mortgages of the husband on the land in which she joined, before resort may be had to her portion.—*Grave v. Bunch*, 83 Ind. 4.

#### [d] (Sup. 1882)

There is no restriction in interest of the wife on the power of the husband to dispose of his personal estate.—*Pond v. Sweetser*, 85 Ind. 144.

#### [e] (Sup. 1885)

As against a purchaser of land on a judgment against the husband, the rights of the wife are not impaired by the fact that the deed to the husband was not recorded.—*Wright v. Tichenor*, 104 Ind. 185, 3 N. E. 853.

#### [f] (Sup. 1892)

A wife's interest in her husband's land is that of a purchaser for value, and is not affected by an outstanding trust in such land, of which she had no notice at the time of her marriage.—*First v. First*, 132 Ind. 572, 32 N. E. 731.

#### [g] (Sup. 1893)

In an action by a wife to set aside a conveyance made by her husband as fraudulent on the ground that it was made between the time the marriage contract was entered into and the

time it was consummated, the complaint was insufficient where it was not averred that she would not have entered into the contract or consummated the marriage had such husband not owned the property he afterwards conveyed at the time she entered into the contract, or that she would not have consummated the marriage had she known that he had conveyed the land previous thereto, and it did not appear that the deeds were not recorded or that he did anything to conceal the conveyance, except that it was averred that he retained the possession and kept the fact of the conveyance secret from her.—*Alkire v. Alkire*, 32 N. E. 571, 134 Ind. 350.

When a man contemplates a second marriage, but has made no representation as to his property for the purpose of inducing his prospective wife to enter into the marriage contract, the fact that between the time the marriage contract was entered into and the time it was consummated he conveys valuable property to his children by his former wife will not enable such second wife to claim that the conveyances were a fraud on her, though she was not advised of their being made, when such conveyances were only a reasonable provision for the children, and in proportion to the father's estate, and he retains sufficient property to afford him and his second wife a reasonable support, and her a reasonable support after his death should she survive.—*Id.*

[h] (Sup. 1907)

Marriage being a valuable consideration, a married woman is regarded as a purchaser for a valuable consideration of all property which accrues to her by her marriage.—*Green v. Estabrook*, 168 Ind. 123, 79 N. E. 373, 120 Am. St. Rep. 349.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 13-18.

See, also, 21 Cyc. pp. 1154-1156; note, 3 L. R. A. (N. S.) 774; note, 39 Am. Dec. 218.

§ 7. Property of wife.

Disposition on divorce, see DIVORCE, §§ 248-254.

Right of wife in property of husband in general, see ante, § 6.

Rights and liabilities of husband as to business of wife as sole trader, see post, § 99.

Separate property, see post, §§ 110-202.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 19-70.

See, also, 21 Cyc. pp. 1157-1195.

§ 9. — Real property.

Conveyances by husband and wife, or both, see post, § 15.

Extent of right to dower, see DOWER, § 22.

Judicial sale of property as barring dower, see DOWER, § 46.

Proceeds of real property, see post, § 10.

Rights of husband's creditors, see post, § 13.

[a] (Sup. 1837)

A husband is not entitled to a land certificate belonging to his wife, and, if he obtains a conveyance founded thereon from the land agent, he will acquire no title thereby, and the grantee of the husband, without notice of the right of the wife will take nothing by his conveyance; but, the wife having deceased, her heir will be entitled to a conveyance of the land from the land agent.—*Chill v. Hornish*, 4 Blackf. 454.

[b] (Sup. 1840)

If a widow, having an estate in dower, marry, her husband and those claiming under him have a right to the enjoyment of the premises during the existence of the marriage.—*Doe ex dem. Cull v. Brown*, 5 Blackf. 309.

[c] (Sup. 1851)

If the wife is seised of an estate of inheritance in land at the time of her marriage, the husband becomes possessed of an estate therein during their joint lives, which he may convey.—*Butterfield v. Beall*, 3 Ind. 203.

[d] (Sup. 1857)

In lands conveyed to the wife, the husband becomes seised of an estate for their joint lives.—*Junction R. Co. v. Harris*, 9 Ind. 184, 68 Am. Dec. 618.

[e] (Sup. 1882)

Since before 1851, the rules of the common law governed the relations of husband and wife as to property, where, before that time, a wife gave her husband money with which to buy a tract of land for her, and he took the deed in his own name, there resulted no trust in her favor, because, in law, the money was his, and not hers.—*Waldron v. Sanders*, 85 Ind. 270.

[f] (Sup. 1883)

A wife has no equitable claim to lands purchased with her money in her husband's name in 1846, when the common-law rule prevailed, that the money of the wife belonged to the husband by virtue of the marital relations, in the absence of any contract making the transaction an exception to the common law rule.—*Ream v. Karnes*, 90 Ind. 167.

[g] (Sup. 1883)

After the marriage of a man and woman, each of whom had children, and owned a farm, he carried on both farms; all living together on the wife's farm. No separate accounts were kept, and the profits were retained and used by the husband. *Held*, that he was not her tenant, and that after his death she was not entitled to anything for use and occupation of her farm.—*Davis v. Watts*, 90 Ind. 372.

[h] (Sup. 1887)

Where the wife died before a sale on a lien for local assessments on her husband's realty, she had no such interest in said realty by her marriage as would descend to her husband, as against the purchaser at such sale.—*Elliott v. Cale*, 113 Ind. 383, 14 N. E. 708.

## [l] (Sup. 1896)

Where, in 1849, a wife gave money to her husband, with which he purchased land, the property purchased became that of the husband.—*Waymire v. Waymire*, 144 Ind. 329, 43 N. E. 267.

## [j] (App. 1902)

Estates by curtesy having been abolished by Burns' Rev. St. 1901, § 2639, and no statute giving a husband any inchoate interest in the wife's lands alienated voluntarily or by judicial sale before her death, or any interest in any of her lands except one of inheritance in those of which she dies seised, a husband cannot maintain suit, after the wife's death, to redeem her lands from a sale in her lifetime for a ditch assessment.—*Turner v. Heinberg*, 65 N. E. 294, 30 Ind. App. 615.

## FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 22, 30-37.  
See, also, 21 Cyc. pp. 1163-1169.

## § 10. — Personal property.

Real property purchased with wife's money, see ante, § 9.

Reduction to possession, see post, § 11.

Rights of husband's creditors, see post, § 13.

What law governs, see ante, § 2.

## [a] (Sup. 1849)

Notes given to a husband for the purchase money of the wife's land, and secured by mortgage to him, are his property and assets in the hands of his administrator.—*Talbott v. Dennis*, 1 Ind. 471, Smith, 357.

[b] Where a woman, being the payee and holder of a sealed note, marries, the property in the note is in the husband, and he alone can negotiate and pass it by indorsement.—(Sup. 1852) *Evans v. Secrest*, 3 Ind. 545; (1859) *Holland v. Moody*, 12 Ind. 170.

## [c] (Sup. 1852)

Where a woman, being the payee and holder of a note, married, on the assignment of the note signed by both husband and wife her signature was mere surplusage.—*Evans v. Secrest*, 3 Ind. 545.

## [d] (Sup. 1859)

A husband's right to a note executed to his wife prior to the marriage, which vested in the husband at the time of the enactment of Acts 1853, p. 57, declaring that the personal property of the wife held by her at the time of her marriage shall remain her own property, was not affected by the act.—*Holland v. Moody*, 12 Ind. 170; *Conley v. Conley*, 13 Ind. 259.

## [e] (Sup. 1860)

The possession of money by the guardian is in law the possession of the ward; and, if the latter be a married woman, it is the possession of her husband, so that, in case of his death, it will go to his administrator.—*Miller v. Blackburn*, 14 Ind. 62, 77.

## [f] (Sup. 1860)

At common law, where the real estate of the wife is sold by the husband and wife, the money or personal property received therefor by the husband vests absolutely in him; and the statute (Acts 1853, p. 57) does not change the rule as to property acquired by the wife by purchase.—*Mahoney v. Bland*, 14 Ind. 176.

The wife owned land, not to her separate use. She and her husband exchanged it for a horse. *Held*, that the husband could sell the horse as his property, both at common law and under St. 1853, p. 57.—*Id.*

## [g] (Sup. 1863)

The wearing apparel of a married woman, furnished by her husband as a marital duty, remains his personal property during his life, and he can sell it or give it away during that period; but she may retain such as she may have at his death as her paraphernalia.—*State v. Hays*, 21 Ind. 288.

## FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 23, 34, 35, 38-46, 396, 398.

See, also, 21 Cyc. pp. 1169-1188; note, 3 L. R. A. (N. S.) 769; notes, 29 Am. Dec. 47, 46 Am. Dec. 47.

## § 11. — Reduction to possession by husband.

## [a] (Sup. 1857)

Although the presumption is that money of the wife, reduced to possession by the husband during the marriage, becomes his, such presumption is not conclusive, and the husband may so treat it as to charge himself and his heirs, as trustees of the wife, with the duty of applying it to her separate use.—*Resor v. Resor*, 9 Ind. 347.

## [b] (Sup. 1860)

The investment of the wife's legacy in real estate, taking the deed in the husband's name, and his subsequent disposition of the same estate by will, operated as a reduction to the husband's possession of money to which he was entitled in right of his wife.—*Miller v. Blackburn*, 14 Ind. 62.

## [c] (Sup. 1863)

Prior to the laws enlarging the rights of married women, the personal property of the wife which came to her after the marriage did not become the property of the husband ipso facto, but only when it had been actually reduced to possession by him by such acts as evinced an intention to divest his wife's right or title, and make it absolutely his own.—*Standeford v. Devol*, 21 Ind. 404, 83 Am. Dec. 351.

## [d] (Sup. 1866)

A wife was the owner of a tract of land which was sold and the money received therefor, which was, with her consent, kept in the possession of the husband for three days, when a portion thereof was invested in chattels with the understanding that they should remain her prop-

erty. *Held*, that the proceeds of the wife's land were not so reduced to the possession of the husband as to vest ownership in him.—*Ireland v. Webber*, 27 Ind. 256.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 39, 40, 47–57.

See, also, 21 Cyc. pp. 1181–1183; notes, 29 Am. Dec. 47, 37 Am. Dec. 577.

### § 13. — Rights of husband's creditors.

As to estates conveyed to husband and wife, see post, § 14.

Liability of separate estate for husband's debt, see post, §§ 150, 171.

Rights as to property of husband, see ante, § 6.

Rights as to separate estates, see post, § 167.

Wife's separate property, see post, § 149.

#### [a] (Sup. 1846)

If a husband sells his wife's land for his own benefit, under an agreement with her to purchase other land for her of equal value with that sold, and he afterwards, conformably to the agreement, makes such purchase and causes the vendor to execute the conveyance to his wife, the lands so conveyed will not be subject in equity to the husband's debts, contracted subsequently to his payment for the land, but before the execution of the conveyance.—*Barnett v. Goings*, 8 Blackf. 284, 44 Am. Dec. 766.

#### [b] (Sup. 1859)

Under St. 1838, as at common law, the husband has an absolute estate in his wife's lands during their joint lives, and the sheriff can sell it on an execution, and, his deed will convey that interest.—*Montgomery v. Tate*, 12 Ind. 615.

#### [c] (Sup. 1863)

In 1843, A. contracted with B., the wife of C., and D., the daughter of C., for the sale to them of land for \$1,000, one half whereof was paid at the date of contract, and a title bond executed by A. for the conveyance of the land to D.; and B. and D. executed their note to A. at 12 months for the other half of the purchase money, which was paid at maturity, and then said bond was canceled, and, under another arrangement, A. conveyed said land to E., a son-in-law of B. and C. The first payment on the land was made in part by the transfer of a note to A., which B. held in her own right, C. having nothing to do with the transfer; and all of the residue of the purchase money was paid by B. with her own money, received from the estate of her grandfather. Said money was received by her after her marriage with C., but never came into his possession, and was never claimed by him by virtue of his marital rights, or otherwise. Said money did not come to her with any limitation to her separate use. B. and C. and their family together occupied and used said land. Action to subject said land to payment of C.'s debts. *Held*, that the money with which said land was purchased never became the property of C., the husband, and that

the land therefore could not be subjected to the payment of C.'s debts.—*Standeford v. Devol*, 21 Ind. 404, 83 Am. Dec. 351.

#### [d] (Sup. 1886)

Creditors of a husband cannot compel him to reduce his wife's choses in action to possession.—*Proctor v. Cole*, 104 Ind. 373, 3 N. E. 106, 4 N. E. 303.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 22, 26, 37, 68–70.

See, also, 21 Cyc. pp. 1161, 1165.

### § 14. Conveyances to husband and wife.

Construction of statute giving mechanic's lien on separate property of wife, see *MECHANICS' LIENS*, § 71.

Conveyance by husband and wife of estate created by conveyance to husband and wife, see post, § 15.

Conveyance by husband to wife of estate by entirety, see post, § 47.

Creation of estate by entirety by will, see *WILLS*, § 627.

Mechanic's lien on land held by husband and wife in joint tenancy, see *MECHANICS' LIENS*, § 57.

Pleading estates by entireties, see post, § 229.

Power of husband to devise land owned by entirety, see *WILLS*, § 6.

Right of action against husband or wife, or both to foreclose mortgage on estate by entirety, see post, § 213.

Right of action by husband or wife, or both, for injuries to estates by entireties, see post, § 209.

Rights of purchaser from wife of entirety, lands devised by husband to wife, see *WILLS*, § 744.

Separate property of wife, see post, § 119.

#### [a] (Sup. 1866)

At common law, where a conveyance of real estate was made to husband and wife, they did not take as joint tenants, or tenants in common, but both were seised of an entirety, and neither could dispose of any part of the estate without the assent of the other; the whole remaining to the survivor.—*Davis v. Clark*, 26 Ind. 424, 89 Am. Dec. 471.

Section 7 of the act concerning real property (1 Gav. & H. Rev. St. p. 259) provides that all conveyances and devises of lands, or of any interest therein, made to two or more persons, except as provided in the next following section, shall be construed to create estates in common and not in joint tenancy, unless it shall be expressed therein that the grantees or devisees shall hold the same in joint tenancy and to the survivor of them, or it shall manifestly appear from the tenor of the instrument that it was intended to create an estate in joint tenancy. Section 8 provides that the preceding section shall not apply to conveyances when made to husband and wife. *Held* that, as the statute did not change the common-law rule regarding conveyances to husband and wife, a

deed to a husband and wife, "the survivor to inherit," vests in them the estate as tenants by the entirety, and no act or conveyance of the husband or sale on execution against him could affect or divest the seisin or use of the wife.—*Id.*

Where land is conveyed to husband and wife, the former has not such an estate in the land as is subject to sale on execution. The right of survivorship does not constitute a contingent or vested remainder, but is a mere incident of the estate.—*Id.*

[b] A conveyance to a husband and wife, as such, creates an estate of entirety, and does not make them joint tenants or tenants in common. Neither can alien without the consent of the other, and the survivor takes the whole.—(Sup. 1868) *Arnold v. Arnold*, 30 Ind. 303; (1868) *Falls v. Hawthorn*, Id. 444; (1869) *Simpson v. Pearson*, 31 Ind. 1, 99 Am. Dec. 577.

[c] (Sup. 1871)

A conveyance or devise of lands, or of an interest therein, to parties who are in fact husband and wife, although not therein described as such, creates in them an estate by entirety.—*Chandler v. Cheney*, 37 Ind. 391.

Where a husband and wife hold an estate as tenants by the entirety, no interest in the estate can be sold on execution for the debts of the husband or the wife.—*Id.*

From the nature of an estate of entirety and the legal relation of the parties there must be unity of estate, unity of possession, unity of control, and unity in conveying; and hence a mortgage on such estate executed by the husband alone is void.—*Id.*

[d] (Sup. 1873)

Where real estate is conveyed to a husband and wife and another person jointly, the husband and wife will take an undivided one-half of the premises as tenants by entirety.—*Anderson v. Tannehill*, 42 Ind. 141.

[e] (Sup. 1876)

Real estate conveyed to a husband and wife cannot, in the absence of fraud, be sold on execution under a judgment rendered against the husband after the conveyance, for a debt contracted by him before the conveyance.—*McConnell v. Martin*, 32 Ind. 434; *Snyder v. Same*, Id. 439.

[f] (Sup. 1877)

Where a deed of lands is made to several persons, two among whom are husband and wife, these two will take their portion as tenants by entirety, even though the deed does not show they are husband and wife; and their share is not liable to be taken on execution for the husband's debts.—*Hulett v. Inlow*, 57 Ind. 412, 26 Am. Rep. 64.

[g] (Sup. 1877)

Where an estate is conveyed to husband and wife as joint tenants, and this relation is suspended by a rule of law which makes them

tenants by entirety, a decree of divorce between them will restore the relation of joint tenants, and the wife takes by survivorship.—*Lash v. Lash*, 58 Ind. 526.

[h] (Sup. 1879)

A crop raised on land held by a husband and wife by entirety is not subject to levy and sale on execution against the husband.—*Patton v. Rankin*, 68 Ind. 245, 34 Am. Rep. 254.

[i] (Sup. 1881)

Land was conveyed by deed to a woman and her husband, to be held by her as her own property; the husband to have possession of the same during his lifetime, and said possession to return to her if she survived him. *Held*, that the title vested in her in fee, subject to his life estate, if he survived.—*Edwards v. Beall*, 75 Ind. 401.

[j] (Sup. 1883)

Rev. St. 1881, § 5117, provides that a married woman may take, acquire, and hold property, real or personal, by conveyance, gift, etc., or by purchase with her separate means or money, and the same, with all the rents and profits, shall be her separate property and under her control the same as if she were unmarried; but she shall not enter into any executory contract to sell or convey or mortgage her land, or convey or mortgage it, unless her husband joins in such contract, etc., provided, that she shall be bound by an estoppel like any other person. *Held*, that neither such statute, nor prior statutes enlarging the rights of married women, abolished tenancy by the entirety, the common-law rule relating to which was first adopted here in 1807, and repeated in each succeeding revision of the statute.—*Carver v. Smith*, 90 Ind. 222, 46 Am. Rep. 210.

[k] (Sup. 1886)

A deed to husband and wife the survivor to take a life estate, and at the death of the survivor the property to be divided among their joint heirs, does not create a tenancy by entirety, under the rule in *Shelley's Case*, "heirs" indicating "heirs apparent," not those who might take in indefinite succession.—*Hadlock v. Gray*, 104 Ind. 596, 4 N. E. 167.

Where a deed is made to husband and wife jointly, without limiting words, they will take as tenants in entirety, but their estate may, by appropriate words, be limited to a life estate; and words clearly expressing an intention to create an estate for their joint lives, and providing that after the termination of such life estate the land shall be divided among the heirs of the husband and the heirs of the wife, will create a life estate in the husband and wife.—*Id.*

[l] (Sup. 1886)

While a wife cannot execute a mortgage on real estate held by herself and husband as tenants by entirety, to secure her husband's debts, yet a mortgage executed by both thereon

for the benefit of the common property, or to secure the wife's debts, may be valid.—*McLead v. Aetna Life Ins. Co.*, 107 Ind. 394, 8 N. E. 230.

[m] (Sup. 1888)

A husband who is not insolvent may in good faith cause land to be conveyed to himself and his wife, and thus vest in himself and wife a joint tenancy with all its legal incidents.—*Phelps v. Smith*, 17 N. E. 602, 19 N. E. 156, 116 Ind. 387.

[mm] (App. 1892)

Where a husband and wife hold, as tenants by entireties, the real estate acquired by them under the same conveyance, and such property has been sold by them, and the proceeds thereof remain in the hands of the agent, no division of them having been made, the husband and wife each take a moiety of the proceeds, and the interest of the husband while in the agent's hands may be subjected to the payment of his debts by proceedings in garnishment.—*Fogleman v. Shively*, 4 Ind. App. 197, 30 N. E. 909, 51 Am. St. Rep. 213.

[n] (Sup. 1893)

Where a conveyance is made to a husband and wife jointly and without words limiting the estate taken, they will take as tenants in entirety; but, where there are in the deed words so limiting the estate conveyed and it is apparent that the grantor intended the grantees to hold by moieties, such intention will prevail.—*Brown v. Brown*, 32 N. E. 1128, 33 N. E. 615, 133 Ind. 476.

In a deed to husband and wife, a recital that, each of the grantees having contributed equally in the purchase of the real estate, it is the express understanding that they shall hold as tenants in common, and not in joint tenancy, is sufficient to make them tenants in common, and not by entireties.—*Id.*

[o] (Sup. 1893)

Where a deed was to a husband and wife "in joint tenancy, and to the survivor of them," a further provision that "in case of the death of" the wife, "her children are to inherit her interest," presupposes that the husband will die before the wife.—*Barden v. Overmeyer*, 134 Ind. 660, 34 N. E. 439.

[p] (Sup. 1893)

Though, where a conveyance is made to husband and wife jointly, without limiting words, they take an estate by entireties, yet if the conveyance is to them expressly "in joint tenancy" they take as joint tenants.—*Thornburg v. Wiggins*, 135 Ind. 178, 34 N. E. 999, 22 L. R. A. 42, 41 Am. St. Rep. 422.

[q] (Sup. 1894)

An agreement by a husband, seised with his wife as tenants by entireties, to survey a boundary line, is void.—*Dyer v. Eldridge*, 136 Ind. 654, 36 N. E. 522.

[r] (Sup. 1895)

Under Rev. St. 1881, § 2922 (Rev. St. 1894, § 3341), providing that a conveyance to two or more shall create a joint tenancy when it appears from the instrument that it was so intended, a deed to a husband and his wife "in joint tenancy, their heirs and assigns, forever," creates a joint tenancy in the husband and wife.—*Wilkins v. Young*, 144 Ind. 1, 41 N. E. 68, 590, 55 Am. St. Rep. 162.

[s] (App. 1898)

Under the statutory proceeding for the assessment of real estate for the construction of gravel roads (Acts 1885, c. 57), remonstrances were filed before the board of commissioners by a husband and wife separately. From a judgment assessing their lands, the husband alone appealed. The husband and wife held the lands as tenants by the entirety. On appeal, the judgment of the board of commissioners was found to be void, and the husband was released from the assessments. *Held*, that the release of the husband was equivalent to a release of the lands, and, since husband and wife were tenants by the entirety, the wife was also released.—*Humberd v. Collings*, 50 N. E. 314, 20 Ind. App. 93.

[t] (Sup. 1900)

A deed to a husband and wife which conveys and warrants to them, jointly, the premises, etc., does not create in them an estate in joint tenancy, but one of entireties; the word "jointly" being mere surplusage.—*Simons v. Bollinger*, 56 N. E. 23, 154 Ind. 83, 48 L. R. A. 234.

[u] (App. 1906)

Lands held by the husband and wife as tenants by the entirety descend to the survivor, and neither can alone alien or incur them.—*Chaplin v. Leapley*, 74 N. E. 546, 35 Ind. App. 511.

[v] (Sup. 1906)

Where a tract of land in question was owned by testator and his wife as tenants by the entirety, such land on testator's death passed to the surviving wife, regardless of any attempt of testator to make a different disposition by will.—*Young v. Biehl*, 77 N. E. 406, 166 Ind. 357.

[w] (App. 1906)

Lands owned by a husband and deeded to a trustee and by him deeded to the husband and wife descend to the survivor of them.—*Wellinger v. Wellinger*, 39 Ind. App. 60, 79 N. E. 214.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 71-89.

See, also, 21 Cyc. pp. 1195-1201; notes, 22 L. R. A. 594, 30 L. R. A. 305, 317; note, 18 Am. Dec. 377; notes, 26 Am. Rep. 65, 33 Am. Rep. 269.

**§ 15. Conveyances by husband and wife.**

As contracts of suretyship by married women, see post, § 87.

Consent of husband in conveyance of married woman's separate estate, see post, § 184.

Construction as to after-acquired property, see DEEDS, §§ 114, 116.

Construction of condition subsequent, see DEEDS, § 155.

Conveyance by husband to or for wife, see post, § 47.

Conveyance by wife to or for husband, see post, § 48.

Conveyance in trust to sale for payment of debts and surplus to wife, see MORTGAGES, § 376.

Conveyances by married women in general, see post, §§ 69-71, 73, 74, 76.

Estoppel of married women by conveyance in general, see post, § 62.

Joinder of assignor's wife in deed of assignment, see ASSIGNMENT FOR BENEFIT OF CREDITORS, § 62.

Mortgage by husband and wife and subsequent assignment to wife of debt secured, see MORTGAGES, § 244.

Of separate property of wife, see post, §§ 180-202.

Pleading partial defense, in action for consideration, see PLEADING, § 80.

Separate conveyance or mortgage of estate conveyed to husband and wife, see ante, § 14.

Separate conveyances of estates by entirety, see ante, § 14.

Sufficiency of delivery, see DEEDS, § 57.

**[a] (Sup. 1845)**

A conveyance of real estate, executed and acknowledged by a husband and wife, but in the body of which the wife's name is not inserted, does not convey the interest of the wife in the premises.—*Cox v. Wells*, 7 Blackf. 410, 43 Am. Dec. 98.

**[b] (Sup. 1851)**

An attempt by a husband to convey the fee simple of property held by the wife at marriage will not render his deed ineffectual to convey his actual interest.—*Butterfield v. Beall*, 3 Ind. 203.

**[c] (Sup. 1857)**

Where land is conveyed to a married woman, the husband being seised of an estate therein for their joint lives, a deed executed by himself and wife is effectual to pass the husband's estate, though the wife was a minor.—*Junction R. Co. v. Harris*, 9 Ind. 184, 68 Am. Dec. 618.

**[d] (Sup. 1859)**

A deed by husband and wife, good in point and form, and properly acknowledged, and in its operative parts conveying a fee simple, is not vitiated by a concluding clause assuming to state the legal effect of the conveyance as to the wife—such clause being mere surplusage.—*Johnson v. Rockwell*, 12 Ind. 76.

**[e] (Sup. 1859)**

Where a conveyance is made by a husband and wife, the wife being under age, she might probably avoid the conveyance as to herself for fraud before arriving at majority.—*Chapman v. Chapman*, 13 Ind. 396.

**[f] (Sup. 1865)**

A conveyance having been made in 1835 to husband and wife, the husband in 1850 executed a deed, which, after reciting that the land had been purchased with the money of the wife, purported to convey and limit the descent of the land on the death of him and his wife to A., B., and C., the children of the wife, to the exclusion of his children by a former marriage. Afterward the husband and wife joined in conveying separate parcels of the land to A., B., and C. *Held*, that the several conveyances to A., B., and C. were valid.—*Noble v. Morris*, 24 Ind. 478.

**[g] (Sup. 1865)**

A. executed a mortgage, in which his wife did not join, upon his interest in certain lands held by him as tenant in common with others. The mortgage was afterwards foreclosed, and the land bought in at the sheriff's sale by B., the mortgagee. B. afterwards, and in the lifetime of A., instituted a suit for partition against the persons who had held as tenants in common with A.; and, upon a report that the land was not susceptible of partition, an order of sale was made, and B. became the purchaser. After the death of A., his widow brought an action for partition against B., claiming to have one-third of the undivided interest of her husband set apart to her. *Held* that, as A.'s wife did not join in the mortgage, her rights were not affected by the proceedings for foreclosure and partition.—*Verry v. Robinson*, 25 Ind. 14, 87 Am. Dec. 346.

**[h] (Sup. 1875)**

A deed made by a husband and wife, not purporting to convey and pass the lands of the wife, but only her interest in the lands of the husband, has no validity under section 6 of the act concerning real property and the alienation thereof. 1 Gav. & H. St. p. 258.—*McCormick v. Hunter*, 50 Ind. 186.

The law of descents (1 Gav. & H. St. p. 296, § 27) gives no authority for the husband to join the wife and convey her interest in his real estate unless his interest passes at the same time, or has previously been divested.—*Id.*

**[i] (Sup. 1878)**

A married woman is not bound by the covenants contained in a deed executed by her husband for her.—*Craig v. Donovan*, 63 Ind. 513.

**[j] (Sup. 1882)**

In ejectment, it appeared that plaintiff, under a mortgage made by defendant in 1876 to secure purchase money, had foreclosed and obtained a sheriff's deed, and that defendant's wife did not join in the mortgage. *Held*, that

defendant's wife had no rights except to redeem.—*Baker v. McCune*, 82 Ind. 585.

[k] (Sup. 1832)

Where a wife has joined with her husband in the execution of a deed of conveyance of his land, it is presumed, in the absence of any special agreement to the contrary, that the inducement for the release of her inchoate right, as to the grantee, was the consideration paid for the land by the grantee to her husband, and not that she separately was paid or promised anything by the grantee.—*Jarboe v. Severin*, 85 Ind. 496.

[l] (Sup. 1832)

Land belonging to a husband, sold under an execution against him, was not redeemed; and, by virtue of the act of 1875, his wife became seised in fee of one-third of the land. The creditor who purchased the husband's interest at the sale, to whom the husband was still indebted, asked him to procure from his wife a deed of her interest; nothing being said about the price to be paid for such interest. She executed the deed to the creditor, in which a consideration of \$1,000 was expressed, and handed it to her husband, who delivered it to the creditor without receiving any payment therefor. *Held*, that the wife was entitled to recover from the creditor the value of her interest in the land.—*Kocher v. Christian*, 88 Ind. 81.

[m] (Sup. 1890)

So long as a mortgage executed by a husband to secure the unpaid purchase money for the land mortgaged is in full force and not barred by the statute of limitation as to the husband, it is also in full force against the wife.—*Leonard v. Binford*, 23 N. E. 704, 122 Ind. 200.

[n] (Sup. 1892)

Where husband and wife execute a warranty deed of the husband's property, which contains the usual words of grant, followed by a clause, "intending hereby to convey absolutely" all the interest of the wife in the property, such clause is mere surplusage, and does not limit the estate conveyed to the inchoate interest of the wife.—*Davenport v. Gwilliams*, 133 Ind. 142, 31 N. E. 790, 22 L. R. A. 244.

[o] (Sup. 1894)

A husband and wife, owners of land as tenants by the entirety, made a joint mortgage of it, with covenants of warranty, to secure the husband's debt, the mortgagee believing the title to be in the husband alone. The husband and wife then conveyed to a third party, who reconveyed to the husband, and afterwards, by a similar process, the husband and wife became tenants by the entirety. *Held*, that the want of title in the husband at the time of the execution of the mortgage was cured by the subsequent vesting of the title in him alone, and that the title of the mortgagee was not affected by the subsequent conveyance.—*Thalls v. Smith*, 139 Ind. 496, 39 N. E. 154.

[p] (Sup. 1896)

The fact that a married woman, who executed with her husband, to secure a debt of the husband, a mortgage on land owned by her and him as tenants by entirety, knew that the mortgage as to her was invalid, and took no steps to notify the mortgagee of her interest in the land, will not estop her from denying the absolute ownership of the husband in it.—*Coats v. Gordon*, 41 N. E. 1044, 42 N. E. 1025, 144 Ind. 19.

[q] (Sup. 1898)

Where property held by a husband and wife by entirety is jointly mortgaged, there is a presumption that they are joint principals, which can only be overcome by satisfactory proof that the wife is only a surety.—*Magel v. Milligan*, 50 N. E. 564, 150 Ind. 582, 65 Am. St. Rep. 382.

[r] (Sup. 1899)

Where a mortgage is given to secure the purchase money of real estate, the wife of the mortgagor has no interest in the land as against the mortgagee.—*Brunson v. Henry*, 52 N. E. 407, 152 Ind. 310.

[s] (App. 1899)

A wife has no vested interest in her husband's lands, and hence her joinder in a lease thereof will be presumed to have been on the consideration paid to him, and not on any separate consideration from the grantee to her.—*Murray v. Cazier*, 53 N. E. 476, 55 N. E. 880, 23 Ind. App. 600.

[t] (App. 1899)

A mortgage, in which the wife's name preceded the husband's both in the body and signature, did not disclose the ownership of the land, or the makers of the note secured, but provided that the "mortgagor expressly agree" to pay the sum secured. *Held*, that they were both promisors, *prima facie*.—*Foster v. Honan*, 53 N. E. 667, 22 Ind. App. 252.

[u] (Sup. 1900)

A wife who is tenant by entirety with her husband in certain lands is not estopped to contest the validity of a mortgage executed by them to secure the husband's individual debt by the fact that, in order to make the property available as security, she joined with the husband in conveying it to a third person, who reconveyed to him, the arrangement for the loan having been made without her knowledge, the mortgagee having relied on his agent, who had full knowledge of the facts, and no misrepresentation or concealment having been shown by the wife.—*Abicht v. Searls*, 57 N. E. 246, 154 Ind. 594.

Where defendants, husband and wife, and tenants by entirety of certain real estate, execute deeds to a third person, who reconveys to the husband alone, such deeds being without consideration, and only for the purpose of vesting title in the husband singly, and the husband then mortgages the property to secure his individual debt, such mortgage is voidable both by husband and wife, since it would be so voida-

ble if made by both without the intervening conveyances, and what cannot be done directly cannot be done by indirection.—Id.

[v] (App. 1901)

The right of a wife to alienate her lands by joining in the grant with her husband is absolute; and as the proceeds are her separate property, she may apply them to the payment of her husband's debts, or to any other use. It follows that she may, her husband joining in the conveyance, convey an estate held with him by entireties, and, with his consent, make a like disposition of the proceeds.—*Rogers v. Shewmaker*, 60 N. E. 462, 27 Ind. App. 631, 87 Am. St. Rep. 274.

[w] (App. 1904)

A husband joined with his wife in the execution of a mortgage to secure notes executed by her. The mortgage described the notes, and stated that they were for the purchase of the real estate, and declared, "And the mortgagors expressly agree to pay the sum of money above secured." Held, that the husband was personally liable.—*Vansell v. Carithers*, 71 N. E. 158, 33 Ind. App. 294.

[x] (App. 1905)

A mortgage executed by husband and wife on real estate owned by them as tenants by the entireties to secure the individual indebtedness of the husband is voidable not only as to the wife, but also as to the husband.—*Davis v. Neighbors*, 73 N. E. 151, 34 Ind. App. 441.

[y] (App. 1906)

The inchoate interest of a husband in the estate of his wife is not an estate which can be conveyed without the joinder of the estate of the wife.—*Unger v. Mellinger*, 77 N. E. 814, 37 Ind. App. 639, 117 Am. St. Rep. 348.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 13, 16, 37, 84, 90-99, 283.

See, also, 21 Cyc. pp. 1203-1207; note, 66 L. R. A. 632; note, 89 Am. Dec. 576.

§ 16. Possession between husband and wife.

Possession by husband of wife's separate property, see post, § 136.

Reduction of wife's property to possession by husband, see ante, § 11.

[a] (Sup. 1881)

Where a husband, holding the title to real estate purchased with funds of his wife so as to make him a trustee for her, survives her, marries again, and dies intestate, his widow takes by descent, and not by purchase, and is bound by the trust, whether she had notice of it or not.—*Derry v. Derry*, 74 Ind. 560.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 100-106.

See, also, 21 Cyc. pp. 1207, 1208; note, 18 Am. St. Rep. 113.

§ 17. Contracts with third persons in general.

Contracts between husband and wife, see post, §§ 39-46, 49½, 49¾, 51, 52.

Contracts by married women in general, see post, §§ 79-81, 82, 84-90.

Contracts for purchasers of realty in general, see post, § 68.

Contracts relating to wife's separate property, see post, § 154.

Rights of action, see post, §§ 208, 213.

[a] (Sup. 1846)

If a husband entirely abandons his wife and infant children, leaving them no other means of support than the cultivation of a small farm on which he had resided, the jury may infer from those facts that he had authorized his wife to employ, on his responsibility, one of his sons after he became of age to cultivate the farm for the support of the family.—*Casteel v. Casteel*, 8 Blackf. 240, 44 Am. Dec. 763.

[b] (Sup. 1860)

The husband of one who has filed an affidavit for a surety of the peace against a stranger is not liable for her costs thereon.—*Bolle v. State*, 14 Ind. 376.

[c] (Sup. 1866)

A husband is liable to repay money paid to the wife in his presence, and on their joint receipt, as the price of lands which they had agreed to sell as lands of the wife, but had not power to convey.—*Jackson v. Finch*, 27 Ind. 316.

[d] (App. 1898)

Where, after the making of a lease, and before its expiration, the tenant's wife becomes the owner of the leased land, the lessee's relation, as regards a mortgagee of the crop, remains that of tenant, and not that of a husband planting crops on his wife's land.—*Conwell v. Jeger*, 51 N. E. 733, 21 Ind. App. 110.

FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. HUS. & W. §§ 107-111.

See, also, 21 Cyc. pp. 1209-1211; note, 24 L. R. A. 629.

§ 18. Antenuptial debts of wife.

[a] (Sup. 1843)

Under Rev. St. 1838, p. 365, providing that a judgment by confession shall stand good against the party confessing, his heirs, etc., though the oath described by statute may have been omitted, such judgment against a single woman, who afterwards married, is good against the husband, since it was not competent for him to urge an objection which she could not have maintained before her marriage.—*Campbell v. Baldwin*, 6 Blackf. 364.

[b] (Sup. 1859)

A man married a wife against whom was a debt of record for land enjoyed by husband and wife. The husband and wife paid it by selling to the creditor another piece of land of the

wife, but before the deed thereof was executed the wife died. *Held*, that the creditor might sue the wife's estate, or her husband, and leave him to his remedy over against the estate.—*Crawford v. Verry*, 12 Ind. 427.

[c] (Sup. 1859)

A husband who married before St. 1852, prescribing the liability of the husband for debts of the wife, came into operation, is not liable, after the wife's death, for a debt contracted by her before marriage, although he received more than sufficient property by her to pay the debt.—*Hetrick v. Hetrick*, 13 Ind. 44.

[d] (Sup. 1874)

A husband, though not liable at the common law for the antenuptial debts of his wife, is liable by statute on account of property which he may have received with or through the wife, to the extent of such property.—*Shore v. Taylor*, 46 Ind. 345.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 112-120.  
See, also, 21 Cyc. pp. 1212-1215; note,  
60 Am. Dec. 259.

§ 19. Necessaries and family expenses.

Liabilities of wife's separate estate, see post, § 151.

Liability of estate of insane husband, see INSANE PERSONS, § 64.

Liability of infant for necessities furnished wife, see INFANTS, § 50.

Pleading in action for necessities, see post, § 229.

[a] (Sup. 1851)

Where an unsuccessful attempt has been made by the husband to obtain a divorce, he is not liable afterwards for his wife's attorney's fees.—*McCullough v. Robinson*, 2 Ind. 630.

[b] (Sup. 1855)

Where a wife separates from her husband, the latter is not liable for necessities furnished her until it becomes notorious that she has so separated, and the creditor has knowledge of such fact.—*Vanuxen v. Rose*, 7 Ind. 222.

[c] (Sup. 1866)

Where the separation of husband and wife is caused by his misconduct, and she has no means of support until some time after the separation, he is liable for necessities furnished to her in the interim.—*Litson v. Brown*, 26 Ind. 469.

If a wife, while separated from her husband, has the means of support, whether furnished by the husband or arising from her separate estate, the husband, though the separation may have taken place on account of his misconduct, can only be held liable, while she has such means, for necessities furnished to her on his express promise to pay.—*Id.*

[d] (Super. 1871)

Where a wife purchases goods with which she is already sufficiently supplied, it is not incumbent on the husband, in order to escape liability, to show that, at the time of the purchase, the seller knew that the wife was already supplied.—*Smith v. Fletcher*, Wils. 34.

Where a wife is properly supplied with means and necessities, though the parties are living together, she is not the agent of her husband, so as to bind him by her purchases.—*Id.*

Goods purchased by the wife when she was already sufficiently supplied with articles of the same kind are not necessities for which the husband will be liable.—*Id.*

Husband and wife cannot be considered living separate and apart, though they do not live together, if cohabitation continues between them; the law presuming that during cohabitation the husband assents to contracts made by the wife for articles suited to their means and station in life as implied agent of her husband.—*Id.*

[e] (Sup. 1873)

In an action to recover on an account for boarding defendant's wife and children, the evidence showed that plaintiff was the brother-in-law of the wife; that, having no knowledge of her separation from her husband, he contracted with her to board her and the children; that he had done so for a number of weeks, her husband being at the time in a distant part of the state; and that the husband had a home for his wife and children, and provided for them, and had such home and provisions during the time in which they were boarded by plaintiff. *Held*, that these facts did not render defendant liable for the board of the wife and children.—*Wallace v. Ellis*, 42 Ind. 582.

[f] (Sup. 1873)

A husband whose wife has abandoned him without cause and lived apart from him, without means of support of her own or furnished by him, is not liable to a person who, with notice of the abandonment, furnished her necessary support during the separation, though she has afterwards returned to her husband, and he has received her and lived with her as his wife.—*Oinson v. Heritage*, 45 Ind. 73, 15 Am. Rep. 258.

[g] Super. 1873)

In an action by a physician for medical services rendered to defendant's wife, proof of the employment by the wife and of the necessity of medical attention is sufficient to fix the liability of the husband.—*Kendleberger v. Vandeußen*, Wils. 289.

[h] (Sup. 1877)

A ratification by the husband of a purchase of goods by the wife, and his promise to pay, may render him liable to the seller for the price, although at the time of the purchase the defendant and his wife were living separate and the

goods were not necessities.—*Mickelberry v. Harvey*, 58 Ind. 523.

[J] (*Sup.* 1883)

If a man, by his cruel treatment, drives his wife from his house, and she goes to her father's, the latter may recover from him the value of necessities furnished, although the husband gave notice that he would not be liable for them.—*Watkins v. De Armond*, 89 Ind. 553.

[J] (*Sup.* 1884)

A husband is liable for necessities furnished his wife, living separate from him by his own fault.—*Eiler v. Crull*, 99 Ind. 375.

[K] (*Sup.* 1894)

While it is generally true that a physician's bill for treating a wife is the debt of the husband, there is no reason why she may not treat it as her own debt and pay it.—*City of Columbus v. Strassner*, 34 N. E. 5, 37 N. E. 719, 138 Ind. 301.

[L] (*App.* 1894)

Where a married woman, cohabiting with her husband, being in need of medical attention, boards with a third person in order to receive the same, she is not personally liable for her board and nursing, unless she expressly agrees to pay therefor and they are furnished on her credit.—*Nelson v. O'Neal*, 11 Ind. App. 296, 39 N. E. 207.

[M] (*App.* 1895)

The evidence in an action to recover from a husband for necessities sold to a wife showed that she had, for several years prior to the purchase of the goods sued for, run bills at different stores, including plaintiff's, and that the husband had paid them regularly without objection. It was shown that, prior to the beginning of the bill in controversy, defendant had ordered his wife not to purchase goods from the plaintiff on credit, but his claim that he so notified plaintiff was expressly contradicted. *Held*, that the evidence was sufficient to sustain a verdict for plaintiff.—*Watts v. Moffett*, 12 Ind. App. 399, 40 N. E. 533.

The general presumption that a husband assents to the contracts of his wife for necessities is strengthened where it appears that for a series of years the husband permitted the making of such contracts by the wife.—*Id.*

The revocation by a husband of the authority of his wife to purchase necessities is not effectual as against one who without knowledge of such revocation contracts to supply the wife with necessities.—*Id.*

[N] Where the husband abandons the wife, or without reasonable cause turns her away, or by ill usage compels her to leave him, he is liable for her necessities, and he sends credit with her to that extent.—(*App.* 1896) *Arnold v. Brandt*, 44 N. E. 936, 16 Ind. App. 169; (*1902*) *Rariden v. Mason*, 65 N. E. 554, 30 Ind. App. 425.

[O] (*App.* 1897)

A man who forces his wife and children to abandon his home by cruel inhuman treatment is legally bound to one who supplies his wife with necessities.—*Scott v. Carothers*, 47 N. E. 389, 17 Ind. App. 673.

The burial outfit, consisting of a casket, robe, slippers, and hose, furnished to be used at the funeral and interment of a wife, are necessities which should be furnished by the surviving husband.—*Id.*

The liability of a husband for necessities for the burial of a wife, forced to live apart from him because of his cruelty, is not affected by an antenuptial contract simply directed to the disposition of their separate property after death, and providing that it should descend to their several heirs as it would have done had the parties not been married.—*Id.*

Suitable garments and casket for the burial of a wife, who had been forced to live apart from her husband because of his cruelty, were chargeable to the husband as necessities, where he was a man of means, and her only property was a small cottage worth \$365, and her only income at the time of her death was that earned by her 15 year old son.—*Id.*

[P] (*App.* 1903)

A wife died, leaving real estate subject to a mortgage executed by herself and husband to secure a debt for money borrowed, which was used to pay living expenses, the expenses of the wife's illness, and for other family necessities. The notes given therefore were not signed by the husband, but the mortgage contained the clause that "the mortgagor expressly agrees to pay the sum of money above secured." *Held*, that the debts were those of the husband.—*Herbert v. Rupertus*, 68 N. E. 598, 31 Ind. App. 553.

The husband's one-third interest in the real estate after the wife's death should be first applied to the payment of the debt, as between a purchaser from him and the wife's administrator.—*Id.*

[Q] (*App.* 1906)

The obligation of a husband to support his wife is a legal one, and from it he cannot shield himself by contract.—*Watson v. Watson*, 37 Ind. App. 548, 77 N. E. 355.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 109, 121-138, 142, 146, 322; 17 CENT. DIG. Divorce, §§ 582, 584.

See, also, 21 Cyc. pp. 1215-1233; notes. 24 L. R. A. 929, 65 L. R. A. 529; note. 10 Am. Dec. 462; note, 36 Am. Rep. 764; note, 98 Am. St. Rep. 627.

§ 20. Agency of wife for husband.

Agency of husband for wife, see post, § 25.

Agency of wife for husband as to purchase of necessities, see ante, § 19.

Power of wife to act as trustee of husband, see post, § 59.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. HUS. & W. §§ 139-147.

See, also, 21 Cyc. pp. 1234-1238.

**§ 23½. — Ratification or repudiation of agency.**

[a] (Sup. 1872)

A contract entered into by a wife for work and material to be furnished, though unauthorized by the husband, will be considered as ratified by him, if, with full knowledge of the facts, he gives no notice of disapproval.—*Munson v. Meiners*, Wils. 459.

[b] (Sup. 1876)

A. placed a lightning rod on B.'s house at the request of B.'s wife, who was not, nor did she pretend to be, her husband's agent for this or any other business purpose. The rod was put up without B.'s knowledge, and the bill was made out against the wife alone. *Held*, that B. was not liable, and that he could not be charged on the ground of ratification of the contract, for the reason that there was no element of agency in the case.—*Meiners v. Munson*, 53 Ind. 138.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. HUS. & W. §§ 144, 147.

See, also, 21 Cyc. p. 1237.

**§ 25. Agency of husband for wife.**

Agency of wife for husband, see ante, § 23½.

As affecting competency of husband as witness for or against wife, see WITNESSES, § 56.

As to wife's separate property, see post, §§ 138, 146.

Husband as agent of wife as sole trader, see post, § 99.

Instructions, see post, § 235.

Notice to husband of mortgage on land conveyed to wife as notice to wife, see VENDOR AND PURCHASER, § 229.

Power to constitute husband agent to make parol contract for sale of realty, see SPECIFIC PERFORMANCE, § 35.

[a] (Sup. 1859)

A wife is not bound by the acts and declarations of her husband, unless she had knowledge of them.—*Ewing v. Gray*, 12 Ind. 64.

[b] (Sup. 1873)

Where a lease is executed by a husband and wife, by the terms of which the rent is payable to the wife and the premises are to be surrendered to her, authority given to the husband to receive the rent will not authorize him to accept a surrender of the premises.—*Woodward v. Lindley*, 43 Ind. 333.

[c] (Sup. 1873)

Where a husband purchases and pays for land, and in the wife's absence has it deeded to her, she is bound by his acts, if she claims the

benefit of the purchase.—*Smither v. Calvert*, 44 Ind. 242.

[d] (Sup. 1873)

A wife may constitute her husband her agent; but, to establish such agency, the evidence must be clear and satisfactory and sufficiently strong to explain and remove the equivocal character in which she is placed by reason of the relation of wife.—*Rowell v. Klein*, 44 Ind. 290, 15 Am. Rep. 235.

[e] (Sup. 1875)

That a married woman may be bound by the act of her husband in selling or exchanging her personal property, it is not necessary that she should authorize him to thus act as her agent before the sale or exchange made by him, and such authority may be given by her at the time of the transaction, or she may ratify his act afterward.—*Lichtenberger v. Graham*, 50 Ind. 288.

[f] (Sup. 1876)

Where there was evidence that a note was either given to the wife for money of her own or was made to her as a gift, it was not error to instruct that, the note being executed to the wife, it became her property, and that her husband could not receive payment on it, either in money or property, without her consent.—*Carver v. Carver*, 53 Ind. 241.

[g] (Sup. 1888)

The principles which govern in dealing with an agent are the same where the agent happens to be a husband whose principal is his wife as where the principal and agent are in other respects strangers, and that one who purchases the property of a married woman through the agency of her husband must pay for it precisely as if he had purchased through an agent who sustained no such relation.—*Runyon v. Snell*, 18 N. E. 522, 116 Ind. 164, 9 Am. St. Rep. 839.

[h] (Sup. 1895)

An estoppel of the husband from any defense to an action on a purchase-money note and mortgage is an estoppel also of the wife, though she may have joined in the execution of neither the note nor the mortgage.—*Krathwohl v. Dawson*, 140 Ind. 1, 38 N. E. 467, 39 N. E. 496.

[i] (Sup. 1900)

Where defendant's husband, who was acting as her agent, had actual notice of plaintiff's lien on the land purchased before the deed was made or he had paid the purchase price, the defendant was not an innocent purchaser.—*Forsythe v. Brandenburg*, 57 N. E. 247, 154 Ind. 588.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. HUS. & W. §§ 148-154, 525.

See, also, 21 Cyc. pp. 1238-1241.

## II. MARRIAGE SETTLEMENTS.

Affecting necessity to elect under will, see **WILLS**, § 784.

Antenuptial conveyances in fraud of wife, see ante, § 6.

Application of statute of fraud, see **FRAUDS**, **STATUTE OF**, §§ 2, 3, 63.

Bar to or release of dower, see **DOWER**, §§ 41, 42.

Bar to or waiver of allowance from estate of deceased husband, see **EXECUTORS AND ADMINISTRATORS**, § 185.

Election between settlement and dower, see **DOWER**, § 58.

Parol evidence to show consideration of, see **EVIDENCE**, § 419.

Validity as to creditors or subsequent purchasers, see **FRAUDULENT CONVEYANCES**, § 94.

### § 26. Nature in general.

[a] (**App.** 1909)

The contingent interest in the property of a spouse, cast by law on husband or wife, may be controlled or eliminated by a marriage settlement or antenuptial agreement.—*Unger v. Mellinger*, 88 N. E. 74, 43 Ind. App. 524.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 155.

See, also, 21 Cyc. pp. 1241, 1242.

### § 28. Requisites and validity.

Evidence as to validity, see post, § 34.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 158-177, 882.

See, also, 21 Cyc. pp. 1243-1257; notes, 27 Am. Rep. 26, 40 Am. Rep. 622.

### § 29. — Antenuptial settlements.

Effect on assignment of mutual benefit insurance, see **INSURANCE**, § 815.

Effect on right to proceeds of mutual benefit insurance, see **INSURANCE**, § 782.

Post nuptial settlements, see post, § 30.

Submission of issues to jury in suit to set aside, see **EQUITY** § 379.

[a] (**Sup.** 1880)

Where evidence to establish an antenuptial agreement, pleaded in bar of a recovery of the husband's interest in the estate of the wife, fails to show a contract in which the parties thereto mutually agreed to renounce or waive any right of inheritance in or to the property of the other, such evidence is insufficient to establish such contract in relation to such interest, or to prevent the recovery thereof.—*Daubenspeck v. Biggs*, 71 Ind. 255.

[b] (**Sup.** 1888)

Though the promise to marry was made six years before the agreement was executed, the marriage is a sufficient consideration for

the agreement, especially where it is shown that the wife exacted the agreement, and would not marry without it.—*McNutt v. McNutt*, 116 Ind. 345, 19 N. E. 115, 2 L. R. A. 372.

[c] (**Sup.** 1892)

A man with personality of the value of \$40,000 falsely represented to a woman whom he was about to marry, and over whom he had acquired complete influence, the effect of a marriage settlement by which she released all of her rights in his estate, and became entitled to receive therefrom the mere sum of \$200. The man took the woman to his own legal adviser, who said the instrument was all right. *Held*, that the rule that the false representation of the legal effect of a written instrument will not entitle the person deceived to relief has no application here.—*Lamb v. Lamb*, 130 Ind. 273, 30 N. E. 36, 30 Am. St. Rep. 227.

[d] (**Sup.** 1893)

A written ratification, after marriage, of an antenuptial contract, is valid and enforceable.—*Claypool v. Jaqua*, 135 Ind. 499, 35 N. E. 285.

[e] (**Sup.** 1898)

An allegation that an antenuptial contract was made and signed after marriage is not a sufficient denial of the validity of the contract, since an antenuptial oral agreement may be confirmed in writing after marriage.—*Buffington v. Buffington*, 51 N. E. 328, 151 Ind. 200.

Where the purpose was to adjust all the property rights, a provision in an antenuptial contract that the husband "will release" his interest in the wife's property is not executory in the sense that some act remains to be done on his part.—*Id.*

In an antenuptial contract providing that each released all claim in the property of the other, and might dispose of his or her own property by will, and that the wife should retain control of her own personality, a provision that the husband would maintain the wife is not a condition on which the validity of the contract depended.—*Id.*

[f] (**App.** 1901)

An oral antenuptial agreement that the survivor should take no share of the estate of the deceased, on the contract being reduced to writing after marriage, is valid: the agreement to marry being consideration.—*Moore v. Harrison*, 59 N. E. 1077, 26 Ind. App. 408.

[g] (**App.** 1905)

Marriage is sufficient consideration to support an antenuptial contract.—*Pierce v. Vansell*, 74 N. E. 534, 35 Ind. App. 525.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 158-168, 205, 882.

See, also, 21 Cyc. pp. 1243-1253; note, 103 Am. St. Rep. 418.

**§ 30. — Postnuptial settlements.**

Antenuptial settlements, see ante, § 29.

**[a] (Sup. 1878)**

A postnuptial agreement making a pecuniary provision for the wife in lieu of her rights in the real estate of her husband must be evidenced by a deed or other written instrument bearing an indorsement of her assent to receive the same in lieu of all her right or claim in the lands of the husband.—*Randles v. Randles*, 63 Ind. 93.

**[b] (Sup. 1884)**

A husband established his wife in business, had all land purchased by him conveyed to her, and improved the same at his own expense, with an indefinite agreement that the whole was to be enjoyed jointly. *Held*, that this was rather a postnuptial settlement than an implied trust, and that on a suit by her for divorce the husband must find his sole remedy therein, and could not enforce a trust or lien for his investments by an independent suit.—*Rose v. Rose*, 93 Ind. 179.

**[c] (Sup. 1891)**

A contract by which a married woman agrees that certain money due her shall be payable at her death to her heirs, reserving the right to demand the money herself in case her husband should die, or she should separate from him, and become dependent on herself for support, is valid.—*Buck v. Hughes*, 127 Ind. 46, 26 N. E. 558.

**[d] (Sup. 1897)**

A postnuptial agreement that a wife was to have no part of her husband's estate in case she survived him is not binding.—*Dudley v. Pigg*, 48 N. E. 642, 149 Ind. 363.

**[e] (App. 1904)**

An irrevocable marriage union cannot form a valuable consideration for a postnuptial settlement or conveyance.—*Clow v. Brown*, 72 N. E. 534, 37 Ind. App. 172.

**[f] (App. 1906)**

While marriage furnishes a consideration for an antenuptial agreement with reference to the separate property of the parties, which agreement will be effective to control the marital right of each in the estate of the other, it does not furnish a consideration for a similar postnuptial agreement.—*Unger v. Mellinger*, 77 N. E. 814, 37 Ind. App. 639, 117 Am. St. Rep. 348.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. HUS. & W. §§ 169-177, 882.

See, also, 21 Cyc. pp. 1254-1257.

**§ 31. Construction and operation.**

**[a] (Sup. 1862)**

A nuptial agreement provided that the husband should have the right to dispose of his lands by will or otherwise, provided that his wife survived him; should have a home and

support for life on the home farm, also all the rest of such property as she should bring him, she taking care of the children; also, in another clause, that she should take care of the children till they could take care of themselves, that she should pay the taxes and keep up the farm, etc. *Held*, that the widow was excluded by this contract from claiming that portion of interest in her husband's realty which otherwise the law would have given her, and that her husband had full power of disposal over it by his will.—*Richards v. Richards*, 17 Ind. 636.

**[b] (Sup. 1888)**

An antenuptial agreement in writing between parties owning real and personal property, the wife having a life estate in land, reciting the contemplated marriage, and stipulating that the survivor should take no interest in the estate of the deceased consort by descent or otherwise, but that the estate should "descend to the heirs the same as it would if they had not married," the term "heirs" includes collateral heirs, though when the agreement was made each party had children, those of the husband having died before him.—*McNutt v. McNutt*, 116 Ind. 545, 19 N. E. 115, 2 L. R. A. 372.

**[c] (Sup. 1889)**

Where a husband, before marriage, for a valuable consideration, relinquishes his marital right in his wife's land, and after her death claims no interest therein, except the life estate given him by her will, no third person can assert that the husband has any other estate in the land.—*Bowen v. Swander*, 121 Ind. 164, 22 N. E. 725.

**[d] (Sup. 1893)**

Where an antenuptial contract was followed after marriage by the execution of a written instrument which declared it to be an affirmation of the original contract, and there was nothing ambiguous or doubtful in its terms, it was conclusive proof of a contract, and the parol agreement was merged in it.—*Claypool v. Jaqua*, 35 N. E. 285, 135 Ind. 499.

**[e] (App. 1894)**

An antenuptial agreement between a widower and a widow provided that "the survivor shall take no absolute right in the real estate of the other, but shall have the full use, control, and rents of all such real estate as would descend to such survivor under the law during the life of such survivor, and shall take and have such part of the personal property of the one first departing this life as the law would give such survivor; and, if any part of such personal property shall remain at the death of such survivor, it shall go to the heirs and legal representatives of the one dying first." The widower was 68 years old, had two children, and possessed an estate worth \$15,000. The widow was 70 years old, had no heirs except brothers and the children of deceased sisters, and she possessed personalty worth \$35,000 and realty worth \$15,000. *Held*, that it was the intention

to confer upon the survivor only a life estate in the personality of the first decedent.—*Ragsdale v. Barnett*, 10 Ind. App. 478, 37 N. E. 1100.

In the construction of contracts having in view the settlement and disposition of property between the parties about to enter the marital relation, much liberality is indulged by courts to effectuate the actual intent of the parties without reference to the strictly technical meanings of words employed. The cardinal rule by which all such contracts are measured and construed is the intention with which the parties contracted, and, in seeking this, the courts will look, not only to the letter of the instrument, but also to its general scope and purpose, and to the conditions, situation, and surrounding circumstances attending the parties at the time the agreement is entered into.—*Id.*

[f] (Sup. 1898)

An antenuptial contract between a widower 71 years old, the father of five adult children, and a widow 28 years younger, purporting to be for the purpose of arranging all questions of property, secured the intended wife her separate property, and provided for her out of the husband's estate in an amount about equal to what she would have been entitled to under the law. *Held* to be an equitable jointure, and not a settlement or jointure under Burns' Rev. St. 1894, § 2661 (Horner's Rev. St. 1897, § 2500), providing that an antenuptial conveyance or provision creating a jointure shall be a bar to dower in case she signify her assent thereto in writing attached to the conveyance, and such contract is a bar, without such assent, to her claiming under section 2644, Burns' Rev. St. 1894 (section 2487, Rev. St. 1881), providing that a childless widow of an intestate leaving children by a former marriage shall have a life estate in his lands, and under section 2653, Burns' Rev. St. 1894 (section 2492, Rev. St. 1881), providing that a surviving wife shall be allowed to remain in the mansion house free of rent for one year from the death of her husband.—*Kennedy v. Kennedy*, 50 N. E. 756, 150 Ind. 636.

A court, in construing a marriage contract will endeavor to so interpret it as to carry out the true intent of the contracting parties without regard to the strict technical meaning of words therein employed. The rule by which the court must be controlled is that which is applicable to any other contract.—*Id.*

[g] (Sup. 1898)

An antenuptial contract provided that the wife released all claims to the husband's property; that the husband would maintain the wife, and release all interest in her property; that she could maintain the control of her own property; and that each could dispose of his or her property by will. *Held*, that the parties intended a permanent adjustment of their property rights, and not one during wedlock only.—*Buffington v. Buffington*, 51 N. E. 328, 151 Ind. 200.

No formality is required in antenuptial contracts, and the rule of construction is to ascertain and give effect to the intention of the parties; they being favored as promoting domestic happiness and adjusting property questions, which would otherwise often be the source of fruitful litigation.—*Id.*

[h] (App. 1906)

Where an antenuptial contract, under which a husband surrenders all claims to his wife's estate, is abrogated by a postnuptial contract with the wife on payment of a certain sum, the husband at her death is restored to the rights in her property which he renounced under such contract.—*Clow v. Brown*, 37 Ind. App. 172, 72 N. E. 534.

FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. HUS. & W. §§ 178-195, 883, 884.

See, also, 21 Cyc. pp. 1258-1265.

### § 33. Revocation or extinguishment.

[a] (Sup. 1860)

On the marriage of a widower with a widow, it was verbally agreed that he should pay her a certain sum per year, to be in her own control, and that neither during coverture nor afterwards should either claim any part of the other's property, but should let it go to their former respective children. After the husband's death, he having regularly paid her the sum stipulated, the court refused its aid to put her in possession of his property, which had passed from his possession to that of his representative.—*Houghton v. Houghton*, 14 Ind. 505, 77 Am. Dec. 60.

Antenuptial contracts to be executed after the marriage has been determined are not destroyed by the marriage.—*Id.*

[b] (Sup. 1886)

Where a man has settled property on his wife, he cannot, in a divorce proceeding instituted by the wife against him for cruel treatment and habitual drunkenness, obtain a revocation of such settlement, and a division of the property, where no alimony is claimed, and the divorce is granted because of his own misconduct.—*Stultz v. Stultz*, 107 Ind. 400, 8 N. E. 238.

FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. HUS. & W. §§ 196-202, 204, 885.

See, also, 21 Cyc. pp. 1265-1267.

### § 34. Evidence.

[a] (Sup. 1892)

In an action to set aside an antenuptial agreement on the ground that it was procured by fraud and misrepresentations, the husband's misconduct towards the wife after marriage is admissible in evidence for the purpose of showing that the act of the wife in bringing suit was not premature, though not admissible for the purpose of showing that the contract was pro-

cured by fraud.—*Lamb v. Lamb*, 30 N. E. 33, 130 Ind. 273, 30 Am. St. Rep. 227.

[b] (App. 1909)

Evidence held to warrant a finding that a man entered into an antenuptial contract with his intended wife by which it was agreed that he should have no interest in her estate.—*Unger v. Mellinger*, 43 Ind. App. 524, 88 N. E. 74.

FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. HUS. & W. §§ 204, 205.

See, also, 21 Cyc. pp. 1267-1269.

§ 35. Enforcement.

Prior judgment as res judicata, see JUDGMENT, § 601.

[a] (Sup. 1873)

A man died, leaving a widow and infant daughter. The widow, in good faith, entered into what she believed to be a valid marriage contract, and with her supposed husband conveyed the real estate received from her former husband to A. The infant daughter married, and with her husband, also a minor, executed a title bond to A. to convey her interest in the same property on attaining full age. The marriage of the widow was void by reason of the prior undissolved marriage of the man with whom she supposed she had contracted marriage. Held, in proceedings for partition of the land, the daughter and husband being still minors, that the deed executed by the widow conveyed all her interest in the property; she being a feme sole, and there being no allegation of inadequacy of consideration, or that any fraud was practiced by the purchaser.—*Light v. Lane*, 41 Ind. 339.

[b] (Sup. 1879)

A. made a fraudulent agreement to marry plaintiff, in consideration whereof the latter sold and delivered to A. a quantity of goods, with an agreement that she might rescind the contract of sale, and have the property restored to her on demand. A. married another woman, and until A.'s death plaintiff made repeated efforts to procure a settlement with him, but without success. Held, that she might maintain a suit against A.'s executor for the value of the goods.—*Frazer v. Boss*, 66 Ind. 1.

[c] (Sup. 1898)

The expenditure of money by the wife for the support of herself and husband is no defense, nor basis of cross complaint, to proceedings by her husband's executor to enforce an antenuptial contract in which the husband agreed to support the wife, and this though the expenditure constituted an enforceable claim against the husband's estate.—*Buffington v. Buffington*, 51 N. E. 328, 151 Ind. 200.

FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. HUS. & W. §§ 209-217.

See, also, 21 Cyc. pp. 1269-1271.

III. CONVEYANCES, CONTRACTS, AND OTHER TRANSACTIONS BETWEEN HUSBAND AND WIFE.

Application of statutes of limitations to, see LIMITATION OF ACTIONS, § 73.

Assignment of insurance policy, see INSURANCE, § 208.

As to wife's separate property, see post, §§ 134-146, 153.

Capacity of married woman to act as trustee for husband, see post, § 59.

Capacity of married woman to create trust, see post, § 71.

Compromise and settlement between, see COMPROMISE AND SETTLEMENT, § 4.

Contracts and transactions creating constructive trusts, see TRUSTS, § 103.

Conveyance of land by vendee to his wife as defeating vendor's lien, see VENDOR AND PURCHASER, § 266.

Marriage settlements, see ante, §§ 26, 29-31, 33-35.

Natural affection as consideration of contracts in general, see CONTRACTS, § 77.

Parol agreement between husband and wife as to investment by husband of wife's money as within statute of frauds, see FRAUDS, STATUTE OF, § 56.

Parol agreement between husband and wife creating trust, see TRUSTS, § 18.

Possession by husband or wife of property sold to the other as fraudulent, see FRAUDULENT CONVEYANCES, § 146.

Preference as creditor, of husband or wife, fraudulent as to other creditors, see FRAUDULENT CONVEYANCES, § 118.

Reformation of agreement for alimony, see REFORMATION OF INSTRUMENTS, § 8.

Relief against fraudulent conveyance from husband to wife in action to foreclose mechanic's lien, see MECHANICS' LIENS, § 245.

Right of wife to enforce contribution from husband, see CONTRIBUTION, § 3.

Rights of action between husband and wife, see post, §§ 204, 205.

Separate property of wife, see post, § 119.

Separation agreements, see post, §§ 277-280.

Transfer of corporate stock, see CORPORATIONS, § 119.

Validity as to creditors or subsequent purchasers, see FRAUDULENT CONVEYANCES, §§ 95, 103-106.

§ 36. Validity of transactions in general.

[a] (App. 1906)

Under modern statutes a husband and wife can contract directly with each other without the intervention of a trustee.—*C'low v. Brown*, 37 Ind. App. 172, 72 N. E. 534.

FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. HUS. & W. § 218.

See, also, 21 Cyc. pp. 1271, 1272.

**§ 37. Statutory provisions.**

[a] (App. 1899)

Under Horner's Rev. St. 1897, § 5115, abolishing all legal disabilities of married women to make contracts except in certain cases, a married woman may contract with her husband.—*Roche v. Union Trust Co.*, 52 N. E. 612.

FOR CASES FROM OTHER STATES,

See 21 Cyc. pp. 1273, 1274.

**§ 38. Contracts and debts existing at time of marriage.**

Contracts of married women before marriage in general, see post, § 78.

[a] (Sup. 1868)

1 Gav. & H. St. p. 295, note 2, Id. p. 379, and 2 Gav. & H. St. p. 41, abrogate the rule of the common law that the marriage extinguishes a debt previously due the wife by the husband. It remains her separate property, and she may enforce its payment by execution after the marriage.—*Flenner v. Flenner*, 29 Ind. 564.

[b] (Sup. 1874)

An unmarried woman executed a note and collateral mortgage on her real estate, and afterwards married the payee of the note. The mortgagee, after the marriage, assigned the mortgage and delivered the note to a third person, who brought a foreclosure suit. *Held*, that by the marriage the debt and mortgage were discharged, and the action could not be maintained.—*Long v. Kinney*, 49 Ind. 235.

[c] (Sup. 1899)

A debt due from a woman to a man is discharged by their marriage.—*Gosnell v. Jones*, 53 N. E. 381, 152 Ind. 638.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. &amp; W. § 223.

See, also, 21 Cyc. p. 1276.

**§ 39. Express contracts.**

Contracts of married women in general, see post, §§ 79–82, 84–90.

[a] (Sup. 1860)

On the marriage of a widower with a widow, it was verbally agreed that he should pay her a certain sum per year to be in her own control, and that neither during coverture nor afterwards should claim any part of the other's property, but should let it go to their former respective children. The husband regularly paid the wife the sum stipulated during his lifetime. *Held*, that the agreement might have been valid if made during coverture.—*Houghton v. Houghton*, 14 Ind. 505, 77 Am. Dec. 69.

[b] (Sup. 1871)

Whenever a contract would be good at law, if made by a husband with trustees for his wife, that contract will be sustained in equity, although made by the husband and wife without

the intervention of trustees.—*Sims v. Rickets*, 35 Ind. 181, 9 Am. Rep. 679.

[c] (Sup. 1892)

A husband and wife have no power to make any valid contract relating to alimony.—*Thompson v. Thompson*, 31 N. E. 529, 132 Ind. 288.

[d] (Sup. 1908)

A married woman may deal with her husband as with a stranger, but the husband, on account of his presumed superior, dominant influence to bind his wife, must clearly establish the contract and show that it is fair to her.—*Leimgruber v. Leimgruber*, 172 Ind. 370, 86 N. E. 73, 88 N. E. 593.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. &amp; W. §§ 220, 221.

See, also, 21 Cyc. p. 1275.

**§ 40. Implied contracts.**

[a] (Sup. 1886)

Where a wife advances her own money to her husband to enable him to prosecute an action at law, she acquires a right to be reimbursed out of his estate, so that, the husband having assigned the judgment obtained in such action to her, she will hold it in preference to his other and prior creditors.—*Beard v. Puett*, 105 Ind. 68, 4 N. E. 671.

[b] (App. 1902)

Where husband and wife live together in her house, there is no implied agreement that he will pay her rent.—*Gardner v. Gardner*, 64 N. E. 637, 29 Ind. App. 449.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. &amp; W. § 222.

See, also, 21 Cyc. p. 1275.

**§ 41. Services.**

By husband to wife's separate estate, see post, § 142.

Earnings of wife as separate property, see post, § 126.

Pleading in action for services, see post, § 229.

Right of action by husband or wife, or both, for services, see post, § 208.

Right of action by wife for services rendered, see post, § 207.

Right of action for loss of services, see post, § 209.

Validity of contract by married women as to services, see post, § 82.

[a] (App. 1899)

Under Horner's Rev. St. 1897, § 5115, abolishing all legal disabilities of married women to make contracts, except to convey real estate or enter into a contract of suretyship, and section 5130, providing that the earnings of a married woman, "other than labor for her husband or family, shall be her sole and separate property," a contract of a husband to pay his wife for services as clerk in his store is for a considera-

tion, and valid.—*Roche v. Union Trust Co.*, 52 N. E. 612.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 224.

See, also, 21 Cyc. p. 1277; note, 15 L. R. A. 215; note, 58 Am. St. Rep. 492.

### § 42. Partnership.

Married women as partners in general, see post, § 97.

#### [a] (Sup. 1869)

A married woman cannot bind herself as the partner of her husband; nor do the facts that she holds herself out as such partner, and that her property gives credit to the supposed firm, charge her property with an indebtedness contracted by such firm in the course of trade.—*Montgomery v. Sprinkle*, 31 Ind. 113.

#### [b] (Sup. 1881)

A. lent money to her husband to do business on. He formed a partnership with B., A. furnishing no more money until she bought B. out; her husband then having the entire control and management of the business, and having an equal interest with her therein. After buying B. out she purchased goods which were levied on under execution against the firm. *Held*, that she could not replevy the same as her individual property.—*Clay v. Vanwinkle*, 75 Ind. 239.

#### [c] (Sup. 1883)

Under Act March 25, 1879, concerning married women, a wife cannot form a valid partnership with her husband under a power to carry on the business on her sole and separate account.—*Haas v. Shaw*, 91 Ind. 384, 46 Am. Rep. 607.

#### [d] (App. 1906)

Under Burns' Ann. St. 1901, § 6967, providing that a married woman shall be liable for debts in carrying on a separate business, or as partner with another, and declaring that the husband shall not be liable for any debts contracted by his wife in carrying on any business on her separate account, or when she is in partnership with any other than himself, a married woman may become a partner with her husband.—*Anderson v. Citizens' Nat. Bank of Crawfordsville*, 76 N. E. 811, 38 Ind. App. 190.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 225.

See, also, 21 Cyc. p. 1277; note, 16 L. R. A. 526; note, 31 Am. St. Rep. 935.

### § 43. Loans and advances.

By husband to wife's separate estate, see post, § 143.

Loans for benefit of separate estate, see post, § 162.

Notes for loans, see post, § 44.

To married women in general, see post, § 84.

#### [a] (Sup. 1870)

A wife sacrificed her income in order to loan her husband money that he might make improvements on real estate: he promising to convey the property to the wife. *Held*, that under the circumstances she was entitled to a decree of specific performance.—*Hixon v. Cuppy*, 33 Ind. 210.

#### [b] (Sup. 1870)

A married woman loaned her husband a sum of money. Afterwards the husband traded a stock of goods to a third person in part payment for a tract of land, the deed being taken in the name of the wife, who executed notes and a mortgage on the land for the balance of the purchase money, the conveyance being to her, and received by her in payment of the money loaned to her husband. *Held* that, in the absence of fraud, the wife was a purchaser for a valuable consideration and was entitled to hold the land as against her husband's creditors.—*Kyger v. F. Hull Skirt Co.*, 34 Ind. 249.

#### [c] (Sup. 1886)

A husband may perform a contract to repay his wife money borrowed from her under an express promise to pay it back, and equity will not only sustain the husband in performing such a promise, but will coerce him into performance.—*Proctor v. Cole*, 3 N. E. 106, 4 N. E. 303, 104 Ind. 373.

#### [d] (Sup. 1886)

A wife may lawfully advance her own money to her husband to enable him to prosecute a suit for injuries done to his person.—*Beard v. Puett*, 105 Ind. 68, 4 N. E. 671.

#### [e] (Sup. 1899)

Money advanced by a husband to pay his wife's debts is presumed to be advanced by virtue of her marital rights, and not as a loan, in the absence of evidence to the contrary.—*Gosnell v. Jones*, 53 N. E. 381, 152 Ind. 638.

#### [f] (App. 1899)

Where money is paid to a wife by her husband for services performed, and she afterwards loans it to him to be used in his business, she may enforce its payment by her husband's assignee for the benefit of creditors.—*Roche v. Union Trust Co.*, 52 N. E. 612.

#### [g] (App. 1900)

Where a husband received funds belonging to his wife, and with her knowledge and consent retained the same and used them in his business, without any express agreement to repay them or to pay interest, and she made no demand for the repayment, she is not entitled to interest.—*King v. King*, 57 N. E. 275, 24 Ind. App. 598, 79 Am. St. Rep. 287.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 226.

See, also, 21 Cyc. p. 1278.

**§ 44. Bills and notes.**

By married women in general, see post, § 85.

Liabilities of wife's separate estate, see post, § 156.

**[a] (Sup. 1886)**

Where a husband borrows money of his wife, and expressly promises to repay it to her children, and does repay it by assigning a note, the assignment is founded on an equitable consideration sufficient to sustain it.—*Proctor v. Cole*, 104 Ind. 373, 3 N. E. 106, 4 N. E. 303.

**[b] (Sup. 1890)**

Money given by a husband to his wife is her property, and if she lends it to him, and takes his note therefor, it is valid.—*Laird v. Davidson*, 124 Ind. 412, 25 N. E. 7.

The bare fact that a husband writes on the back of a note an assignment to his wife does not transfer the title to her.—*Id.*

**[c] (App. 1898)**

Where a wife voluntarily destroys a note against her husband while acting under the influence of strong feeling, caused by cruel treatment on his part, it does not constitute a discharge of the debt in the absence of any showing of fraud.—*Schlemmer v. Schendorf*, 49 N. E. 968, 20 Ind. App. 447.

FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. HUS. & W. § 227.

See, also, 21 Cyc. p. 1280.

**§ 45. Sales and transfers of personal property.**

Assignment of note by husband to wife, see ante, § 44.

Right of husband to sell proceeds of wife's separate property, see post, § 137.

**[a] (Sup. 1884)**

A married woman's assumption of her husband's debt, for which she is surety, is a good consideration for the sale to her of personal property by her husband.—*Rinn v. Rhodes*, 93 Ind. 389.

FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. HUS. & W. §§ 220-231.

See, also, 21 Cyc. pp. 1282, 1283.

**§ 46. Contracts for conveyance of real property.**

Contracts for purchases of realty by married women in general, see post, § 68.

**[a] (Sup. 1889)**

Rev. St. 1876, p. 550, § 5, provides that no lands of a married woman should be liable for her husband's debts, but such lands and the rents and profits should be hers as fully as if she were unmarried, and that she should have no power to incumber or convey such lands, except by deed in which her husband joined. Under the law in force in 1866, a married woman could not bind herself by contract. *Held*, that a contract made in 1866, by a married wo-

man, to give her husband half her land, to be held by them as joint tenants, in consideration of his agreement to discharge a lien thereon, was void, and such contract and performance thereof on the husband's part were no defense to ejectment by the wife for the land.—*Crater v. Crater*, 118 Ind. 521, 21 N. E. 290, 10 Am. St. Rep. 161.

**[b] (Sup. 1889)**

An executory contract of a wife to support her husband, in consideration of a conveyance made by him to her, is void.—*Corcoran v. Corcoran*, 119 Ind. 138, 21 N. E. 468, 4 L. R. A. 782, 12 Am. St. Rep. 390.

**[c] (App. 1892)**

An agreement by a husband to convey to his wife certain lands in fee, in consideration of her joining in deeds of other land owned by him, is not void.—*Worth v. Patton*, 5 Ind. App. 272, 31 N. E. 1130.

Such agreement is enforceable by the wife, although the land conveyed and to be conveyed belonged to the husband at marriage, and the wife had but an inchoate interest therein.—*Id.*

Where a husband dies without fulfilling his promise to convey to his wife land in consideration of her joining in deeds to other land owned by him, she can recover from his estate the fair value of her released interest in the lands conveyed.—*Id.*

To recover under the contract, the wife need not show that she has renounced a devise to her, by her deceased husband, of a less estate in the lands promised her in fee.—*Id.*

**[d] (App. 1900)**

Since Horner's Rev. St. 1897, § 5115, abolishes all disabilities of married women to make contracts, save as otherwise provided, and no statute prohibits a contract between a husband and wife, a contract by a wife to sign a deed of the husband's real estate, thereby releasing her inchoate interest therein, in consideration of his agreement to pay her a certain sum from the proceeds of the sale, was valid.—*Dailey v. Dailey*, 58 N. E. 1065, 26 Ind. App. 14.

FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. HUS. & W. § 228.

See, also, 21 Cyc. p. 1281.

**§ 47. Conveyances by husband to or for wife.**

Contracts to convey, see ante, § 46.

Conveyances to married women in general, see post, § 68.

Effect of fraud, see DEEDS, § 71.

Rescission, see post, § 52.

Withholding deed from record, see MORTGAGES, § 175.

[a] A husband cannot convey land directly to his wife without the intervention of a trustee.—(Sup. 1845) *Doe ex dem. Abbott v. Hurd*, 7 Blackf. 510: (1854) *Fletcher v. Mansur*, 5 Ind.

267. CONTRA, see (1872) *Brookbank v. Kennard*, 41 Ind. 339.

[b] (Sup. 1863)

A relinquishment of her contingent interest in her husband's real estate by the wife, her husband being alive, is a valuable and sufficient consideration for a conveyance by her husband, or procured by him to her.—*Hollowell v. Simonson*, 21 Ind. 398.

[c] While a conveyance by a wife to a husband is void at law, it may be upheld and confirmed by courts of equity; such confirmation being within the sound discretion of the court.—(Sup. 1866) *Bunch v. Bunch*, 26 Ind. 400; (1868) *Frank v. Kessler*, 30 Ind. 8.

[d] (Sup. 1871)

A conveyance from a husband to his wife which is good in equity vests the title to the property conveyed in the wife as fully, completely, and absolutely as though the deed had been made by a stranger on a valuable consideration moving from the wife.—*Sims v. Rickets*, 35 Ind. 181, 9 Am. Rep. 679.

A conveyance from a husband to his wife without the intervention of a trustee is void at law, but will be upheld in equity, where the consideration of the transfer is a separate interest of the wife yielded up by her for the husband's benefit, or that of their family, or which has been appropriated by him to his uses.—*Id.*

A conveyance from a husband to his wife without the intervention of a trustee will be sustained in equity where the husband distinctly separates the property given from the mass of his own property, and sets it apart to the separate and exclusive use of his wife.—*Id.*

Where a wife advances money to her husband, or the husband is indebted to the wife on a valid consideration, the wife stands as the creditor of her husband; and, if a conveyance is made to pay or secure such liability, the wife will hold the property free from the claims of other creditors, where the transaction is unaffected by unfairness or fraud.—*Id.*

Conveyances from a husband to his wife are not sustained in equity, if there is some feature in them impeaching their fairness and certainty, as that they are not in the nature of a provision for the wife, or where they interfere with the rights of creditors, or when the property given or granted is not distinctly separated from the mass of the husband's property.—*Id.*

In consequence of the absolute power which a man possesses over his own property, he may make any disposition of it which does not interfere with the existing rights of others.—*Id.*

When a husband is free from debt, and has no children, and conveys property to his wife for a nominal consideration, the law will presume that it was intended as a provision for his wife.—*Id.*

[e] A husband may convey to his wife a reasonable amount of property, leaving ample in his hands for payment of his debts, and such conveyance will be valid.—(Sup. 1872) *Brookbank v. Kennard*, 41 Ind. 339; (1876) *Eagan v. Downing*, 55 Ind. 65.

[f] (Sup. 1872)

That a conveyance executed by a husband to his wife has not been recorded for a year, and until after the contracting of debts by the husband, cannot of itself render it void.—*Brookbank v. Kennard*, 41 Ind. 339.

[g] (Sup. 1872)

Where property has been conveyed to a husband, the consideration paid therefor being the property of the wife, and a note of the husband given for the remaining purchase money, said note being secured by a mortgage on the property conveyed, it is not fraudulent for the husband and wife, such note being still unpaid, to convey the property to a third person, and for such third person to reconvey to the wife, in order to vest title in her; she never having consented to the title being vested in her husband.—*Parton v. Yates*, 41 Ind. 456.

[h] (Sup. 1876)

A conveyance of property by husband to wife, either directly or through an intermediate person, will be upheld, except as against creditors whom it would operate to defraud.—*Sherman v. Hogland*, 54 Ind. 578.

[i] (Sup. 1883)

A conveyance made by the husband to his wife in payment of an existing indebtedness, and accepted for such purpose, cannot be assailed by creditors.—*Meredith v. Citizens' Nat. Bank*, 92 Ind. 343.

[j] (Sup. 1889)

A husband's deed to his wife, she not joining, of land held by them by entireties, is valid.—*Enyeart v. Kepler*, 118 Ind. 34, 20 N. E. 539, 10 Am. St. Rep. 94.

[k] (Sup. 1889)

A conveyance of property from a husband to his wife is presumably a voluntary settlement, or provision for her benefit, and, if it is reasonable, it will be upheld against the husband and his heirs, unless obtained by fraud or undue influence.—*Corcoran v. Corcoran*, 21 N. E. 468, 119 Ind. 138, 4 L. R. A. 782, 12 Am. St. Rep. 390.

[l] (Sup. 1896)

A deed conveying real estate direct from husband to his wife in good faith for a valuable consideration is valid.—*Merchants' & Laborers' Bldg. Ass'n v. Scanlan*, 42 N. E. 1008, 144 Ind. 11.

The execution of a mortgage by a wife with her husband to another by which her inchoate interest in real estate becomes subject to the lien thereof was a sufficient consideration for the conveyance by him to her of other property.—*Id.*

[m] (Sup. 1900)

The inchoate interest of a wife in the lands of her husband in the conveyance of which she is asked by him to join constitutes a valuable consideration for the conveyance by him, or, at his request to her, of other property by way of compensation for the interest so surrendered and conveyed by her.—*Baldwin v. Heil*, 58 N. E. 200, 155 Ind. 682.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 232-241.

See, also, 21 Cyc. pp. 1284-1291; note, 60

L. R. A. 353; note, 88 Am. Dec. 54

#### § 48. Conveyances by wife to or for husband.

Contracts to convey, see ante, § 46.

Conveyances by married women in general, see post, §§ 69-71, 73, 74, 76.

Effect of duress, see DEEDS, § 71.

[a] (Sup. 1859)

In transactions between husband and wife touching the separate estate of the latter, she prima facie will be viewed in the light of a feme sole, and as such she may dispose of it to him, or for his use, subject to proof of fraud or undue influence on his part, and such disposal of it will preclude her right to charge his estate, after his death, with what he so received. The conveyance in such case must be made through a third person.—*Johnson v. Rockwell*, 12 Ind. 76.

[b] When a married woman conveys real estate, her husband must join in the conveyance, although the property conveyed be the separate estate of the wife; hence a conveyance of real estate by a married woman to her husband is void.—(Sup. 1866) *Bunch v. Bunch*, 26 Ind. 400; (1873) *Kinnaman v. Pyle*, 44 Ind. 275.

[c] (Sup. 1883)

A husband and wife conveyed his land to their son, who conveyed it to the wife pursuant to a parol contract that she should hold it in trust for the husband. Afterwards she, by her separate deed, conveyed the land in execution of the trust to the son, who conveyed it to the husband. *Held*, that the separate deed of the wife was sufficient to convey the land.—*Moore v. Cottingham*, 90 Ind. 239.

[d] (Sup. 1885)

A conveyance by a wife directly to her husband of land in which she holds an equitable estate is void both at law and in equity.—*Luntz v. Greve*, 102 Ind. 173, 26 N. E. 128.

[e] (Sup. 1890)

The common-law rule respecting the unity of husband and wife prevails in Indiana to the extent of rendering nugatory any attempt by a married woman to convey her separate real estate directly to her husband, unless the transaction can be sustained on the principles of equity.—*Johnson v. Jouchert*, 24 N. E. 580, 124 Ind. 105, 8 L. R. A. 795.

A conveyance of real estate by a wife to her husband is void, under Rev. St. 1888, § 5117.—*Id.*

[f] (Sup. 1897)

Under Burns' Rev. St. 1894, § 3340 (Rev. St. 1881, § 2921), providing that "the joint deed of a husband and wife shall be sufficient to convey and pass the lands of a wife," a conveyance to a trustee by husband and wife of the wife's land, for the purpose of having separate estates reconveyed to them by the trustee, conveyed same to the trustee, and his deed to the husband of one-half the land absolutely passed the title thereto to the husband, subject only to be avoided by the wife for fraud or undue influence.—*Leach v. Rains*, 48 N. E. 858, 149 Ind. 152.

[g] (App. 1909)

A conveyance of land by a married woman direct to her husband and daughter as joint tenants without the intervention of a trustee is void as to the husband, and the legal title of the entire estate passes to the daughter.—*McCord v. Bright*, 87 N. E. 654.

The husband has the burden of showing that he acted in good faith in taking a deed from his wife, and that he took no advantage of his influence or knowledge of the rights of the parties, and that the contract was fair and equitable.—*Id.*

Where a husband relinquishes his inchoate interest in lands of his wife, or vice versa, in consideration that a greater interest in the same lands shall be reconveyed to such husband or wife, such relinquishment is not considered a valuable consideration for such conveyance.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 242-248.

See, also, 21 Cyc. pp. 1291-1293; note, 20

L. R. A. 702; note, 9 Am. St. Rep. 323.

#### § 49. Gifts.

Inheritance from donee, see DESCENT AND DISTRIBUTION, § 61.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 249-260.

See, also, 21 Cyc. pp. 1294-1301.

#### § 49½. — Gift by husband to or for wife.

As constituting separate estate, see post, § 116. Rescission, see post, § 52.

[a] (Sup. 1865)

At the request of a husband, a bond was executed to his wife to convey certain land to her on payment of the price, and the greater part of the price was paid by him. *Held*, in a suit by her for specific performance of the contract, she offering to pay the sum due, that his gift to her was executed and could not be revoked, so that his refusal to be a party to

the suit would not prevent her from maintaining it.—*Raymond v. Pritchard*, 24 Ind. 318.

[b] (Sup. 1865)

In determining whether a gift of money from husband to wife is a reasonable provision, the court must take into consideration all the circumstances of the case.—*Clawson v. Clawson's Adm'r*, 25 Ind. 229.

By Act 1853, § 5 (1 Gav. & H. St. p. 295), the power of the wife to acquire personal property by gift during coverture is changed from an equitable to a legal right, and it would seem to follow that the only restriction the courts can impose on this right is to guard against fraud.—Id.

It is the rule in equity that if the nature and circumstances of a gift or grant from the husband to the wife are such that there is no ground to suspect fraud, and the gift amounts only to a reasonable provision for the wife, under all the circumstances of the case, it will be sustained without the intervention of a trustee.—Id.

[c] (Sup. 1881)

A husband may make a valid gift of his wife's services to her, so that she may sue for the value of the services.—*Farman v. Chamberlain*, 74 Ind. 82.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 249-255, 257.

See, also, 21 Cyc. pp. 1294-1298.

§ 49½. — Gifts by wife to or for husband.

[a] (Sup. 1862)

A note given to an unmarried woman, and by her subsequently delivered in free gift to her husband, may be sued on by him in his own name.—*White v. Callinan*, 19 Ind. 43.

[b] (Sup. 1882)

The presumption of law is that the wife's money remains her own after her husband has taken it into his possession, and that he holds it for her use and benefit; there being no evidence of a gift.—*Hileman v. Hileman*, 85 Ind. 1.

[c] (Sup. 1885)

A husband for 37 years applied the rents of his wife's real estate to the common use of the family, and also invested them in other real estate for the benefit of the family, without objection by her, and with no apparent intention that he was to be charged therewith. Held, that she would be deemed to have waived all right to follow such rents into the property.—*Bristor v. Bristor*, 101 Ind. 47.

[d] (sup. 1890)

The presumption of law under the statute of this state is that the separate property or money of a wife, which is taken possession of by her husband, is to be considered as held by him for her use and benefit until such pre-

sumption is overcome by evidence showing that she intended to make a gift of the property to him.—*Denny v. Denny*, 23 N. E. 519, 123 Ind. 240.

Where a husband receives the respective estates of his wife's ancestors and relatives, and appropriates the same to his own use, the mere fact that she consented that he might collect and receive the money raises no presumption that she intended to bestow it on him. In such a case he becomes her agent or trustee, and must account.—Id.

[e] (App. 1893)

Where a portion of the money received by a wife in payment for her real and personal property, sold during coverture, is used by the husband, with her consent, in erecting a building on his land, which both occupy as a dwelling house, a prima facie presumption arises that the husband took and held the money as trustee, and not that the transaction constituted a gift.—*Parrett v. Palmer*, 8 Ind. App. 356, 35 N. E. 713, 52 Am. St. Rep. 479.

[f] (App. 1900)

When a husband receives property of his wife, and with her knowledge and consent deals with it as his own, without any express promise to repay, the presumption is that it was not a gift, but that he took the property as trustee for her.—*King v. King*, 57 N. E. 275, 24 Ind. App. 598, 79 Am. St. Rep. 287.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 251, 256-260.

See, also, 21 Cyc. pp. 1298-1301.

§ 51. Releases.

[a] (Sup. 1880)

It is incumbent on the administrator of a husband to show affirmatively that an adjustment made during marriage of a demand of the wife against the husband was fair and honest, and reasonably advantageous to the wife, although there is no claim of fraud.—*Hon v. Hon*, 70 Ind. 135.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 262, 263.

See, also, 21 Cyc. p. 1301.

§ 52. Rescission or avoidance.

[a] (Sup. 1859)

A husband cannot say that a conveyance from him to his wife is void, so that the land is his and exempt from execution under the statute, though the suit be brought against him to try a title under an execution sale against him.—*Holman v. Martin*, 12 Ind. 553.

[b] (Sup. 1876)

An executed gift by a husband to his wife cannot be revoked by him.—*Garner v. Graves*, 54 Ind. 188.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 264-269.

See, also, 21 Cyc. pp. 1301, 1302.

**§ 53. Torts.**

Amount awarded for assault by husband on wife, see **ASSAULT AND BATTERY**, § 40.

[a] (*Sup.* 1896)

The common-law rule that marriage extinguished all rights of action in favor of the wife against the husband for antenuptial injuries by the husband to her person or character was founded on the principle of the unity of husband and wife, and not upon the theory that the wife was under a legal disability. This rule of the common law is enforced in this state; it not having been abrogated by statute.—*Henneger v. Lomas*, 44 N. E. 462, 145 Ind. 287, 32 L. R. A. 848.

FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. HUS. & W. § 270.

See, also, 21 Cyc. pp. 1302, 1303; note. 58 L. R. A. 307.

**§ 54. Crimes.**

[a] (*Sup.* 1880)

Since a wife cannot be guilty of larceny from her husband, another woman cannot be guilty of larceny for acting conjointly with the wife.—*Lamphier v. State*, 70 Ind. 317.

[b] (*Sup.* 1894)

Under Burns' Rev. St. 1894, §§ 6960, 6962, 6963, 6965, 6973, 6976, a married woman's husband may steal from her, where the circumstances attending the wrongful act are such that, if performed by another, it would constitute larceny.—*Beasley v. State*, 38 N. E. 35, 138 Ind. 552, 46 Am. St. Rep. 418.

On a trial of a husband for the larceny of his wife's property, evidence examined, and held to warrant a conviction.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 271.

See, also, 21 Cyc. p. 1303.

**IV. DISABILITIES AND PRIVILEGES OF COVERTURE.**

Ademption of legacy to married woman, see **WILLS**, § 766.

As to filing complaint to review judgment, see **JUDGMENT**, § 335.

Competency as administratrix, see **EXECUTORS AND ADMINISTRATORS**, § 18.

Competency of married woman to act as next friend, see **INFANTS**, § 81.

Consent of married woman to annexation of land to city, see **MUNICIPAL CORPORATIONS**, § 34.

Marriage of administratrix ground for removal, see **EXECUTORS AND ADMINISTRATORS**, § 35.

New and additional notice in case of marriage and change of name of owner of land proposed to be taken for highway, see **HIGHWAYS**, § 30.

Pleading defense of coverture, see post, §§ 229, 230.

Proof of marriage, see post, § 233.

Recovery of property by purchaser at foreclosure sale, see **MORTGAGES**, § 544.

Right of married woman to prosecute for bastardy, see **BASTARDS**, § 33.

Right of married woman to recover for breach of contract for her benefit, see **CONTRACTS**, § 187.

Right of married women to redeem from foreclosure sale, see **MORTGAGES**, § 594.

Right of married women to reform deed of husband, see **REFORMATION OF INSTRUMENTS**, § 1.

Right of married women to surplus of foreclosure sale, see **MORTGAGES**, § 567.

Special assessments for public improvements, see **MUNICIPAL CORPORATIONS**, § 422.

Taking mortgage as security for price of land sold to married woman as waiver of vendor's lien, see **VENDOR AND PURCHASER**, § 260.

Tax sale to wife of property of husband, see **TAXATION**, § 674.

Validity of assent of husband and wife to contract of sale, see **SALES**, § 35.

Vendor's lien on property sold to married woman, see **VENDOR AND PURCHASER**, §§ 251, 253.

Wife's inchoate interest as affected by foreclosure of mortgage executed before marriage, see **MORTGAGES**, § 588.

**(A) IN GENERAL.**

Capacity to sue and be sued, see post, § 203.

Eligibility of married woman to appointment as guardian, see **GUARDIAN AND WARD**, § 10.

**§ 56. What law governs.**

Conveyances of married woman's separate estate, see post, § 180.

Mutual rights, duties and liabilities in general, see ante, § 2.

[a] (*Sup.* 1887)

The capacity of a married woman who executes a mortgage in Ohio covering lands situated in Indiana is fixed by the laws of Indiana.—*Swank v. Hufnagle*, 111 Ind. 453, 12 N. E. 303, 13 N. E. 105.

[b] (*Sup.* 1890)

A mortgage of land situated in Indiana, previously conveyed by a husband to his wife by way of gift, was executed by the husband and wife, who were at that time residents of the state of Kentucky, to secure a loan, made in part to pay off prior incumbrances on the land. *Held*, that the question of the power of the wife to incumber her real estate was to be determined by the law of the place where the property was situated; and the validity of the mortgage was not affected by the statutes of Kentucky.—*Cochran v. Benton*, 126 Ind. 58, 25 N. E. 870.

[c] (*App.* 1902)

The defense, in an action against a married woman on a note given in Indiana to make good the default of one for whom, as surety,

she executed a bond in Ohio, that under the laws of Indiana she cannot make a contract of suretyship, is unavailing, the bond being governed by the laws of Ohio, under which she can contract as if unmarried.—*Robison v. Pease*, 63 N. E. 479, 28 Ind. App. 610.

[d] (Sup. 1905)

Under the Illinois statute which permits a married woman to subject herself to liability as surety, a note executed in Illinois by a married woman as surety, while domiciled in that state, is valid and enforceable in Indiana, although it is made payable at a bank in the latter state, and the statute thereof prohibits a married woman to enter into a contract of suretyship.—*Garrigue v. Keller*, 74 N. E. 523, 164 Ind. 676, 69 L. R. A. 870, 108 Am. St. Rep. 324.

The statute prohibiting a married woman to bind herself as surety does not render the enforcement, in the courts of this state, of an Illinois contract of suretyship entered into by a married woman residing in that state, which is valid by the laws thereof, against public policy.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 273.

See, also, 21 Cyc. p. 1311; note, 85 Am. St. Rep. 552.

§ 57. Constitutional and statutory provisions.

Subjects and titles of statutes removing disabilities of married women, see STATUTES, § 111.

[a] (Sup. 1869)

The statutes relative to married women have not changed the rule of the common law that a wife is incapable of binding herself by an executory contract, and all such contracts made by her, whether in writing or by parol, are absolutely void.—*O'Daily v. Morris*, 31 Ind. 111.

[b] (Sup. 1884)

Prior to September 19, 1881, a married woman could estop herself by her admissions and conduct from asserting title to her land, or divest herself of such title; and Rev. St. 1881, § 5117, which then took effect, providing that a married woman shall be bound by an estoppel in pais like any other person, is prospective, and not retroactive, in its effect and operation.—*Wilhite v. Hamrick*, 92 Ind. 594.

[c] St. 1881, touching estoppels in pais affecting married women, has no application to a contract executed before the statute came in force.—(Sup. 1885) *Levering v. Shockey*, 100 Ind. 558; (1889) *Cook v. Walling*, 19 N. E. 532, 117 Ind. 9, 2 L. R. A. 769, 10 Am. St. Rep. 17.

[d] (Sup. 1885)

The provision of Rev. St. § 5117, that married women shall be bound, like other persons, by estoppels in pais, is not retroactive, and has no application to a mortgage made by a mar-

ried woman before the enactment.—*Levering v. Shockey*, 100 Ind. 558.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 274, 284.

See, also, 21 Cyc. p. 1310.

§ 59. Capacity to act as agent or trustee.

Agency of wife for husband as to purchase of necessities, see ante, § 19.

Agency of wife for husband in general, see ante, §§ 20, 23½.

Capacity to create trust, see post, § 71.

[a] (Sup. 1894)

A married woman may become the trustee of her husband.—*Rose v. Rose*, 93 Ind. 179.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 277.

See, also, 21 Cyc. p. 1305.

§ 61. Confession of judgment.

[a] (Sup. 1862)

A married woman cannot bind herself by simply signing a power of attorney to confess judgment; neither does her acknowledgment thereof before the clerk of the county court validate it.—*Patton v. Stewart*, 19 Ind. 233.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 281.

§ 62. Estoppel.

Denial of validity of contract or conveyance relating to separate property, see post, § 198.

Estoppel to assert invalidity of mortgage or pledge on separate property, see post, §§ 169, 171.

Estoppel to claim property as separate property, see post, § 129.

Estoppel to deny validity of contracts of suretyship, see post, §§ 87, 158.

Retroactive effect of statute, see ante, § 57.

To claim interest in property conveyed to husband and wife, see ante, § 15.

[a] (Sup. 1855)

A married woman is not excused from the ordinary duty of disclosing her title to property which is being disposed of by another; but, where she is the owner of the estate, the fraudulent concealment by her husband of her interest cannot affect her rights unless she participated in the fraud.—*Gatling v. Rodman*, 6 Ind. 289.

[b] (Sup. 1868)

Where a husband and wife have conveyed land by deed, she cannot complain of a decree against the grantee (who had notice of the plaintiff's equity), her husband, and herself for the land, in favor of a person to whom she and her husband had, prior to the deed, promised to convey the land. Her deed estops her from claiming title to the land.—*Farley v. Eller*, 29 Ind. 322.

[c] (Sup. 1875)

Where a married woman knows that her husband has traded her personal property to a third person for other personal property, which she allows him to keep for a long period and then to sell or trade away, and asserts no claim to her property till it has been, with her knowledge, kept for a long period by such third person, and has been again traded by him to another, she cannot recover possession thereof on the grounds that she did not authorize its transfer, and that she did not know the law.—*Lichtenberger v. Graham*, 50 Ind. 288.

[d] (Sup. 1877)

Where a married woman joins with her husband in the conveyance of lands held in her own right, which purports to convey the entire estate therein, she is estopped from afterwards setting up any title to such lands, whether it existed at the time of making such conveyance or was subsequently acquired by her.—*King v. Rea*, 56 Ind. 1.

[e] (Sup. 1877)

1 Rev. St. 1876, p. 550, relating to the rights of married women, does not make it possible for such a one to divest herself of title to her lands by an estoppel in pais.—*Behler v. Weyburn*, 59 Ind. 143.

[f] (Sup. 1878)

The rule that a married woman cannot divest her title in real estate by an estoppel in pais applies with greater force to an attempt to estop her from claiming title to lands descended from a deceased former husband by means of matter in pais existing during a subsequent coverture.—*Unfried v. Heberer*, 63 Ind. 67.

[g] (Sup. 1879)

A married woman will not be estopped by matter in pais from asserting title to real estate claimed by her.—*Suman v. Springate*, 67 Ind. 115.

[h] (Sup. 1880)

A landlord purchased the building on the leased premises from the husband, who was in possession, and, with his wife's knowledge, held himself out as the owner thereof. *Held*, that she was estopped from afterwards asserting any title thereto.—*Griffin v. Ransdell*, 71 Ind. 440.

[i] (Sup. 1880)

Under Rev. St. 1876, p. 411, § 18, forbidding conveyances by married women, a conveyance by a married woman cannot estop her from asserting her title.—*Sebrell v. Hughes*, 72 Ind. 186.

[j] (Sup. 1884)

Under Rev. St. 1881, § 5117, married women have been barred by estoppel by conduct since September 19, 1881.—*Applegate v. Conner*, 93 Ind. 185.

[k] (Sup. 1885)

A married woman may be bound by an estoppel in pais in the same manner and to the same extent as if she were not under coverture.

—*Marsh v. Thompson*, 102 Ind. 272, 1 N. E. 630.

[l] (Sup. 1885)

A married woman cannot be estopped by a mere contract which she had no power to make.—*Cupp v. Campbell*, 103 Ind. 213, 2 N. E. 565.

[m] (Sup. 1886)

Where a married woman is not personally bound for a debt, nor by the covenants of a mortgage given by her husband and herself on the former's land to secure payment, she is not estopped by contract from asserting title to land conveyed to her in exchange for the mortgaged property.—*Reeves v. Howes*, 104 Ind. 435, 6 N. E. 904.

[n] (Sup. 1886)

A married woman, on joining with her husband in the conveyance of his property, is not estopped by the covenants therein contained from asserting an after-acquired title, unless it is expressly stated that she is to be bound by such covenants.—*Snoddy v. Leavitt*, 105 Ind. 357, 5 N. E. 13.

[nn] (Sup. 1886)

A married woman, who by will was given an inchoate interest in certain real estate dependent upon her survivorship of her husband, before his death joined him in a warranty deed thereto "for the purpose only" of conveying his interest therein. *Held*, that the deed being absolute on its face, no mistake being shown, and no reformation being asked, she was estopped from claiming such interest as against the grantee.—*Littell v. Hoagland*, 106 Ind. 320, 6 N. E. 645.

[o] (Sup. 1886)

Where the question is one of capacity to contract, there can be no estoppel, but there may be an estoppel against a married woman where the question is as to the character of the contract into which she has entered; and where she represents, by sworn statement, that a contract is for her own benefit, and induces another to act in good faith on such statement, she is estopped from asserting that the contract is one of suretyship, which, by the married woman's act of 1881, is excepted from the general power conferred upon married women to contract.—*Ward v. Berkshire Life Ins. Co.*, 108 Ind. 301, 9 N. E. 361.

Under the statute declaring that a married woman may be bound by an estoppel like any other person, she is bound by representation as to the character of the contract into which she seeks to enter and from which she asserts she will receive a benefit.—*Id.*

[p] (Sup. 1887)

A married woman, who represents that she is executing a mortgage to secure money for her own use, is estopped, as against one who in good faith relies on such representations, to claim that she executed the mortgage as surety for her husband.—*Rogers v. Union Cent. Life*

Ins. Co., 111 Ind. 343, 12 N. E. 495, 60 Am. Rep. 701.

[q] (Sup. 1887)

A married woman, who accepts and executes a parol trust, cannot avoid her conveyances on the ground that they were executed to secure her husband's debts.—*Stringer v. Montgomery*, 111 Ind. 489, 12 N. E. 474.

[r] (Sup. 1887)

Until Rev. St. 1881, § 5115, a married woman was not bound by an estoppel in pais, especially when such an estoppel was invoked to affect her right of title to real estate.—*City of Indianapolis v. Patterson*, 14 N. E. 551, 112 Ind. 344.

[s] (Sup. 1889)

A married woman is as much bound by the decision of a court of competent jurisdiction as a feme sole.—*Ratliff v. Stretch*, 117 Ind. 526, 20 N. E. 438.

[ss] (Sup. 1890)

When a wife joins her husband in the execution of a warranty deed of his land, she is not bound by the covenants in the deed, and a title subsequently acquired by her does not inure to the benefit of her husband's grantee.—*De Haven v. Musselman*, 24 N. E. 171, 123 Ind. 62.

[t] (Sup. 1891)

In 1878 a married woman could not lose title by estoppel in the lands of her husband.—*Powers v. Nesbit*, 127 Ind. 497, 27 N. E. 501.

[tt] (Sup. 1892)

Defendants were husband and wife. At the time of executing a mortgage the wife made affidavit that she had purchased certain property of plaintiff for her own benefit, and that the mortgage on other property was given for her own use to secure the purchase price, and not to secure any debt of her husband. Plaintiff, relying on her statements in the affidavit, sold her the property, and took the mortgage to secure the note given therefor. *Held*, in an action to foreclose the mortgage, that she was estopped from claiming that she signed the note and mortgage as surety for her husband.—*Taylor v. Hearn*, 131 Ind. 537, 31 N. E. 201.

[u] (Sup. 1893)

Where a married woman conveys land to her husband to enable him to mortgage it, and to avoid the statute which prohibits the wife from becoming surety for the husband, of which facts the mortgagee has notice, a recital in the wife's deed that it is made for the purpose of placing title in the husband, "who is, and ever has been, the true owner thereof," does not estop her from showing that she was the real owner when the property was conveyed to the husband, and when the mortgage was executed.—*Sohn & Co. v. Gantner*, 134 Ind. 31, 33 N. E. 787.

Neither does such deed operate as an estoppel against the wife, if she cannot read the

English language, and the recital was inserted in the deed without her knowledge and consent.—*Id.*

[uu] (Sup. 1893)

Plaintiff and her husband, who owed defendant money on notes, represented, when such notes fell due, that the husband was ready to pay them; that plaintiff wanted to borrow the money due defendant to use on her separate estate, on which she would give a mortgage to secure the loan. Defendant thereupon took her note and mortgage, and, by mutual agreement, defendant surrendered the notes to the husband, directing him to pay the money to plaintiff, who, together with her husband, agreed to the arrangement. *Held*, that plaintiff was bound by such representations, and estopped from denying the truthfulness thereof in order to avoid the mortgage; Rev. St. 1881, § 5117, providing that a married woman shall be bound by estoppel in pais like any other person.—*Wertz v. Jones*, 134 Ind. 475, 34 N. E. 1.

[v] (Sup. 1893)

A married woman, who joins with her husband in a mortgage on land, the record title to which is in him, and who knows that the mortgagee is parting with his money in reliance on the husband's ownership, without making any objection, is estopped from afterwards asserting, as against the mortgagee, that she is the equitable owner of the land, and that the title was taken in her husband's name, without her knowledge and consent.—*Duckwall v. Kiser*, 136 Ind. 99, 35 N. E. 697.

[vv] (App. 1893)

Where a married woman borrows money of the school fund to pay her husband's debts, and gives a mortgage on her separate property, and makes oath that she is the legal owner of the property mortgaged, and that there is "no incumbrance or better claim, either in law or equity, that she knows of or believes, on or to said land," and complies with all the statutory requirements, she is estopped from denying the validity of the mortgage, though the county auditor, by whom, under the law, the loan is made, knows at the time that it is for the husband's benefit, and that part of the money is to be applied on a note of the latter on which such auditor is surety.—*Davee v. State ex rel. Board of Com'rs of Morgan County*, 7 Ind. App. 71, 34 N. E. 308.

[vvv] (Sup. 1896)

The owner of land, and his wife, conveyed it to his son, in consideration that the son would support them during life. The conveyance was afterwards declared void as to the father's creditors, and the land was sold under the decree to pay his debts. Before a deed was made the father died intestate. After it was made the grantees and the wife partitioned the land by agreement and conveyances, whereby one-third of it was conveyed to her. *Held*, that she was not estopped from claiming title and

possession of such third, as against the son, who had performed and was ready to perform the conditions of such contract and the deed to him.—*Miller v. Miller*, 140 Ind. 174, 39 N. E. 547.

[w] (Sup. 1895)

A married woman holding an equitable title to real estate, the legal title to which is in her husband, who knowingly allows the latter to contract for improvements with a third party, who in good faith relies upon the husband's ownership as shown of record, is estopped to set up her equitable interest as against the creditor.—*Le Coil v. Armstrong-Landon-Hunt Co.*, 140 Ind. 256, 39 N. E. 922.

[ww] (Sup. 1895)

Where land is purchased by a wife with her own money, the deed being taken in the husband's name, and so remaining in the records for nearly 18 years, the wife meanwhile joining her husband in mortgages on the land as his property, she will be estopped from asserting her title as against innocent persons, who have become creditors of the husband on the faith of his ownership.—*Pierce v. Hower*, 42 N. E. 223, 142 Ind. 626.

[www] (Sup. 1895)

Where a wife purchases a retail drug store with her separate property, and permits her husband to carry on the business in his own name, she is not estopped, there being no allegation of her insolvency, as against a person selling goods to the husband on the faith of his ownership of the store, to deny the authority of the husband to subsequently mortgage the goods to secure the price, though, after the goods were bought, she may have stated to the sellers that they belonged to her husband.—*McGirr v. Sell* (1877) 60 Ind. 249, approved.—*Kiefer v. Klinsick*, 42 N. E. 447, 144 Ind. 46.

[x] (App. 1895)

Where a married woman executed an instrument with her husband, and all the parties were fully conversant with all the facts relating to her rights, there was no ground for estoppel.—*Goff v. Hanks*, 39 N. E. 294, 11 Ind. App. 456.

[xx] (App. 1896)

A married woman is not estopped to claim property mortgaged by her husband, as her own, because she failed to inform the mortgagee of her ownership, where she was not guilty of collusion or fraud, and did nothing to induce the taking of the mortgage, no duty resting upon her to act affirmatively in the premises.—*Roberts v. Trammel*, 15 Ind. App. 445, 40 N. E. 162, 44 N. E. 321.

[xxx] (Sup. 1899)

Where a wife, acting with her husband in endeavoring to procure a loan secured by their joint mortgage on land owned by them as tenants by the entirety, conveyed the land through a third party, without consideration, to the husband, and remained silent when the husband represented himself as the sole owner of the

land, she was estopped from contesting the validity of the mortgage by *Burns' Rev. St. 1894*, § 6962, providing that a married woman is bound by estoppel in pais like any other person.—*Government Building & Loan Inst. No. 2 v. Denny*, 55 N. E. 757, 154 Ind. 261.

[xxxx] (App. 1901)

Where a married woman signed a written statement that money loaned to her was for her sole and separate use, and the loan was made upon the representations, she was estopped to contest the validity of a mortgage executed to secure the loan, though the money was in fact borrowed for the use of her husband.—*Till v. Collier*, 61 N. E. 203, 27 Ind. App. 333.

[y] (App. 1902)

Where, in order to secure a loan and the acceptance of a mortgage on the joint property of a husband and wife as security therefor, they both state that the money is for their joint use and improvement of such property, the wife is estopped from claiming that the loan was for her husband, and she only a surety.—*Lavene v. Jarnecke*, 62 N. E. 510, 28 Ind. App. 221.

[yy] (App. 1906)

A married woman being bound by an estoppel in pais, her representations to a bank that she was a partner with her husband, and was borrowing money with him to be used in the partnership business, was as binding on her as if she were a feme sole.—*Anderson v. Citizens' Nat. Bank of Crawfordsville*, 76 N. E. 811, 38 Ind. App. 190.

[z] (App. 1908)

Under *Burns' Ann. St. 1901*, § 6962, a married woman is bound by an estoppel in pais like any other person.—*Indianapolis Brewing Co. v. Behnke*, 41 Ind. App. 288, 81 N. E. 119.

[zz] (App. 1910)

If one accepting a married woman's obligation knew and understood all of the facts, and participated in the evasion of the statute by so doing, there can be no estoppel binding her in such case.—*Weil v. Waterhouse*, 91 N. E. 746.

#### FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. HUS. & W. §§ 282-284, 363.

See, also, 21 Cyc. pp. 1343-1350; note, 22 L. R. A. 779; notes, 28 Am. Rep. 374, 49 Am. Rep. 87; note, 57 Am. St. Rep. 169.

#### § 65. Effect of incapacity or absence of husband or separation.

[a] (Sup. 1866)

A promise made to a married woman, living separate from her husband, to pay a sum of money in consideration of her agreement not to prosecute the promisor for bastardy, is good, though made without the concurrence of her husband.—*Abshire v. Mather*, 27 Ind. 381.

## [b] (Sup. 1880)

A married woman whose husband is insane, but whose insanity has not been judicially declared, may, under 1 Rev. St. 1876, p. 556, make a valid contract concerning her separate real property.—*Shin v. Bosart*, 72 Ind. 105.

## [c] (Sup. 1891)

A wife, whose husband has deserted her, and fails to provide for her and her children's support, has the right to cause the land left in her possession to be cultivated, and to use so much of the crop as may be necessary for such support, and her rights are superior to those of a chattel mortgagee of her husband with notice of the circumstances.—*Loy v. Loy*, 128 Ind. 150, 27 N. E. 351.

It is not necessary to the wife's rights that the father shall have relinquished his claim to the services of the minor children, who cultivated the crop, otherwise than by his abandonment of and failure to support them and his wife.—*Id.*

## [d] (Sup. 1891)

Under Act March 11, 1861 (1 Rev. St. 1876, p. 555), providing that married women, whose husbands are insane, may during such insanity "make and execute all such contracts, and be contracted with, in relation to their separate property, as they could if unmarried," a conveyance of lands owned by a married woman in her own right, executed by her during the insanity of her husband, is valid, although the husband did not join in the deed.—*Teeter v. Newcom*, 130 Ind. 28, 29 N. E. 391.

## FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 287, 288.

See, also, 21 Cyc. p. 1307; note, 64 Am. St. Rep. 861.

## § 67. Effect of termination of coverture.

Effect on conveyances and contracts relating to separate property, see post, § 200.

Ratification of contract after termination of coverture, see post, § 89.

## [a] (Sup. 1875)

The statutory disability of a married woman to alienate real estate held by her in virtue of a previous marriage is removed by her divorce or the death of her husband.—*Piper v. May*, 51 Ind. 283.

## FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 289.

See, also, 21 Cyc. p. 1309.

## (B) PROPERTY AND CONVEYANCES.

Between husband and wife, see ante, §§ 46-48, 52.

Consent of husband in conveyance of wife's separate estate, see post, § 184.

Conveyances of estate by entirety, see ante, § 14.

Conveyances to or by husband and wife, see ante, §§ 14, 15.

Dedication, see DEDICATION, § 13.

Effect of incapacity of husband on right of wife to convey, see ante, § 65.

Effect of termination of coverture, see ante, § 67.

Estoppel by conveyance, see ante, § 62.

Estoppel to claim benefit of statute of frauds, see FRAUDS, STATUTE OF, § 144.

Liability on covenants in deeds, see post, § 81.

Mortgage of inchoate interest in husband's land, see MORTGAGES, § 12.

Mortgage or pledge of separate property, see post, §§ 168-172.

Mortgage to secure loan of school funds, see SCHOOLS AND SCHOOL DISTRICTS, § 18.

Purchase and sales of personalty, see post, § 86.

Ratification by wife of deed sought to be canceled which her husband compelled her to execute, see CANCELLATION OF INSTRUMENTS, § 17.

Reformation of deed of, see REFORMATION OF INSTRUMENTS, §§ 21, 28.

Retroactive effect of statute, see ante, § 57.

Separate property, see post, §§ 110-202.

Testamentary capacity, see WILLS, §§ 27-30.

What law governs, see ante, § 56.

## § 68. Capacity to take and hold property.

## [a] (Sup. 1877)

A vendor's lien is not prevented from arising by the mere fact that the purchaser is a married woman.—*Haskell v. Scott*, 56 Ind. 564.

## [b] (Sup. 1891)

Where a married woman buys real property, gives a note, and, jointly with her husband, executes a mortgage for the purchase money, and the conveyance is made to her as sole grantee, she receives a consideration for her contract, and is liable as principal, though the property was not purchased for herself alone, but for herself and husband.—*Kedy v. Kramer*, 129 Ind. 478, 28 N. E. 1121.

## FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 290-293, 343.

See, also, 21 Cyc. pp. 1327, 1328; note, 57 Am. Dec. 194.

## § 69. Capacity to convey.

Effect of incapacity of husband, see ante, § 65.

Effect of termination of coverture, see ante, § 67.

Retroactive effect of statute, see ante, § 57.

What law governs, see ante, § 56.

## [a] (Sup. 1858)

Though a wife's property is secure from her husband's creditors, she is incompetent to convey personal property.—*Reese v. Cochran*, 10 Ind. 195.

At common law, the deed of a married woman is absolutely void.—*Id.*

At common law coverture disabled the wife to convey her property, real or personal.

without the consent of her husband, unless by virtue of some trust or power of appointment.—Id.

By our statutes a married woman cannot convey her separate property, either real or personal, without the consent of her husband.—Id.

[b] (*Sup.* 1879)

An agreement by a wife to join with her husband in a conveyance of land is void.—Long v. Brown, 66 Ind. 160.

#### FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. HUS. & W. §§ 205-209, 345.

See, also, 21 Cyc. pp. 1328, 1329; notes, 43 Am. Dec. 426, 99 Am. Dec. 599.

#### § 70. Requisites and validity of conveyances.

Acknowledgment of married woman, see Acknowledgment, §§ 25, 37.

Estoppel to deny validity, see ante, § 62.

[a] (*Sup.* 1843)

A feme covert cannot alien her real estate unless her husband join with her in the deed.—Scott v. Purcell, 7 Blackf. 66, 39 Am. Dec. 453.

[b] (*Sup.* 1881)

A decree in foreclosure proceedings against a husband, to which the wife is not made a party, does not defeat her right to redeem from the foreclosure sale; and she may convey this right to another by a deed in which her husband joins.—McGlöthlin v. Pollard, 81 Ind. 228.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 301, 302, 304.

See, also, 21 Cyc. p. 1330; notes, 16 Am. Dec. 518, 99 Am. Dec. 602.

#### § 71. Trusts.

Capacity of married woman to act as trustee, see ante, § 59.

[a] (*Sup.* 1878)

An agreement by a wife to hold certain lands entered upon and purchased by her husband in her name, in trust for him, is invalid. Under Rev. St. 1838, p. 312, § 5, a wife has no power to declare an express trust.—Lochenour v. Lochenour, 61 Ind. 595.

[b] (*Sup.* 1883)

A wife, by her separate deed, may convey land in execution of a trust for her husband.—Moore v. Cottingham, 90 Ind. 239.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 303.

#### § 73. Ratification.

[a] (*Sup.* 1892)

Where land was conveyed to a married woman, and the price secured by mortgage and notes signed by her husband and herself, and

she knew nothing of the conveyance to her at the time, but was fully apprised of all the facts in the transaction by her husband within four weeks thereafter, and she retained title for years, and made no offer to rescind or reconvey, it was a complete ratification of the transaction on her part, and rendered her liable on the note.—Pattison v. Babcock, 130 Ind. 474, 30 N. E. 217.

#### FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. HUS. & W. §§ 307, 308.

See, also, 21 Cyc. p. 1332.

#### § 74. Avoidance.

[a] (*Sup.* 1843)

A conveyance executed by a feme covert cannot be avoided by her, after her husband's death, on the ground that she had executed it under a misapprehension of her legal rights.—McNeely v. Rucker, 6 Blackf. 391.

[b] (*Sup.* 1887)

Where a right of easement is granted by a married woman, and the dominant estate is afterwards sold by her, the grantee cannot defeat the easement upon the ground that the contract was executed by a married woman; coverture being solely a personal defense of the married woman.—Robinson v. Thrailkill, 110 Ind. 117, 10 N. E. 647.

[c] (*Sup.* 1887)

Coverture is a personal defense, and under Rev. St. 1881, § 5119, where a husband and wife mortgage real estate, and afterwards sell it, the grantee cannot avail himself of such defense against the mortgage.—Crooks v. Kennett, 111 Ind. 347, 12 N. E. 715.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 309-312.

See, also, 21 Cyc. pp. 1332, 1333.

#### § 75. Jurisdiction of courts.

##### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 313, 314.

#### § 76. — In equity.

[a] (*Sup.* 1831)

Where an act for the relief of a decedent's estate authorized the probate court, on the petition of a minor heir by his guardian, with the consent of certain other heirs, to order the sale of the real estate of the decedent, the proceeding could not be questioned on the ground that one of such heirs, being a married woman, could not consent, by reason of her coverture, to the order of the court for the sale of the real estate.—Davidson v. Koehler, 76 Ind. 398.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 314.

See, also, note, 51 Am. Rep. 458.

#### (C) CONTRACTS.

Between husband and wife, see ante, §§ 36, 37, 39-46, 49½, 49¾, 51, 52.

By husband and wife with third persons in general, see ante, § 17.

Capacity of married woman to contract for or consent to improvements on separate estate as affecting right to mechanic's lien, see **MECHANICS' LIENS**, § 68.

Consent of husband in sale of wife's personality constituting separate estate, see post, § 184.

Effect of incapacity of husband on right of wife to contract, see ante, § 65.

Effect of separation from husband on capacity to contract, see ante, § 65.

Estoppel by contract, see ante, § 62.

Liability of sureties, see **PRINCIPAL AND SURETY**, § 8.

Marriage settlements, see ante, §§ 26, 29-31, 33-35.

Mutuality of contract of wife as affecting right to specific performance, see **SPECIFIC PERFORMANCE**, § 32.

Relating to separate property, see post, §§ 152-154, 156-160, 162-172, 180-202.

Release of claim assigned by husband to wife, see **ASSIGNMENTS**, § 92.

Retroactive effect of statute, see ante, § 57.

Specific performance, see **SPECIFIC PERFORMANCE**, § 35.

Sufficiency of bond of married woman in county seat removal proceedings, see **COUNTIES**, § 32.

What law governs, see ante, § 56.

### § 79. Capacity to contract.

Retroactive effect of statute, see ante, § 57.

#### [a] (Sup. 1880)

An assignment of a policy of insurance on the life of a husband, made by the husband and wife during coverture, is void as to the wife.—*Godfrey v. Wilson*, 70 Ind. 50.

#### [b] (Sup. 1881)

The rule of the common law, except in so far as the same has been modified by statute uniformly recognized as prevailing in this state, is that a feme covert is incapable of binding herself by an executory contract, and that all such contracts made by married women, whether in writing or by parol, are absolutely void at law.—*Eberwine v. State ex rel. Koster*, 79 Ind. 266.

#### [c] (Sup. 1882)

A married woman may lease her land for three years by parol. Such a lease is not an incumbrance or conveyance which she is prohibited from making.—*Pearcy v. Henley*, 82 Ind. 129.

#### [d] (Sup. 1883)

Prior to the passage of the married woman's act, a married woman contracting jointly with her husband was not liable on a contract.—*Scarlett v. Snodgrass*, 92 Ind. 262.

#### [e] (Sup. 1885)

Those who deal with a married woman are bound to inquire as to whether a contract, or the consideration thereof, is for her benefit, or

the benefit of her estate, and, therefore, one which, under the statute, she may lawfully make.—*Cupp v. Campbell*, 103 Ind. 213, 2 N. E. 565.

#### [f] (Sup. 1886)

A party who contracts with a married woman is bound to take notice of the capacity in which she contracts.—*Keller v. Orr*, 106 Ind. 406, 7 N. E. 195.

#### [g] (Sup. 1894)

A married woman can make through an agent only such contracts as she can make herself.—*Bowles v. Trapp*, 139 Ind. 55, 38 N. E. 406.

#### [h] (Sup. 1895)

Since a married woman who receives no benefit from a contract cannot bind herself as a principal except by estoppel, she cannot bind herself as a joint principal.—*Cole v. Temple*, 41 N. E. 942, 142 Ind. 498.

#### [i] (App. 1903)

The contract of a married woman, being void as against her and incapable of ratification by her, is also void as against the other party to it.—*Shirk v. Stafford*, 67 N. E. 542, 31 Ind. App. 247.

#### [j] (App. 1906)

Burns' Ann. St. 1901, § 6960, abolishes all legal disabilities of married women to contract, except as provided in sections 6961, 6962, and 6963, which restrain her right to convey or mortgage her real estate and prohibit her from becoming a surety. *Held*, that under such sections a married woman may contract as a feme sole, except as expressly forbidden.—*Anderson v. Citizens' Nat. Bank of Crawfordsville*, 76 N. E. 811, 38 Ind. App. 190.

#### [k] (App. 1908)

Under the express provisions of Acts 1881, p. 527, c. 60 (Burns' Ann. St. 1901, § 6960), a married woman may contract as a feme sole, except as otherwise provided by statute.—*Townsend v. Huntzinger*, 83 N. E. 619, 41 Ind. App. 223.

#### [l] (App. 1908)

Burns' Ann. St. 1908, § 7851, abolishes all the legal disabilities of married women to contract except as otherwise provided. Section 7853 prohibits a married woman from contracting to convey or mortgage, or from conveying or mortgaging, her realty, unless her husband join in the contract, conveyance, or mortgage. Section 7855 prohibits contracts of suretyship by married women. *Held*, that a wife has a broad general power to make all executory contracts the same as if feme sole, except as prohibited, and may hence contract with a mortgagee of a first mortgage, given by her and her husband, that, in consideration of his becoming her husband's surety, she would join in a second mortgage with her husband and waive an agreement between her and the mortgagee that if the first mortgage were foreclosed he should pay her a

certain sum.—*Druckamiller v. Coy*, 42 Ind. App. 500, 85 N. E. 1028.

Under the married woman's act, a married woman may purchase property for the use of any one, employ an attorney to defend her husband or any other person, or employ a physician, or purchase drugs or other property for a third person.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 317, 323, 329.

See, also, 21 Cyc. pp. 1310-1313; note, 4 L. R. A. (N. S.) 547; note, 90 Am. Dec. 599.

### § 80. Requisites and validity of contracts in general.

[a] (*Sup.* 1895)

Where a husband received the entire consideration for a sale of a certain business, but his wife joined in a covenant that neither would engage in it again for a limited time, it is no defense for the woman to assert that no consideration passed to her.—*Koh-i-noor Laundry Co. v. Lockwood*, 141 Ind. 140, 40 N. E. 677.

[b] (*App.* 1910)

There can be no evasion of the statute on the part of the person who accepts an obligation a married woman is powerless to issue; and, except for the fact that she may be bound by an estoppel in pais, the statutory prohibition cannot be escaped.—*Weil v. Waterhouse*, 91 N. E. 746.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 327-330.

See, also, 21 Cyc. pp. 1313-1315; note, 16 Am. Dec. 518; note, 32 Am. Rep. 185.

### § 81. Instruments under seal.

Bills and notes, see post, § 85.

Contracts of suretyship, see post, § 87.

Liability of married woman on covenants in conveyance of separate estate, see post, § 202.

[a] (*Sup.* 1833)

A wife who joins in a deed for the purpose of relinquishing her dower is not liable on the covenants in the deed.—*Aldridge v. Burlison*, 3 Blackf. 201.

A married woman, by joining with her husband in the conveyance of land of which they were seised in her right, and in a covenant of warranty, is not bound by the covenant of warranty.—*Id.*

[b] (*Sup.* 1873)

On a conveyance by a husband and his wife of real estate descended to her from a deceased husband, he alone is liable for a breach of covenants of warranty in which both join.—*Griner v. Butler*, 61 Ind. 362, 28 Am. Rep. 675.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 331-335.

See, also, 21 Cyc. pp. 1323-1325.

### § 82. Services.

See ante, § 79.

As charge on separate estate, see post, §§ 152, 162.

As property of husband, see ante, § 5.

Contracts between husband and wife as to services, see ante, § 41.

Earnings of wife as separate property, see post, § 126.

Evidence, see post, § 232.

Pleading in action for services, see post, § 229.

Questions for jury, see post, § 235.

Ratification, see post, § 89.

Right of action by husband or wife, or both, for services, see post, § 208.

Right of action by wife for services rendered, see post, § 207.

Right of action for loss of services, see post, § 209.

[a] (*Sup.* 1871)

A judgment cannot be recovered against a woman upon an employment by her, during her marriage, of an attorney to conduct a divorce proceeding for her.—*Cook v. Walton*, 38 Ind. 228.

[b] (*Sup.* 1875)

A contract made by a married woman to pay an attorney a certain sum to prosecute a suit for divorce is void because of her coverture, and rendering the services and procuring a divorce; and a promise after the divorce to pay the amount will not render the contract valid.—*Putnam v. Tennyson*, 50 Ind. 456.

[c] (*Sup.* 1881)

A married woman's promise, pending divorce proceedings, to pay an attorney's fee or to give him a lien on the alimony, is not valid.—*McCabe v. Britton*, 79 Ind. 224.

[d] (*Sup.* 1882)

A written contract made by a married woman to pay an attorney a certain sum in case of the successful termination of a suit to be prosecuted by him for the recovery of her land, he to receive nothing unless successful, does not bind her, nor can the amount be made a lien on the land recovered.—*Lacey v. Willson*, 83 Ind. 570.

[e] (*Sup.* 1882)

An agreement made by a decedent while she was a married woman to pay for certain services rendered during her marriage was void.—*Candy v. Coppock*, 85 Ind. 594.

[f] (*Sup.* 1890)

Under Rev. St. § 5115, abolishing all legal disabilities of married women to make contracts, except contracts of suretyship, a married woman may contract as a principal with an attorney to defend her husband against a criminal charge.—*Young v. McFadden*, 125 Ind. 254, 25 N. E. 284.

[g] (*App.* 1905)

A married woman being under no legal disability to contract (*Burns' Ann. St.* 1901, § 6560), and being entitled to her separate earn-

ings (section 6975), a contract made by the husband alone to furnish and care for a room for decedent in consideration of the rent of the premises occupied by the husband's family did not prevent the wife from making an independent oral contract with decedent to furnish him board and care during his illness.—Kennedy v. Swisher, 73 N. E. 724, 34 Ind. App. 676.

[h] (App. 1905)

A married woman has power to bind herself for the payment of broker's services rendered to her in the sale of her real estate, under Burns' Ann. St. 1901, § 6960, declaring that all the legal disabilities of married women to make contracts are abolished, except as otherwise provided.—Ishphording v. Wolfe, 75 N. E. 598, 36 Ind. App. 250

[i] (App. 1910)

Under Burns' Ann. St. 1901, § 6975 (Burns' Ann. St. 1908, § 7867), providing that the earnings and profits of any married woman accruing from her trade, business, services, or labor other than labor for her husband or family shall be her sole and separate property, a married woman may lawfully contract to furnish board and perform services in caring for persons other than her husband or family and charge and enforce payment for the same in her own name.—Elliott v. Atkinson, 90 N. E. 779.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 322, 324.

See, also, 21 Cyc. p. 1315.

#### § 84. Loans and advances.

Between husband and wife, see ante, § 43.  
Ratification, see post, § 80.

[a] (Sup. 1862)

A husband is not liable for money deposited with or loaned to his wife, unless the deposit was at his request, or unless the wife be proved to have acted as his agent in taking it.—Gilbert's Ex'r v. Plant, 18 Ind. 308.

[b] (Sup. 1873)

Where money is loaned to a married woman, her contract to repay is absolutely void.—Maher v. Martin, 43 Ind. 314.

[c] (Sup. 1877)

Where money is loaned to a wife without the knowledge or consent of her husband, he is not liable therefor to the lender.—Sheehan v. Crosby, 58 Ind. 205.

[d] (Sup. 1881)

A married woman has a right to recover money paid by her at another's request.—Farman v. Chamberlain, 74 Ind. 82.

[e] (Sup. 1883)

In an action for money had and received for the use of another, coverture is no defense.—Hoke v. Applegate, 88 Ind. 530.

[f] (Sup. 1893)

Where a married woman executes her note and mortgage for a loan of the school fund, and

it is accepted, she has the right to the money which the loan called for, and, if the officer refuses to pay the money over to her, she may compel the payment, but, if she waives her right to the money and directs the auditor to pay it to another or permits him to retain it and apply it to other purposes, she may have a right against him, but cannot defend against a mortgage executed to the state.—Lloyd v. State ex rel. Banta, 34 N. E. 311, 134 Ind. 506.

[g] (Sup. 1893)

Where a married woman executed a mortgage for a loan of a school fund and the auditor of the county issued the warrant to her payable to her alone, and she presented it to the county treasurer, and he gave her a check for the amount thereof, she cannot avoid repayment of the loan on the ground that she signed the statutory note and mortgage as surety for her husband.—State ex rel. Morris v. Frazier, 34 N. E. 636, 134 Ind. 648.

[h] (Sup. 1904)

A married woman is not bound by contract to repay money used to pay another's debts in the absence of an estoppel in pais.—Field v. Campbell, 164 Ind. 389, 72 N. E. 260, 108 Am. St. Rep. 301.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 326, 796, 798.

See, also, 21 Cyc. p. 1315.

#### § 85. Bills and notes.

Indorsement of or signature to note as surety, see post, § 87.

Liabilities of wife's separate estate, see post, § 156.

Notes for loans, see ante, § 84.

Notes for purchases of realty, see ante, § 68.

Notes in payment of purchases of property, see post, § 86.

[a] (Sup. 1866)

A married woman is not liable on a note signed by her where the money for which the note was executed was not obtained for her benefit, or for the use or benefit of her separate estate.—Coats v. McKee, 26 Ind. 223.

[b] (Sup. 1869)

A note was executed by a husband and wife jointly, the credit being given on account of the wife's responsibility, for the purchase money of lands conveyed to the husband, but which are afterwards sold and the proceeds thereof applied to the wife's benefit. *Held*, that the wife is not liable on such note, nor can her lands or the profits thereof be charged therefor.—Armstrong v. Nichols, 32 Ind. 408.

[c] (Sup. 1871)

The fact that a person sued as maker of a note was a married woman at the time of the execution is a bar to the action, and need not be pleaded in abatement.—Higgins v. Willis, 35 Ind. 371.

[d] (Sup. 1871)

A married woman cannot bind herself by any indorsement of a note beyond the vesting of the title in the purchaser. Her indorsement vests in the indorsee whatever title she had. Further than this it is inoperative to bind her.—*Moreau v. Branson*, 37 Ind. 195.

[e] (Sup. 1874)

The note of a married woman is absolutely void, and is not evidence of any promise on her part to pay the indebtedness for which it is given.—*Brick v. Scott*, 47 Ind. 299.

[f] (Sup. 1877)

A married woman, with the consent of her husband, may make an equitable assignment of a note and mortgage executed to her by the sale and mere delivery of the same to another.—*Baker v. Armstrong*, 57 Ind. 189.

[g, h] (Sup. 1881)

In an action on a note given in consideration of a warranty deed from a married woman, the fact that she had no title, so that the purchaser obtained neither title nor possession, could be pleaded as showing failure of consideration, although by 1 Rev. St. 1876, p. 363, § 6, she was not bound by her covenants of warranty.—*Beal v. Beal*, 79 Ind. 280.

[i] (Sup. 1882)

The signature of a married woman to a note executed by her husband to a creditor constitutes no consideration for a confirmation by the creditor of a conveyance of land by the husband through a third party to the wife made for the purpose of defrauding creditors.—*Heaton v. White*, 85 Ind. 376.

[j] (Sup. 1886)

Where a married woman joins her husband as principal in executing a note and mortgage on her real estate, to secure a loan for the purpose of removing a prior valid lien thereon, she thereby becomes liable the same as if sole, and a personal judgment may be rendered against her.—*Fawcner v. Scottish-American Mortg. Co.*, 107 Ind. 555, 8 N. E. 689.

[k] (Sup. 1890)

The fact that a married woman joined her husband in executing a note in payment of the fees of an attorney employed by the wife to defend the husband charged with crime does not imply that she was not a principal, for in a note signed by a husband and wife both may be principals. The relation of the parties to the note and the capacity in which they contracted depend upon the contract with the creditor and not solely upon the signatures to the instrument.—*Young v. McFadden*, 25 N. E. 284, 125 Ind. 254.

[l] (Sup. 1897)

A wife who had joined in a purchase-money mortgage of land conveyed to her husband, and who had paid a part of the mortgage on the agreement that she should be secured on the land, joined her husband in a note for money borrowed from plaintiff's intestate to pay off

the balance of the incumbrance, such note being given prior to the act removing the disabilities of married women to contract. After the passage of such act, the note was renewed, without further consideration, and thereafter the husband conveyed the land to his wife in satisfaction of her debt. *Held* that, as the wife was not legally or equitably indebted to intestate, the latter's claim was not enforceable as a lien on the land.—*Heiney v. Lontz*, 46 N. E. 665, 147 Ind. 417.

[m] (Sup. 1899)

Where a husband and wife executed a note together prior to the married women's act of 1881, and after said act executed a renewal note, such renewal note was not without consideration as to the wife; for the consideration moving to the husband was sufficient to support said note against all who executed it with him.—*Lackey v. Boruff*, 53 N. E. 412, 152 Ind. 371.

Where a husband and wife executed a note for money loaned to the wife and used by the husband, before the passage of the married women's act of 1881, and after that law went into effect the husband and wife executed a new note in renewal, it was binding on the husband, whether or not he was surety thereon, though it was void as to the wife.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 333, 336-341.

See, also, 21 Cyc. pp. 1316-1318; note, 3 L. R. A. (N. S.) 145.

#### § 86. Purchases and sales.

See ante, § 79.

Between husband and wife, see ante, § 45.  
Of realty, see ante, §§ 68-70, 73, 74, 76.

[a] (Sup. 1860)

Our statute does not allow a married woman to purchase property to be paid for out of the future profits of her real estate. Property purchased as above, and paid for by a joint note of herself and her husband, is liable for his debts; it not having been paid for at the time of the levy on it.—*Johnson v. Chissom*, 14 Ind. 415.

[b] (Sup. 1884)

Acts 1879, p. 160, provides that "a married woman may enter into any contract in reference to her separate personal estate, trade, business, labor, or service, \* \* \* the same as if she were sole." *Held*, that a married woman was bound by her note given for personal property purchased by her.—*Rothschild v. Raab*, 93 Ind. 483.

[c] (Sup. 1887)

A married woman may bind herself by an executory contract for personal property purchased by her for her own use, where the title and ownership vest in her, although it is to be delivered to some one else in her behalf; but it is otherwise where the title vests in such other

person.—*Chandler v. Spencer*, 109 Ind. 553, 10 N. E. 577.

[d] (Sup. 1890)

A married woman may bind herself by a note executed in payment for property purchased by her either for herself or another.—*Beridge v. Banks*, 125 Ind. 561, 25 N. E. 805.

[e] (App. 1908)

Under the express provisions of Burns' Ann. St. 1901, § 6962, a wife may, in her own name, as if she were unmarried, sell and dispose of her personal property and contract with reference to it.—*Townsend v. Huntzinger*, 83 N. E. 619, 41 Ind. App. 223.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 342-345.

See, also, 21 Cyc. pp. 1318, 1319.

§ 87. **Guaranty or suretyship.**

See ante, § 79.

Avoidance, see post, § 90.

Indorsement of bill or note for transfer, see ante, § 85.

Liabilities of wife's separate estate, see post, §§ 157-159.

Mortgage by husband and wife of estate by entirety to secure husband's debts, see ante, § 14.

Notes for husband's debts in general, see ante, § 85.

Ratification, see post, § 89.

What law governs, see ante, § 56.

[a] (Sup. 1879)

The taking of a note of a married woman for her husband's debt cannot operate as a payment of such a debt, though payable at a bank in this state, so as to be covered by a law mortgage.—*Little v. American Buttonhole Over-Seam Sewing Mach. Co.*, 67 Ind. 67.

[aa] (Sup. 1879)

An agreement made by a married woman, before Act March 25, 1879, that, if she should be unable to pay a loan to her, for which she and her husband had given their note, before the death of her father, the loan should be satisfied out of her share of her father's estate, was void.—*Wooden v. Wampler*, 69 Ind. 88.

[b] A married woman cannot bind herself by a contract of replevin bail for the stay of execution.—(Sup. 1881) *Eberwine v. State ex rel. Koster*, 79 Ind. 266; (1882) *Bromley v. Wheeler*, 83 Ind. 600; (1898) *Peck v. Williams*, 113 Ind. 256, 15 N. E. 270.

[c] (Sup. 1882)

Prior to 1878 a married woman could not execute a valid replevin bond.—*Coverdale v. Alexander*, 82 Ind. 503.

[d] (Sup. 1884)

Rev. St. 1881, § 5119, makes all contracts of suretyship by a married woman void. *Held*, that a mortgage executed by husband and wife

on land held by them as tenants by entirety to secure an individual debt of the husband was void.—*Dodge v. Kinzy*, 101 Ind. 102; *Allen v. Davis*, Id. 187.

[e] (Sup. 1885)

A note and mortgage given by a wife in payment of her husband's debt are void, though the creditor believed that the land had been paid for by the husband, and a conveyance taken to the wife in fraud of creditors, and was about to commence proceedings to subject the land to the payment of his debt, and the note and mortgage were given to avoid this litigation; Rev. St. 1881, § 5119, providing that a married woman shall not enter into any contract of suretyship as indorser, guarantor, or in any other manner, and such contract, as to her, shall be void.—*Warey v. Forst*, 102 Ind. 205, 26 N. E. 87.

[ee] (Sup. 1886)

Under Rev. St. 1881, § 5119, forbidding a married woman to enter into contracts of suretyship, where a married woman purchases part of certain real estate, paying the vendor therefor in money, all the estate of which she is possessed, the vendor having knowledge of that fact, and her husband at the same time purchases the balance of such real estate, giving notes in payment, signed by the wife as surety, and secured by mortgage on all the real estate, no personal judgment can be rendered against the wife on such notes, nor can the mortgage be foreclosed as against the part of the real estate purchased by her, although the entire estate may have been conveyed directly to her.—*Jones v. Elwing*, 107 Ind. 313, 3 N. E. 819.

[f] Under Rev. St. 1881, § 5119, a mortgage by husband and wife on real estate owned by entireties to secure the husband's debt is invalid.—(Sup. 1887) *Crooks v. Kennett*, 111 Ind. 347, 12 N. E. 715; (1892) *Wilson v. Logue*, 131 Ind. 191, 30 N. E. 1079, 31 Am. St. Rep. 426.

[ff] (Sup. 1887)

Under Rev. St. 1881, § 5119, declaring contracts of suretyship by a married woman void, a mortgage executed by a married woman to secure the debt to her husband or others is invalid.—*Crooks v. Kennett*, 111 Ind. 347, 12 N. E. 715.

[g] (Sup. 1887)

A mortgage executed by a married woman and her husband on land which they owned as tenants by entireties was not necessarily void either at common law or under the statutes, but would under Rev. St. 1881, § 5119, be void at her pleasure, if she executed it only as surety for her husband.—*Bartholomew v. Pierson*, 14 N. E. 249, 112 Ind. 430.

[gg] (Sup. 1888)

A married woman cannot become security for another on a replevin bail.—*Peck v. Williams*, 113 Ind. 256, 15 N. E. 270.

[h] (*Sup.* 1888)

A wife joining with her husband in a mortgage on his land is not a surety for the husband, and on her interest in the land being sold for part of the judgments on the debt secured, after she has obtained a divorce, she cannot recover the amount from the husband, as money paid for his use.—*Tennison v. Tennison*, 114 Ind. 424, 16 N. E. 818.

[hh] (*Sup.* 1889)

Under the law as it existed in 1877, when a mortgage was executed, a married woman was protected by the disabilities imposed on her by the common law, and was incapable of binding herself by an executory contract.—*Crawford v. Hazelrigg*, 18 N. E. 603, 117 Ind. 63, 2 L. R. A. 130.

Where a married woman has joined her husband in the execution of a mortgage on his real estate to indemnify an indorser or surety of her husband in the event of a suit to foreclose the mortgage, she may avail herself of a valid legal or equitable defense to protect or prevent the sale of her inchoate interest in such real estate under the mortgage should she survive her husband, or should his title to the real estate become absolute and vested in the purchaser at a judicial sale thereof under the mortgage.—*Id.*

[hhh] (*Sup.* 1889)

Rev. St. 1881, § 5119, declares that a married woman shall not enter into any contract of suretyship, and that all such contracts shall, as to her, be void. A married woman, to enable her husband to obtain a loan for his own benefit, conveyed her land to him through a third person, who knew of the intent. After six months plaintiff made the loan on a mortgage on the land executed by husband and wife, but one-half the amount was furnished to plaintiff by the third person, who took plaintiff's note therefor. There was evidence that plaintiff had no knowledge of the purpose of the conveyances. Title remained in the husband for seven years, and, so far as appeared, with the wife's approbation, and it did not appear that she was in any way misled. *Held*, that the wife was estopped to allege that the conveyances and mortgage were void, as an evasion of the statute.—*Long v. Crosson*, 119 Ind. 3, 21 N. E. 450, 4 L. R. A. 783.

[i] (*Sup.* 1889)

Under Rev. St. 1881, § 5119, which provides that a married woman's contract of suretyship shall be void, a mortgage by husband and wife on land held by them jointly, to secure the husband's note given in payment for the land, is void as to the wife.—*Stewart v. Babbis*, 120 Ind. 568, 22 N. E. 770.

[ii] (*Sup.* 1890)

Under Rev. St. 1881, § 5119, making a contract of suretyship void as to a married woman, she may defend against a note executed without consideration jointly with her husband for land conveyed to him, though she agreed to

occupy the place of principal.—*Thacker v. Thacker*, 125 Ind. 489, 25 N. E. 595.

[j] (*Sup.* 1890)

A married woman executed her notes for rent under a lease to her of a farm, which her son-in-law had previously applied to rent and had failed to obtain, being financially irresponsible, whereupon she had taken the lease; the credit being given to her. The negotiations were conducted by him, the son-in-law, and it was known to the lessors that he was to occupy the farm. He occupied it without paying rent to her. *Held*, that she was liable on the notes, and was not a mere surety, and exempt under the statute; the transaction not appearing to have been intended as an evasion of the statute.—*Crisman v. Leonard*, 126 Ind. 202, 25 N. E. 1101.

[jj] (*Sup.* 1891)

A married woman who negotiates a loan in the absence of her husband, and who actually receives the money from the lender on her representation that she desires it for her own use, with no knowledge on his part that it was for the use of any other person, and who, with her husband, executes a note, and a mortgage on her separate property as security, is the principal debtor, and not a surety for her husband, though the money was in fact afterwards applied for his use.—*Bouvey v. McNeal*, 126 Ind. 541, 26 N. E. 396.

[k] (*Sup.* 1891)

Where a mortgage given by a husband and wife is released by the mortgagee in consideration of a pledge by the wife of a note belonging to her, the wife, being simply the surety of the husband, is not estopped to deny the validity of the mortgagee's claim to the pledged note, under the statute making void a wife's contracts as surety for her husband, since the mortgagee, having knowledge of all the facts, is chargeable with notice of the invalidity of the contract.—*Wolf v. Zimmerman*, 127 Ind. 436, 26 N. E. 173.

A husband and wife gave a second mortgage on two parcels of land, one of which they owned as tenants by the entireties, while the other the husband owned alone, to secure the mortgagee from loss as surety of the husband. This mortgage was released, in order to enable the mortgagors to make a new mortgage to take up the first mortgage, and thereupon a note belonging to the wife, was given to the mortgagee as security, in place of the released mortgage. *Held*, that in the entire transaction the wife was merely the surety of the husband.—*Id.*

[kk] (*Sup.* 1892)

Where the only consideration for a mortgage given by a husband to his wife was the assumption by the mortgagee of her husband's debt, the mortgage having been made without the knowledge or request of plaintiff, to whom the debt assumed by the mortgagee was due, it is valid between plaintiff and the husband's

attaching creditors, being voidable as to the wife only, under Rev. St. 1881, § 5119, forbidding a married woman to "enter into any contract of suretyship," and providing "that such contract, as to her, shall be void."—*Plaut v. Storey*, 131 Ind. 46, 30 N. E. 886.

[i] (App. 1892)

A note executed by a wife in payment of a transcript of a judgment against her husband, necessary to appeal the case, is not a "contract of surety," within Rev. St. § 5119, prohibiting married women to enter into any "contract of surety," especially when she holds junior liens against his property which will receive priority if the judgment is reversed.—*Morningstar v. Hardwick*, 3 Ind. App. 431, 29 N. E. 929.

[ii] (App. 1892)

Under Rev. St. 1881, § 5115, which renders void contracts of suretyship entered into by a married woman, one who sues on a note executed jointly by a married woman and her husband must show that she was not a surety for the husband; but the rule is different where she executes her individual note, as no presumption arises in such a case that she executed it as surety for her husband or for any other person.—*Potter v. Sheets*, 5 Ind. App. 506, 32 N. E. 811.

[m] (Sup. 1893)

The statute prohibiting a married woman from becoming a surety was enacted for the protection of the rights of married women, and ought not on slight technicalities and still less on misrepresentations to be allowed to deprive creditors, who are themselves without fault, of the means of collecting honestly due indebtedness.—*Tombler v. Reitz*, 33 N. E. 789, 134 Ind. 9.

[mm] (Sup. 1894)

Money advanced to a married woman and her husband, with which they purchase land as tenants by the entireties, inures to her benefit, and she cannot repudiate liability on the note and mortgage on such land, executed by her and her husband to secure repayment, on the ground that she was merely a surety for the husband.—*McCoy v. Barns*, 136 Ind. 378, 36 N. E. 134.

The question as to whether a married woman is a surety is not to be determined by the form of the contract, nor from the basis from which the contract was had, but from the inquiry: Was the wife to receive in person or in benefit to her estate, the consideration upon which the contract rests? To the extent to which she receives the benefit she is not a surety, but a principal.—*Id.*

[n] (Sup. 1894)

A married woman may defend an action on a note of which she is the sole maker on the ground that she executed it as a surety.—*Bowles v. Trapp*, 139 Ind. 55, 38 N. E. 406.

[nn] (Sup. 1894)

Where, pursuant to an oral agreement, the maker of a note delivers to the husband of the payee certain personal property in payment of the note, the transaction does not constitute her a surety for her husband, in the absence of evidence showing that the husband was a debtor to the maker.—*Collins v. Stanfield*, 139 Ind. 184, 38 N. E. 1091.

[o] (App. 1894)

A policy on the husband's life for his wife's benefit cannot be assigned by them jointly to secure his debt. His act cannot divest her interest, and hers is void for that purpose. Rev. St. 1894, § 6964 (Rev. St. 1881, § 5119).—*Union Cent. Life Ins. Co. v. Woods*, 11 Ind. App. 335, 37 N. E. 180, 39 N. E. 205.

A husband insured his life for his wife's benefit, and the policy became forfeited for non-payment of premiums. Subsequently he procured a loan from the insurance company, and a portion thereof being applied to the payment of the back premiums, the company waived the forfeiture. The wife signed the note given by the husband for the loan, and assigned the policy to the company. *Held*, that she thereby became her husband's surety, and hence was not liable for the loan.—*Id.*

The fact that a wife received a benefit from a transaction wherein she was her husband's surety does not render her liable as principal.—*Id.*

[oo] (Sup. 1895)

Where a married woman joined in a covenant with her husband that, as a part of the consideration for the sale of a business, they "severally agree and covenant that they will not, nor will either of them," engage in a certain business, she was a principal therein, and was personally bound thereby.—*Koh-i-noor Laundry Co. v. Lockwood*, 141 Ind. 140, 40 N. E. 677.

[ooo] (Sup. 1895)

A recital in a mortgage executed by a husband and wife that they conveyed the property that "we" have purchased from the mortgagee and "we" acknowledge that we own the real estate in equal shares did not estop the wife from denying that she signed the notes and mortgage as surety for her husband.—*Cole v. Temple*, 41 N. E. 942, 142 Ind. 498.

[p] (App. 1895)

Where a wife pledges her personal property as security for her husband's debt, she occupies the position of a surety, though the contract defining the terms of the pledge between the husband and the pledgee is not signed by her.—*Goff v. Hanks*, 11 Ind. App. 456, 39 N. E. 294.

Rev. St. 1894, §§ 6960, 6962 (Rev. St. 1881, §§ 5115, 5117), provide that all legal disabilities of married women to make contracts are abolished, "except as herein otherwise provided," and authorize a married woman to acquire and hold real and personal property, the

same as if unmarried, and further declare that she may in her own name convey her personal property, and make any contract concerning it. Section 6964, Rev. St. 1894 (section 5119, Rev. St. 1881), provides that a married woman shall not enter into a contract of suretyship as indorser or in any other manner, and such contract, as to her, shall be void. *Held*, that a contract of suretyship of a married woman is void, whether it operates upon her personal or real property.—*Id.*

[pp] (App. 1895)

Under Burns' Ann. St. 1894, § 6962, providing that a married woman shall be bound, the same as any other person, by an estoppel in pais, a statement by a married woman that her note is all right, and that she has no defense thereto, and that she will pay it, will estop her from claiming, as defenses to an action on it by one who purchased it, relying on her statement, that it was given for the debt of a third person and was without consideration.—*Stephenson v. Clayton*, 14 Ind. App. 76, 42 N. E. 491.

[ppp] (Sup. 1897)

The determination of the question whether a married woman is principal or surety in an obligation to which her husband is a party is to be solved by inquiring whether she received in person or by benefit to her property the consideration for which the obligation was executed.—*Leschen v. Guy*, 48 N. E. 344, 149 Ind. 17.

[q] (Sup. 1899)

Where a husband and wife executed a note for money loaned to the wife and used by the husband, before the passage of the married woman's act of 1881, and after that law went into effect the husband and wife executed a new note in renewal, the contract of the wife in executing the new note was one of suretyship.—*Lackey v. Boruff*, 53 N. E. 412, 152 Ind. 371.

[qq] (Sup. 1899)

Where a mortgagee had knowledge that a husband and wife had previously owned the mortgaged property as tenants by the entirety, and had conveyed the same to a third party, who reconveyed it to the husband, both conveyances being without consideration, and for the sole purpose of obtaining the loan, the mortgage executed by the husband and wife was voidable as to either or both of them and their subsequent grantee, under Burns' Rev. St. 1894, § 6964, prohibiting a married woman from executing a contract of suretyship for another.—*Government Building & Loan Inst. No. 2 v. Denny*, 55 N. E. 757, 154 Ind. 261.

[r] Under Burns' Rev. St. 1901, § 6964 (Horner's Rev. St. 1901, § 5119), providing that a married woman shall not contract as surety in any manner, and such a contract as to her shall be void, whether a married woman is principal or surety will be determined not from the form of the contract, but upon the fact whether the wife did or was to receive in person or in benefit to her estate the considera-

tion on which the contract rests.—(Sup. 1900) *Field v. Noblett*, 56 N. E. 841, 154 Ind. 357; (1902) *Cook v. Buhrlage*, 64 N. E. 603, 159 Ind. 162; (1902) *Guy v. Liberenz*, 65 N. E. 186, 160 Ind. 524; (App. 1903) *John C. Groub Co. v. Smith*, 68 N. E. 1030, 31 Ind. App. 685; (Sup. 1904) *Harbaugh v. Tanner*, 71 N. E. 145, 163 Ind. 574; (1904) *Field v. Campbell*, 72 N. E. 260, 164 Ind. 389, 108 Am. St. Rep. 301.

[rr] (App. 1901)

An absolute deed of trust by a married woman and her husband of lands, a portion of her separate estate, the lands to be sold and the proceeds applied to the debts of her husband, is not a contract of suretyship, and void, within Burns' Rev. St. 1894, § 6964, providing that a married woman shall not enter into any contract of suretyship.—*Rogers v. Shewmaker*, 60 N. E. 462, 27 Ind. App. 631, 87 Am. St. Rep. 274.

[s] (App. 1901)

Whether the contract of a married woman binds her as principal or only as surety, and therefore void under Burns' Rev. St. 1901, § 5064 (Horner's Rev. St. § 5119), is not to be determined from the form of the contract, but from a determination of the question whether she received the benefit of the consideration on which the contract rested.—*Beidenkoff v. Brazee*, 61 N. E. 954, 63 N. E. 577, 28 Ind. App. 646.

[ss] (Sup. 1902)

Horner's Rev. St. 1901, § 5119, provides that a married woman's contract of suretyship shall be void. *Held*, that where, in an action to foreclose a mortgage given by a married woman, she pleaded by cross complaint that she had given the mortgage as a surety, her cross complaint was not insufficient for not alleging that the mortgagee knew such fact.—*International Building & Loan Ass'n v. Watson*, 64 N. E. 23, 158 Ind. 508.

[t] (Sup. 1902)

Where the only consideration for the note of a married woman is property conveyed to another, the title not resting in her, she is only a surety, and the note is void as to her.—*Cook v. Buhrlage*, 64 N. E. 603, 159 Ind. 162.

[tt] (Sup. 1902)

The fact that a wife had an inchoate interest in the real estate of her husband does not make her a principal on a note given by her with her husband, the consideration of which was used to pay a note of her husband, secured by a mortgage on the real estate.—*Andrysiak v. Satkowski*, 63 N. E. 854, 65 N. E. 286, 159 Ind. 428.

Plaintiff and her husband executed a mortgage on real estate to secure two notes given by him for unpaid purchase money. Afterwards they executed a note, the consideration of which was paid on one of the notes given for the purchase money. *Held*, that the wife

was a surety, and not a principal, as she did not receive the benefit of the consideration of the note; it being used to pay her husband's debts.—Id.

[u] (Sup. 1902)

The consideration for a note given by husband and wife, and secured by mortgage given by them on realty held by them as tenants by entirety, was used to pay individual debts of the husband, and no part of the consideration was received by the wife, or expended in the betterment of any property in which she had any interest. *Held*, that the wife was a surety.—*Guy v. Liberenz*, 65 N. E. 186, 160 Ind. 524.

A contractor, in order to complete a building, borrowed money; he and his wife giving a note and mortgage on realty, held by them as tenants by entirety. The owner of the building was unable to pay the contractor therefor, and assigned to him a contract for the purchase of the land occupied by the building, which land was subsequently conveyed to the wife. *Held*, that such conveyance did not operate to make her a principal, rather than a surety, on the note and mortgage.—Id.

Her action toward securing a reduction did not estop her from asserting that she was a mere surety, in the absence of any showing that the mortgagee had been thereby misled to his prejudice.—Id.

Burns' Rev. St. 1901, § 8417a (Horner's Rev. St. 1901, § 6272a), provides that an owner of mortgaged property may have the amount of the mortgage, not exceeding \$700, deducted from the assessed valuation. *Held*, that where a husband and wife gave a mortgage on realty, owned by them as tenants by entirety, to secure their note, the wife at the time acting merely as a surety, that she thereafter joined with her husband in securing a deduction under the statute was not an "election" on her part to treat the note and mortgage as binding on her.—Id.

[uu] (App. 1903)

Under Burns' Rev. St. 1901, § 6964 (Horner's Rev. St. 1901, § 5119), providing that a married woman shall not contract as surety in any manner, and such contract as to her shall be void, where the facts set out in the answer of defendant, a married woman, showed that the indorsement by her of the note sued on was solely for her husband's benefit, and that the consideration in no way moved to her or for her benefit, she was the surety of her husband, and not liable.—*John C. Groub Co. v. Smith*, 68 N. E. 1030, 31 Ind. App. 685.

[v] (Sup. 1904)

Burns' Rev. St. 1901, § 6964 (Horner's Rev. St. 1901, § 5119), forbidding married women to enter into contracts of suretyship, prohibits married women from mortgaging property held by themselves and husbands as tenants by entirety to secure either the debts of

their husbands or of any other person.—*Webb v. John Hancock Mut. Life Ins. Co.*, 69 N. E. 1006, 162 Ind. 616, 66 L. R. A. 632.

Where a husband and wife, as tenants by entirety, conveyed property to a trustee, to convey to the husband, in consideration of \$1 passing to the wife, a mortgage thereafter executed by the husband and wife to enable the husband to procure a loan for his own use was an evasion, and within the prohibition of Burns' Rev. St. 1901, § 6964 (Horner's Rev. St. 1901, § 5119), forbidding married women to enter into contracts of suretyship, either as indorsers, guarantors, or otherwise.—Id.

Where a mortgagee knew that the mortgagors were husband and wife; that two years before the execution of the mortgage the property had been conveyed to them as tenants by entirety, and that they had continued to so hold it until a few days before the execution of the mortgage, at which time it was conveyed through a trustee to the husband for the nominal consideration of \$1, whereas its loan value was over \$4,000; and that within three days the husband applied for the loan—it was put upon inquiry, such as to charge it with knowledge that the conveyance to the husband was resorted to for the purpose of evading Burns' Rev. St. 1901, § 6964 (Horner's Rev. St. 1901, § 5119), forbidding married women from entering into contracts of suretyship.—Id.

Where a mortgagee had knowledge at the time it made a loan to the husband of the fact of an evasion of Burns' Rev. St. 1901, § 6964 (Horner's Rev. St. 1901, § 5119), forbidding married women to enter into contracts of suretyship, and was afforded the same means of knowledge at the time it made a second loan to him, and accepted a second mortgage on the same property, it must be held chargeable with the same knowledge at the time of accepting the second mortgage.—Id.

Where a mortgagee knew that the mortgagors were husband and wife, and that the property had been held by them as tenants by entirety, it was bound to know the protection afforded the wife's tenancy by Burns' Rev. St. 1901, § 6964 (Horner's Rev. St. 1901, § 5119), forbidding married women to enter into contracts of suretyship, either as indorsers, guarantors, or otherwise.—Id.

[vv] (Sup. 1904)

Where a married woman gave a note to one to whom her husband was indebted in satisfaction of the indebtedness, the wife was not the less a surety because of the fact that the note was given to one to whom the husband was then indebted.—*Harbaugh v. Tanner*, 71 N. E. 145, 163 Ind. 574.

[w] (Sup. 1904)

Under Burns' Ann. St. 1901, § 6964, making a married woman's contract of suretyship void, there can be no recovery on her suretyship undertaking, except where the facts are such that the person who accepted it was rea-

sonably justified in supposing and did suppose that she was not only a principal in name, but also in fact.—*Field v. Campbell*, 72 N. E. 260, 164 Ind. 389, 108 Am. St. Rep. 301.

The fact that a husband was in need of money to indemnify the sureties on his bond as county treasurer did not render a contract made by the wife, under which she borrowed money to assist the husband, a valid one; *Burns' Ann. St. 1901, § 6964*, making a married woman's contract of suretyship void.—*Id.*

[ww] Under the direct provisions of *Burns' Ann. St. 1901, § 6964*, a contract of suretyship by a married woman is void as to her.—(*App. 1904*) *Ft. Wayne Trust Co. v. Sihler*, 72 N. E. 494, 34 Ind. App. 140; (*1905*) *Davis v. Neighbors*, 73 N. E. 151, 34 Ind. App. 441.

[n] (*App. 1905*)

An affidavit, signed by a married woman, that a loan was a joint one, will not estop her to claim the benefit of *Burns' Ann. St. 1901, § 6964*, declaring void contracts of suretyship by married women, where persons loaning money to her husband knew that she executed the contract as surety; she not being present when the affidavit was delivered, nor when the loan was consummated, and testifying that she did not know the contents of the affidavit.—*Davis v. Neighbors*, 73 N. E. 151, 34 Ind. App. 441.

In an action on a note executed by a married woman, jointly with her husband, for a loan of money, proof that she never requested a loan, and did not request a third person signing the note as surety to sign the note for her; that she had no occupation, other than that of housekeeper; that she was not present when the loan was made, and did not receive any part of the money; and that it was not expended either for her use, or for the betterment of any estate in which she had an interest—shows that she signed the note as surety.—*Id.*

[xx] (*App. 1908*)

*Burns' Ann. St. 1901, §§ 6960, 6964*, abolish disabilities of married women, except as otherwise provided, and declare that a married woman shall not enter into a contract of suretyship. Acts 1903, p. 394, c. 214 (*Burns' Ann. St. 1905, § 6946a*), provides that, if any married woman shall execute her note for a loan, and the lender shall pay the proceeds to her by check payable to her order, and she shall state under oath that the money is to be used for her own separate use, she shall not be permitted to claim that the loan was made for the use of another person. A married woman executed notes secured by a mortgage, and made an affidavit averring that the money was to be used for the betterment of her own property. The court found that the notes evidenced a loan made, and that the same was paid by a check payable to her order, which she subsequently indorsed. *Held*, that she was estopped from asserting that she executed the notes and mortgage as surety for another.—*Ludlow v. Colt*, 83 N. E. 643, 41 Ind. App. 138.

[y] (*App. 1908*)

A married woman cannot alone convey, or mortgage, her real estate, or become a surety.—*Indianapolis Brewing Co. v. Behnke*, 41 Ind. App. 288, 81 N. E. 119.

[yy] (*App. 1908*)

An agreement between a wife and a mortgagee that in consideration of the mortgagee's becoming surety for her husband she would sign a second mortgage with her husband and would waive an indemnity bond given her by the mortgagee conditioned for the payment to her of money if the first mortgage, also held by him, were foreclosed, was not a contract of suretyship, which a married woman is prohibited from executing under *Burns' Ann. St. 1908, § 7855*, such a contract being one whereby one person engages to be answerable for the debt, default, or miscarriage of another.—*Druckmiller v. Coy*, 42 Ind. App. 500, 85 N. E. 1028.

[z] (*App. 1910*)

A married woman has no power to deal as principal if she is in fact a surety.—*Weil v. Waterhouse*, 91 N. E. 746.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 346-353, 798.

See, also, 21 Cyc. pp. 1320-1322.

## § 88. Releases.

Between husband and wife, see ante, § 51.

[a] (*Sup. 1881*)

Prior to the revision of 1881, a married woman who was personally indebted could not, without her husband's consent, make a settlement of the claim which could be set up against her, or, after her death, her personal representative.—*Smith v. Smith*, 80 Ind. 267.

Where defendant prior to the purchase of the interest of his sister, who was a married woman, in certain land, had executed a release and discharged her from certain demands on a sufficient consideration, such demands did not constitute a valid consideration for a receipt for a payment due on land purchased from her, since without the consent of her husband the wife had no power to restore such demands to vitality.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 354-357.

See, also, 21 Cyc. pp. 1322, 1323.

## § 89. Ratification.

[a] (*Sup. 1872*)

A married woman, by failing to interpose the defense of coverture to a suit, is estopped from availing herself of such fact after judgment to avoid a levy of execution.—*Elson v. O'Dowd*, 40 Ind. 300.

[b] A contract by a married woman, void for want of power to make it, cannot be ratified by her after her husband's death without a

new consideration.—(Sup. 1873) *Maheer v. Martin*, 43 Ind. 314; (1891) *Austin v. Davis*, 128 Ind. 472, 26 N. E. 890, 12 L. R. A. 120, 25 Am. St. Rep. 456.

[c] (Sup. 1875)

Where attorneys procure a divorce and judgment for alimony for a woman, a promise by her to pay them a certain sum, in consideration of their services already rendered in the suit, "and for such services as they would have to render in collecting said alimony," is supported by a consideration accruing after the disability of coverture is removed, and is enforceable.—*Putnam v. Tennyson*, 50 Ind. 456.

A promise by a divorced woman to pay the attorneys who procured her divorce their fees is without consideration.—*Id.*

[d] (Sup. 1882)

The promise of a married woman to pay an attendant for services is void; and the fact that, after becoming a widow, she acknowledged it, is immaterial. An acknowledgment is not a promise to pay.—*Candy v. Coppock*, 85 Ind. 594.

[e] (Sup. 1891)

Where a wife joined with her husband in a contract to leave an adopted child his property at his death, it is void as to her, and incapable of ratification by her.—*Austin v. Davis*, 128 Ind. 472, 26 N. E. 890, 12 L. R. A. 120, 25 Am. St. Rep. 456.

[f] (App. 1891)

The execution of a deed by a wife to a purchaser procured by real-estate brokers, and the receipt by her of the proceeds of the sale, constitute a ratification of the unauthorized hiring of the brokers by her husband, and render her liable to them for commissions.—*Barnett v. Gluting*, 3 Ind. App. 415, 29 N. E. 154, 927.

[g] (App. 1892)

Where a married woman agrees, in consideration of the conveyance to her by her husband of all his property, that she will pay his debts, such agreement is absolutely void, and could not be ratified by her after the death of her husband. She could then be bound only by a new contract, based on a new and sufficient consideration.—*Keadle v. Siddens*, 5 Ind. App. 8, 31 N. E. 539.

[h] (App. 1892)

A woman offered to leave her property to her niece if the niece would live with her as a companion and assistant. Soon after, the woman married. Several years later the niece accepted the offer and lived with the woman eight years. The woman died without making any provision for the niece. *Held*, that the contract was void, because made and performed during coverture, and a promise, made after coverture, to pay for such services, could not be enforced unless it was supported by a valuable consideration.—*Davis v. Schmidt*, 31 N. E. 840.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 358-361;  
11 CENT. DIG. CONTRACTS, §§ 365, 366.  
See, also, 21 Cyc. p. 1326; note, 53 L. R. A. 366.

## § 90. Avoidance.

[a] (Sup. 1880)

Where a widow brought action on a life insurance policy issued on the life of her husband for her benefit, and one of the defendants answered by way of cross-complaint, setting up a written assignment of the policy by plaintiff and her husband to secure them for money loaned plaintiff, her reply of coverture at the time of the execution of the assignment was sufficient.—*Godfrey v. Wilson*, 70 Ind. 50.

[b] (Sup. 1882)

If an infant who is also a married woman makes an instrument voidable because of her infancy, the disability of coverture enables her to postpone the act of avoidance until a reasonable time after the coverture ends.—*Sims v. Smith*, 86 Ind. 577.

[c] (Sup. 1887)

Coverture is a personal defense; and the grantees of mortgaged premises cannot plead as a defense to an action to foreclose that the mortgage was granted by a married woman as surety, and is invalid under Rev. St. 1881, § 5119, which declares that a contract of suretyship by a married woman, "as to her, shall be void."—*Bennett v. Mattingly*, 110 Ind. 197, 10 N. E. 299, 11 N. E. 792.

[d] (Sup. 1887)

Where, in an action to foreclose a mortgage executed by a husband and wife, the wife by her cross-complaint asked to have the mortgage canceled on the ground that she executed it as surety for her husband, the burden was on her to show that the note and mortgage were invalid as to her by reason of her having executed them as such surety.—*Bartholomew v. Pierson*, 14 N. E. 249, 112 Ind. 430.

[e] (Sup. 1888)

Under Rev. St. 1881, § 5119, providing that a contract of suretyship by a married woman shall be void as to her, her children, on her death while married, stand in her shoes, and may set up the invalidity of a mortgage of her separate estate, executed by her as surety, in a proceeding against them, as her heirs, to foreclose.—*Ellis v. Baker*, 116 Ind. 408, 19 N. E. 193.

[f] (Sup. 1892)

A contract of suretyship by a married woman can be avoided only by the woman herself, or those in privity of blood, or in representation to her.—*Plaut v. Storey*, 30 N. E. 886, 131 Ind. 46.

[g] (Sup. 1899)

A creditor of a married woman cannot avoid her contracts of suretyship, under *Hor-*

ner's Rev. St. 1897, § 5119 (Burns' Rev. St. 1894, § 6064), providing that "a married woman shall not enter into any contract of suretyship, \* \* \* and such contract as to her shall be void."—*Lackey v. Boruff*, 53 N. E. 412, 152 Ind. 371.

[h] (App. 1908)

A married woman, receiving for herself nothing in return for her assignment of her certificate of bank stock to secure her husband's individual indebtedness may maintain replevin for the certificate without returning the consideration therefor.—*Opperman v. Citizens' Bank of Michigan City*, 85 N. E. 991.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 310, 362–364.

See, also, 21 Cyc. p. 1327.

#### (D) TRADE OR BUSINESS.

Liability of separate estate for debts incurred in business, see post, § 160.

#### § 96. Rights and powers of sole traders.

Capacity of wife to sue and be sued, see post, § 203.

[a] (Sup. 1895)

A contract by a married woman and her husband, on the sale of a business, not to engage in the same business for a certain time, is valid as to the wife, under Rev. St. 1894, § 6960 (Rev. St. 1881, § 5115), providing that the disabilities of coverture shall be abolished, it not being within the exceptions of Rev. St. 1894, §§ 6961, 6964 (Rev. St. 1881, §§ 5116, 5119).—*Koh-i-noor Laundry Co. v. Lockwood*, 141 Ind. 140, 40 N. E. 677.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 372.

See, also, 21 Cyc. p. 1338.

#### § 97. Married women as partners.

Husband and wife as partners, see ante, § 42.

[a] (Sup. 1860)

As an abstract proposition, the law may not authorize a married woman to enter into a contract of partnership, but if she does make such contract, and in pursuance of it places her separate funds in the firm of which she is by contract a partner, such funds cannot, while there, be made subject to her husband's debts.—*Maghee v. Baker*, 15 Ind. 254.

[b] (Sup. 1889)

Under Rev. St. 1881, § 5115, which abolishes the disabilities of married women to make contracts, and section 5122, which exempts a husband from liability for his wife's debts contracted when she is in partnership with any third person, a married woman may become a partner in a business firm.—*Conant v. National*

State Bank of Terre Haute, 121 Ind. 323, 22 N. E. 250.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 373.

See, also, 21 Cyc. p. 1341; notes. 31 Am.

St. Rep. 934, 34 Am. St. Rep. 339.

#### § 98. Married women as members of corporations or joint-stock companies.

[a] (Sup. 1880)

Prior to Act March 25, 1879, a married woman could not become a member of a draining association incorporated under Act March 10, 1873, by signing its original articles of incorporation; and, not being a member of the association, she is not restricted by the statute to such defenses merely as relate to the amount of the assessment of benefits to her lands, and it is erroneous to permit the association to prove the public utility of the work and the benefits her land would receive.—*Liberty Tp. Draining Ass'n v. Watkins*, 72 Ind. 459.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 374.

See, also, 21 Cyc. p. 1342.

#### § 99. Rights and liabilities of husband of sole trader.

[a] (Sup. 1869)

A married woman carrying on a business in her own name, and living with her husband, whom by a written instrument she had made her agent to manage her business, borrowed for her own use a sum of money, which was delivered to her personally, for which she and her husband executed a promissory note; the payee relying on her for its payment. *Held*, in a suit on the note after the woman had been divorced from her said husband and while she was still unmarried, that she was not personally liable on the note.—*O'Daily v. Morris*, 31 Ind. 111.

[b] (Sup. 1871)

Where a wife engages in business with the consent of the husband, the business is regarded as that of the husband, the wife as his agent, and he is bound for the performance of contracts which she may make relating to such business; but where the wife incurs the indebtedness, and the credit is given to her exclusively, and there can be no presumption that she was acting as the agent of the husband merely, the husband is not liable.—*Jenkins v. Flinn*, 37 Ind. 349.

[c] (Sup. 1904)

A wife conducted a business, her husband being a general manager thereof, and the name of one who was employed was, by agreement with him, use as that of a partner, and the husband executed a note to the employé for wages, etc., the note reciting that the husband was agent for the firm. *Held*, that the note

was binding on the wife.—*Taylor v. Angel*, 71 N. E. 49, 162 Ind. 670.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. HUS. & W. § 375.

See, also, 21 Cyc. p. 1339.

**(E) TORTS.**

Liability of husband for keeping disorderly house owned by wife, see **DISORDERLY HOUSE**, § 5.

Liability of husband for sale of intoxicating liquor by wife, see **INTOXICATING LIQUORS**, § 170.

Rights of action for torts of wife, see post, § 214.

**§ 102. Torts during coverture in general.**

[a] (*Sup.* 1863)

The husband is liable for the torts and frauds of his wife committed during coverture.—*Ball v. Bennett*, 21 Ind. 427, 83 Am. Dec. 356.

Where the tort of the wife is not committed in company with the husband, or by his order, they are jointly liable.—*Id.*

If the wife commits a tort in company with the husband, or by his order, he is alone liable.—*Id.*

[b] (*Sup.* 1879)

A husband is liable in replevin for his wife's unlawful detention of another's chattels under claim of title in herself.—*Choen v. Porter*, 66 Ind. 194.

[c] (*Sup.* 1881)

The husband and wife are jointly liable for the wrongful taking and conversion of money by the wife, and the wife's answer of her coverture will be insufficient on demurrer, in the absence of an allegation that she committed the alleged tort in company with or by the order of her husband.—*Stockwell v. Thomas*, 76 Ind. 506.

[d] (*Sup.* 1883)

Before the enactment of Act Sept. 19, 1881, a husband was liable for his wife's torts.—*McCabe v. Berge*, 89 Ind. 225.

[e] (*Sup.* 1885)

Prior to Sept. 19, 1881, husband and wife were jointly liable in damages for the wife's torts.—*McCaslin v. State ex rel. Auditor of State*, 99 Ind. 428.

[f] (*App.* 1902)

Under Burns' Rev. St. 1901, §§ 6965, 6966, making the wife alone liable for her tort committed not in his presence or by his direction, the husband is not liable for her negligent act, not committed in his presence or by his direction, while driving his team; she not being engaged in driving as his servant, but as his

wife.—*Radke v. Schlundt*, 65 N. E. 770, 30 Ind. App. 213.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. HUS. & W. §§ 378-380.

See, also, 21 Cyc. p. 1350; note, 30 L. R. A. 521.

**(F) CRIMES.**

Larceny by one spouse of property belonging to the other, see **LARCENY**, § 7.

**§ 107. Crimes during coverture in general.**

[a] (*Sup.* 1831)

If a wife commit an indictable offense without the presence or coercion of her husband, she alone is responsible for the offense.—*Pennybaker v. State*, 2 Blackf. 484.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. HUS. & W. §§ 384-388, 392.

See, also, 21 Cyc. pp. 1353-1355.

**V. WIFE'S SEPARATE ESTATE.**

Capacity of wife to sue and be sued, see post, § 203.

Evidence in will contest, see **WILLS**, § 292.

Homestead in separate estate, see **HOMESTEAD**, § 87.

Laws relating to as impairing obligation of contracts, see **CONSTITUTIONAL LAW**, § 154. Limitation of action by wife to recover separate property, see **LIMITATION OF ACTIONS**, § 73. Property subject to mortgage, see **MORTGAGES**, § 12.

Rights of action relating to separate estate, see post, § 215.

**(A) WHAT CONSTITUTES.**

Conveyance to husband and wife, see ante, § 14.

Pleading, see post, § 229.

**§ 110. Nature of equitable or statutory estate.**

[a] (*Sup.* 1855)

A wife's release of dower in a conveyance of her husband's real estate is a valuable consideration, and money paid for it may be secured to the wife through a trustee.—*Hale v. Plummer*, 6 Ind. 121.

[b] (*Sup.* 1879)

A policy of insurance issued on the life of a husband for his wife's benefit is her property, and can be assigned only by her. When an action is brought by a creditor to recover the amount due on such a policy, on the ground of fraud on the part of the husband in taking it out and in paying the premiums, the most that he can recover in any event is only the

aggregate amount of the premiums thus paid; and it is only on the clearest proof of fraud that he can recover at all.—*Pence v. Makepeace*, 65 Ind. 345.

[c] (Sup. 1885)

An insurance policy taken by a man on his life, and made payable to his wife or her assigns, is assignable by her in a state the law of which permits her to transfer her property.—*Damron v. Penn Mut. Life Ins. Co.*, 99 Ind. 478.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 396-407.  
See, also, 21 Cyc. pp. 1357-1364, 1367-1371.

§ 111. Married women's property acts.

Subjects and titles of acts, see STATUTES, § 115.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 393-395.  
See, also, 21 Cyc. pp. 1364-1366; note, 76 Am. Dec. 366.

§ 112. — Constitutionality.

[a] (Sup. 1863)

Semble that the Legislature may limit the power of a feme covert over her legal fee-simple estates for the purpose of protecting them for her benefit.—*Cox's Adm'r v. Wood*, 20 Ind. 54.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 393.  
See, also, 21 Cyc. p. 1364.

§ 113. — Construction and operation in general.

As to capacity of married woman to execute note in general, see ante, § 85.

Effect on estates conveyed to husband and wife, see ante, § 14.

Effect on right of wife to contract with husband, see ante, § 37.

Operation of married woman's act on common-law rule that marriage extinguishes debt due wife from husband, see ante, § 38.

[a] (Sup. 1857)

Acts 1847, p. 45, in no manner impairs the husband's rights in the real estate of the wife. It simply protects it from sale on execution for his debts. It literally imports that, and its operation should not be enlarged by construction.—*Junction R. Co. v. Harris*, 9 Ind. 184, 68 Am. Dec. 618.

[b] (Sup. 1858)

The intention of the Legislature, to be considered particularly in construing the laws relative to married women, was not to destroy the community of interest, but rather to secure to the wife her own property against a spend-thrift husband.—*Reese v. Cochran*, 10 Ind. 193.

[c] (Sup. 1859)

Under the married woman's property acts all the property, both real and personal, held by a woman at the time of her marriage or acquired during coverture, remains hers in all respects as fully as if she had remained unmarried, except, only, that she cannot alienate without her husband's consent; but she may sue him or any one else in respect to such separate property.—*Scott v. Scott*, 13 Ind. 225.

[d] (Sup. 1890)

Rev. St. 1881, § 5130, providing that a married woman may carry on any trade or business and perform any labor or services on her sole and separate account and that the earnings accruing therefrom shall be her sole and separate property, in no way changes the relation between husband and wife.—*Citizens' St. R. Co. v. Twiname*, 23 N. E. 159, 121 Ind. 375, 7 L. R. A. 352.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 394.  
See, also, 21 Cyc. p. 1365.

§ 114. — Retroactive operation.

[a] (Sup. 1879)

Rev. St. 1876, p. 554, giving the execution debtor's wife one-third interest in the property, and, on the vesting of the remaining two-thirds in the purchaser, the right of immediate possession and partition, applies to judgments rendered on contracts made before, as well as to those made since, the statute took effect.—*Taylor v. Stockwell*, 66 Ind. 505.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 395.  
See, also, 21 Cyc. p. 1366.

§ 115. Property of wife at time of marriage.

As vesting in husband in general, see ante, § 10.

Debts due wife from husband before marriage, see ante, § 38.

[a] (Sup. 1857)

The personal property of the wife, held by her at the marriage, remains her separate property by Laws 1853, c. 38, § 5.—*Wilkins v. Miller*, 9 Ind. 100, affirmed *Orme v. Boyd*, 10 Ind. 388.

[b] (Sup. 1857)

A husband and wife cannot during marriage make contracts which will be enforced at law, without the intervention of a trustee; but courts of equity will hold the husband and his heirs trustees of the wife's separate property, if he take possession of it in any other way than by gift, express or implied.—*Resor v. Resor*, 9 Ind. 347.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 408-412.  
See, also, 21 Cyc. p. 1371; note, 31 C. C. A. 40.

**§ 116. Gifts to wife.**

[a] (Sup. 1876)

Where a husband causes a promissory note, given in consideration of the sale and conveyance of his real estate, to be made to his wife, though without her knowledge, and delivers it to her, whether as a gift to her (which, in the absence of anything to the contrary, would be inferred) or for the purpose of repaying her for money or other property of her separate estate used by said husband in the purchase of said real estate, she does not hold said note as the trustee of her husband, so as to render valid as against her a payment thereon made to him, but such note is her separate property.—*Carver v. Carver*, 53 Ind. 241.

[b] (Sup. 1883)

Where a husband purchased personal property, and paid the balance of the price with money obtained from his father-in-law, who afterwards gave the wife the note made for the money, no trust arises, as such money is not the wife's.—*Meredith v. Citizens' Nat. Bank*, 92 Ind. 343.

[c] (App. 1901)

The evidence shows that a married woman did not acquire property by gift, so as to render her mortgage thereof for debt of her husband void, under Acts 1879, Sp. Sess., p. 160, but by purchase; the only testimony being that of the husband, who stated that it was deeded to his wife for the lot that he had given to her, which he had traded for the lot deeded to her.—*Bentley v. Goodwin*, 60 N. E. 735, 26 Ind. App. 689.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. HUS. & W. §§ 398, 413-417.

See, also, 21 Cyc. pp. 1373, 1374.

**§ 117. Property devised or bequeathed to wife.**

Presumptions and burden of proof, see post, § 131.

[a] (Sup. 1881)

Where, in 1841, a husband received a legacy left to his wife as the money of his wife, and on an agreement to hold it for her, it became a valid claim in her favor.—*Brookville Nat. Bank v. Kimble*, 76 Ind. 195.

Where a testator died in 1849, leaving a bequest to his daughter, "and to no other person" and providing that "her receipt for the same shall be conclusive evidence of its payment," such legacy became the separate property of the daughter, beyond her husband's control.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. HUS. & W. §§ 418-421, 423.

See, also, 21 Cyc. pp. 1375-1377.

**§ 118. Property inherited by wife.**

[a] (Sup. 1882)

Where decedent was indebted to the estate of his wife's father on promissory notes and in lieu of his wife's share in the estate took up and received one of the notes, his representatives could not claim in an action by his wife to recover the amount of such share that evidence of such facts did not support a complaint charging that decedent received money or funds belonging to his wife.—*Hileman v. Hileman*, 85 Ind. 1.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. HUS. & W. §§ 422, 423.

See, also, 21 Cyc. p. 1377.

**§ 119. Property conveyed to or for use of wife.**

Admissibility of evidence, see post, § 132.

Presumptions and burden of proof, see post, § 131.

Weight and sufficiency of evidence, see post, § 133.

[a] (Sup. 1871)

Under St. May 31, 1852, a conveyance to a married woman need not state that she is to hold the property to her separate use.—*Sims v. Rickets*, 35 Ind. 181, 9 Am. Rep. 679.

Prior to the recent legislation in this state authorizing married women to hold real estate to their separate use, when a conveyance was made by a stranger to a married woman or to a trustee for her, it was necessary in order to give her a separate use of the property that such conveyance should contain words clearly indicating such intention, but such words were unnecessary in a conveyance from a husband to his wife, for the law presumed that it was intended for her separate exclusive use.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. HUS. & W. §§ 424-429, 447.

See, also, 21 Cyc. pp. 1378-1382; note, 96 Am. Dec. 423.

**§ 120. Property acquired by husband in trust for wife.**

Admissibility of evidence, see post, § 132.

Weight and sufficiency of evidence, see post, § 133.

[a] (Sup. 1854)

The separate property of the wife will be protected by courts of equity, both against the husband and his creditors. They will even hold the husband and his heirs trustees of the wife's separate property, if he take possession of it in any other way than by gift, express or implied.—*Totten v. McManus*, 5 Ind. 407.

[b] (Sup. 1860)

The purchase of land in the husband's name, with a legacy left to the wife in the hands of her guardian, and which was held not to be her separate property, raises no resulting or implied trust in her favor contrary to the face of

the deed. It is but a way of reducing the legacy to possession.—*Miller v. Blackburn*, 14 Ind. 62, 77.

[c] (Sup. 1866)

A conveyance of land having been made in 1835 to a husband and wife, the husband, in 1850, executed a deed, which recited that the land had been purchased with the money of the wife. *Held*, that the husband held the land only as trustee for the wife.—*Noble v. Morris*, 24 Ind. 478.

[d] (Sup. 1856)

Where land of a wife was sold, and the proceeds were, with her consent, kept in the husband's possession for three days when a portion of it was invested in a wagon which was attached, the wagon was the property of the wife, and not subject to the attachment.—*Ireland v. Webber*, 27 Ind. 256.

[dd] (Sup. 1867)

A wife sued her husband, alleging that certain lands had been bought with her separate property, that she did not intend to give them to him, but, being ignorant of the proper way to secure title, she suffered the conveyance to be made to him on his representation that such conveyance secured the land to her, and that he could not convey any interest therein without her consent. *Held*, that the husband's agreement to hold lands for the wife, being free from fraud, constituted a valid trust.—*Watkins v. Jones*, 28 Ind. 12.

[e] (Sup. 1868)

Where a husband invested money received by his wife from her father's estate in another state in personal property for her use, and treated it as hers, and not his, and the two brought it with them to this state, it must be protected as her separate property, under our statute.—*Schurman v. Marley*, 29 Ind. 458.

[ee] (Sup. 1869)

A husband loaned money belonging to his wife, taking notes therefor in his own name, but declaring at the time that it was his wife's money. He afterwards kept the notes distinct from those received on the loan of other funds. The administrator of the husband's estate took possession of such notes as a part of the estate, with notice of the wife's claim thereto, and collected the money thereon. *Held*, that the administrator was liable to the wife for the money so collected.—*Fowler v. Rice*, 31 Ind. 258.

[f] (Sup. 1870)

When a husband invests his wife's money in land, and, without her knowledge or consent, takes the deed therefor in his own name, and afterwards sells such land, she is entitled to the entire sum received therefor.—*Dayton v. Fisher*, 34 Ind. 356.

[g] (Sup. 1873)

If the separate real estate of a wife is exchanged for other lands under an agreement that the deed shall be made to her, and it is taken in the name of her husband without her consent,

she has an equity to have the contract or trust enforced against the heirs of her husband.—*Davis v. Davis*, 43 Ind. 561.

[h] (Sup. 1877)

Where on a purchase of land by a judgment debtor under an agreement with his wife that it will be conveyed to her, the conveyance is by mistake made to the debtor, who gives his own notes for the entire purchase money, secured by a mortgage on the lands conveyed, executed jointly by him and his wife, no trust arises in her favor on her subsequently furnishing him money with which he pays one of the notes; and she cannot enjoin a judgment creditor from issuing and levying execution on the lands, and compel a conveyance thereof to her.—*Burkert v. Burkert*, 58 Ind. 579.

[i] (Sup. 1880)

Where a married woman was induced to convey her real estate to her husband on his promise to invest its proceeds for her sole use, his estate is liable to her to the extent of the value of the land.—*Hon v. Hon*, 70 Ind. 135.

[j] (Sup. 1881)

If a husband purchases real estate in his own name with money belonging to his wife's separate estate, advanced for the purpose of buying the land and as the consideration therefor, a trust results in favor of the wife.—*Milner v. Hyland*, 77 Ind. 458.

[k] (Sup. 1882)

A husband's promise to invest for his wife in land money of her inheritance received by him at a time when, under the law, such money was his, and not hers, is based on no valid consideration; and she, therefore, can claim no trust in the land thus purchased in his name with the money.—*Westerfield v. Kimmer*, 82 Ind. 365.

[l] (Sup. 1882)

Where a wife places in her husband's hands her own separate property, with which to purchase land, and he purchases land with the money so received, and takes an absolute conveyance in his own name, with the agreement that he is to hold the land in trust for his wife, a valid and enforceable trust results.—*Boyer v. Libey*, 88 Ind. 235.

Where a husband bought lands for his wife with her money, taking the deed to himself, and agreeing to hold them in trust for her, and afterwards sold them without notice of the trust, taking in payment a note payable to himself, which, without his wife's consent, he assigned to one having notice of the trust, the wife was entitled to the proceeds of the note.—*Id.*

[m] (Sup. 1882)

Though, by the law in force in 1852, money held by the wife at time of marriage became her husband's by the marriage, yet where the evidence showed that he spoke of and treated the money as hers, and with it, combined with some of his own, purchased land the title to which he took in his own name, agreeing to

hold it in trust for her, a trust resulted for her benefit.—*Radcliff v. Radford*, 96 Ind. 482.

Where a husband buys land with his wife's money, taking a deed therefor in his own name, with or without her consent, agreeing to hold the land in trust for her, a trust results in her favor, under Rev. St. 1881, § 2976.—*Id.*

[n] (Sup. 1883)

Where the title to land bought by a husband with his wife's money is taken by the husband under an oral agreement to hold it for her, the trust is valid.—*Goldsberry v. Gentry*, 92 Ind. 103.

[o] (Sup. 1883)

Where the entire consideration for land deeded to a husband and wife moved from the wife, and the husband recognized the property as the wife's, it was against him sufficient to establish ownership in her.—*Bristor v. Bristor*, 93 Ind. 281.

[p] (Sup. 1884)

A husband may hold land in trust for his wife, under an agreement to so hold it, where the purchase money was paid by her, and there is no fraud.—*Camp v. Smith*, 98 Ind. 409.

[q] (Sup. 1885)

A husband, with money furnished by his wife's mother to invest in land for the wife, took title in his own name without her knowledge, and held it 33 years, paying the taxes and improving it, and then, when in debt, conveyed it to his wife. *Held*, that the land is not subject to his debts.—*Lord v. Bishop*, 101 Ind. 334.

[r] (Sup. 1886)

Where a husband borrows his wife's money to buy real estate, and afterwards, while solvent, purchases other real estate, which, by agreement with each other and the vendor, is to be deeded to the wife in payment of the money already borrowed, but, by mistake, the deed is made to the husband, the wife becomes the real and equitable owner thereof from the time of the purchase, with rights superior to those of the judgment creditors of the husband.—*Heberd v. Wines*, 105 Ind. 237, 4 N. E. 457.

[s] (Sup. 1887)

Where a husband purchases real estate with the money of his wife, who is insane, and takes the title in his own name, a trust results in favor of the wife; but the title of a bona fide purchaser without notice, who purchases from one having a deed from both the husband and wife, will, under Rev. St. 1881, § 2970, providing that no trust shall defeat the title of a purchaser for a valuable consideration without notice, prevail over her equitable title, although, being insane, her rights therein as wife may still be asserted.—*Gray v. Turley*, 110 Ind. 254, 11 N. E. 40.

[t] (Sup. 1889)

Where a married woman pays the purchase price of real estate, and takes the title in the name of her husband, the common law raises no

presumption that it was so taken as a gift or advancement to the latter. The presumption is that the husband took the title as agent or trustee, and that he was to hold the land in trust for his wife, unless such presumption is rebutted by lapse of time, or by the facts and circumstances surrounding the transaction.—*Buchanan v. Hubbard*, 21 N. E. 538, 119 Ind. 187.

[u] (Sup. 1895)

Land was purchased with a wife's money, and a deed taken in the husband's name, without her knowledge or consent. The cash payment was made by her; and, though the husband alone signed notes and a mortgage for the balance of the price, the notes were paid by the wife with her own money. Before making such payments, she ascertained that the deed had been taken in his name, and frequently asked him to deed the land to her. *Held* that, as between husband and wife, the latter was the equitable owner.—*Pierce v. Hower*, 42 N. E. 223, 142 Ind. 626.

[v] (Sup. 1897)

A wife has no equitable interest in land conveyed to her husband merely because one-half the price is paid by her father as an advancement to her, where he knew the land was to be conveyed to the husband alone.—*Lewis v. Stanley*, 45 N. E. 693, 47 N. E. 677, 148 Ind. 351.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 430-434.  
See, also, 21 Cyc. pp. 1382-1384.

§ 121. Property purchased with wife's money.

Presumptions and burden of proof, see post, § 131.

Property acquired by husband in trust for wife, see ante, § 120.

Retroactive operation of married woman's property act, see ante, § 114.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 432, 435-441.  
See, also, 21 Cyc. pp. 1385, 1386.

§ 122. Property purchased by wife.

[a] (Sup. 1863)

1 Gav. & H. St. p. 374, § 5, providing that "no land of a married woman" shall be liable for the debts of her husband, but the lands and profits shall be hers as if she were unmarried, excepting the power to convey, included lands which the wife might acquire by purchase, as well as in other modes.—*Johnson v. Runyon*, 21 Ind. 115.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 442-448.  
See, also, 21 Cyc. pp. 1386-1388.

§ 124. Proceeds of separate property.

[a] (Sup. 1863)

Personal property acquired by a married woman with the profits of her real estate does

not become the property of her husband by being left in his possession and use, and a sale of it on execution for the payment of his debts will not divest her title or convey any title to the purchaser.—*Johnson v. Runyon*, 21 Ind. 115.

[b] (Sup. 1869)

A married woman carried on, in her own name, the business of a clothing merchant, employing her husband as a clerk; the money invested in the business having been received by her during coverture, though a trustee, as a gift from her brother, to be invested in such business, and when so invested to be under her sole control, the business to be carried on in her name and for her sole use and benefit, and, in the event of her death, the money to go to her children by her said husband. *Held*, that personal property purchased by her with the proceeds of such business was not subject to the debts of her husband.—*Bellows v. Rosenthal*, 31 Ind. 116.

[c] (Sup. 1876)

A note made payable to a husband and wife as the consideration for separate real estate of the wife, on the death of either of the joint payees, is taken by the other by survivorship.—*Abshire v. State ex rel. Wilson*, 53 Ind. 64.

[d] (Sup. 1876)

A husband cannot, without the consent of his wife, receive payment of a promissory note made payable to her by a third person for money which, being her separate property, has been used or borrowed by her husband, or so made payable to her as a gift of the amount thereof from her husband; such note being her separate property.—*Carver v. Carver*, 53 Ind. 241.

[e] (Sup. 1877)

Under Act May 14, 1852, § 7, the widow of an intestate husband, who died seised of real estate conveyed to him in consideration of love and affection, takes a lien on the whole of such realty for the value of all the improvements by her made, and for all money belonging to her separate estate by her expended in making improvements thereon prior to the husband's death.—*Myers v. Myers*, 57 Ind. 307.

[f] (App. 1893)

Rev. St. 1881, § 5116, provides that "no lands of any married woman shall be liable for the debts of her husband, but such lands and the profits therefrom shall be her separate property, as fully as if she were unmarried." Section 2488 provides that the personal property held by a wife at the time of her marriage, or acquired during coverture, "by descent, devise, or gift," shall remain her own property, to the same extent as her realty so remains. *Held*, that money received by a wife in payment for her land sold during coverture was her own separate property. *Mahoney v. Bland*, 14 Ind. 177, overruled. *Abshire v. State*, 53 Ind. 64, limited.—*Parrett v. Palmer*, 8 Ind. App. 356, 35 N. E. 713, 52 Am. St. Rep. 479.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 89, 449-452.

See, also, 21 Cyc. pp. 1388, 1389.

§ 125. Rents and profits of separate property.

Charges against, see post, § 156.

Evidence as to right of husband to possession, see post, § 136.

Liability to be charged with debt, see post, § 162.

Nature of proceedings to enforce liability of rents and profits, see post, § 176.

Presumptions and burden of proof, see post, § 131.

Right of husband to sell proceeds of separate property, see post, § 137.

Weight and sufficiency of evidence, see post, § 133.

[a] (Sup. 1878)

Under 1 Rev. St. p. 550, providing that the lands of any married woman "and the profits therefrom shall be her separate property, as fully as if she was unmarried," she can maintain replevin against any officer, or creditor of her husband, who seizes the products of her lands, raised by her husband with her consent; and this, although the same be the share of corn coming from a tenant to whom he has rented a field with her consent, furnishing the teams and implements for making the crop.—*Montgomery v. Hickman*, 62 Ind. 598.

[b] (Sup. 1880)

Where a husband and wife live together on the latter's land, and there is no express agreement that the former should be the tenant of the latter, all crops raised on the land belong, under 1 Rev. St. 1876, p. 550, § 5, to the wife, and cannot be seized by the husband's judgment creditors.—*Stout v. Perry*, 70 Ind. 501.

[c] (App. 1909)

Where a husband with the consent of the wife takes sheep belonging to her and uses them on his farm, the parties living harmoniously together on the farm till his death, the inference is that the profits, if any, from an increase in the sheep were jointly shared by the husband and wife.—*Featherngill v. Dougherty*, 89 N. E. 521.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 453-458.

See, also, 21 Cyc. pp. 1390-1393.

§ 126. Earnings of wife.

Contracts between husband and wife as to services, see ante, § 41.

Pleading in action for services, see post, § 229.

Right of action by wife for services rendered, see post, § 207.

Services and earnings of wife in general, see ante, § 5.

Weight and sufficiency of evidence, see post, § 133.

[a] (Sup. 1867)

The earnings of the wife still belong to her husband, as at common law. The married women's property acts have made no change in this respect.—*Baxter v. Prickett's Adm'r*, 27 Ind. 490.

[b] (Sup. 1871)

The married women's act applies only to such personal property as a wife had at the time of marriage, or has acquired during the coverture by descent, devise, or gift. It leaves the common-law rule with reference to the husband's right to the wife's earnings unchanged; hence, if a wife engages in trade and purchases goods to be used or sold in such trade, they become the property of the husband, unless purchased with money acquired and belonging to her as above stated.—*Jenkins v. Flinn*, 37 Ind. 349.

[c] (Sup. 1875)

Property acquired by the earnings of a wife during coverture is governed by the common-law rule, and belongs to the husband.—*Yopst v. Yopst*, 51 Ind. 61.

[d] (Sup. 1883)

Since the enactment of Rev. St. 1881, § 5130, a wife's earnings do not belong to her husband, as formerly, under the common-law rule.—*Boots v. Griffith*, 89 Ind. 246.

[e] (App. 1892)

In an action against a board of county commissioners for services performed in caring for a pauper resident, there was no error in permitting plaintiff and his wife to testify as to services rendered the pauper by the wife, and the value thereof; the earnings of the wife being the property of the husband, except where she carries on a separate business or works for others on her own account.—*Board of Com'rs of Tipton County v. Brown*, 4 Ind. App. 288, 30 N. E. 925.

[f] (App. 1901)

Under Burns' Rev. St. 1894, § 6975 (Hornor's Rev. St. 1897, § 5130), providing that a married woman may perform any service for her sole account, and that earnings for any services except for her husband and family shall be her sole property, a married woman may legally contract to perform services consisting of nursing, boarding, and washing for her husband's father while he was living at her home.—*Hamilton v. Hamilton's Estate*, 59 N. E. 344, 26 Ind. App. 114.

[g] (App. 1906)

Where a wife performs services for a third person who is a member of the husband's household, such services being performed as a part of her household work, compensation therefor belongs to the husband.—*Kennedy v. Swisher*, 34 Ind. App. 676, 73 N. E. 724.

The wife's separate earnings for services to persons other than the members of the family belong to her, and not to her husband.—*Id.*

[h] (App. 1910)

Where a married woman, under a contract with the husband of her deceased cousin, cared for his children in her household, her earnings therefrom were her separate property, and did not belong to the husband, under the rule that where a wife performs services for a third party at the time a member of her husband's family, as a part of the household work, the compensation belongs to him.—*Elliott v. Atkinson*, 90 N. E. 779.

#### FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. HUS. & W. §§ 459-464.

See, also, 21 Cyc. pp. 1393-1396.

#### § 129. Estoppel to claim property.

Application of doctrine of estoppel, in general, see ante, § 62.

Estoppel to assert invalidity of conveyance of separate property, see post, § 198.

[a] (Sup. 1870)

Where a man dies seized of land purchased in part with his own money and in part with money belonging to his wife, the deed being taken in his name without her knowledge or consent, she is entitled to recover from his estate the amount of her money so invested; and in the prosecution of such claim against said estate she will not be estopped by the facts that she attended a sale, made by the administrator of said estate under an order of the proper court, of two-thirds of said land, and did not make any objection to such sale, but herself bid thereat, and that in an action by the purchaser at such sale against her for partition of said land she set up her claim to an interest in said land beyond her one-third thereof as widow, because of its purchase with her money in part, and her claim to such equitable interest was disallowed, and partition was awarded without regard thereto.—*Dayton v. Fisher*, 34 Ind. 356.

[b] (App. 1894)

In this case the Appellate Court is of opinion that a married woman who delivers her property to her husband and permits him to appear to the world as the owner thereof is estopped to deny his title on his executing a mortgage on the property to one of his creditors, but, believing that such opinion is in conflict with the holdings of the Supreme Court, transfers the case to that court. See same case in Supreme Court.—*Kiefer v. Klinsick*, 37 N. E. 1048, 13 Ind. App. 253.

[c] (Sup. 1897)

In a suit to set aside a deed by a husband to his wife as in fraud of creditors, the wife cannot hold two other lots, deeded by her husband as equivalents for an advancement made to her by her father in the shape of one-half of the price paid for the land in controversy, and at the same time claim that she did not agree to accept such lots for the purpose for which her husband deeded them to her, and by a cross complaint invoke equity to quiet her title to the

land in controversy.—*Lewis v. Stanley*, 45 N. E. 693, 47 N. E. 677, 148 Ind. 351.

[d] (Sup. 1901)

Under *Burns' Rev. St. 1894*, § 6962, providing that a wife may be bound by an estoppel in pais, like any other person, her separate property may be bound by estoppel for the payment of her husband's debts.—*Morgan v. Hoadley*, 59 N. E. 935, 156 Ind. 320.

[e] (App. 1901)

The fact that plaintiff knew that her husband had sold her horse to K., and that it was in K.'s possession before K. sold it to defendant, was not sufficient evidence of plaintiff's consent to the sale to require submission of the question whether plaintiff was estopped from claiming the animal.—*Carrico v. Shepherd*, 59 N. E. 347, 26 Ind. App. 207.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 283, 468-470; 19 CENT. DIG. ESTOP. §§ 191, 195, 197.

See, also, 21 Cyc. pp. 1398-1402.

§ 130. Evidence as to ownership.

Evidence as to right of husband's possession or occupation, see post, § 136.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 471-494.

See, also, 21 Cyc. pp. 1402-1410.

§ 131. — Presumptions and burden of proof.

[a] (Sup. 1859)

Where money received as a legacy by the wife during coverture has been treated by both as her own, the jury may infer therefrom that it is her separate property.—*Ewing v. Gray*, 12 Ind. 64.

It was claimed that a deed from a stranger to a wife, fair on its face, was in trust for her husband and paid for by him. *Held*, that the wife should not be put to her proof to keep her estate, but that the creditors should bring proofs to take it away.—*Id.*

[b] (Sup. 1859)

Where a husband helps to farm his wife's lands, the crops, presumably, are hers, not his.—*Scott v. Hudson*, 86 Ind. 286.

[c] (Sup. 1883)

Where a husband had purchased a tract of land in 1847, and in 1880 conveyed it to his wife, who brought action against his creditors, who had acquired liens while he held it, on the ground that she had during all that time been the equitable owner of the land, the burden is on her to show that she furnished the consideration with which the land was purchased.—*Meredith v. Citizens' Nat. Bank*, 92 Ind. 343.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 426, 471-483.

See, also, 21 Cyc. pp. 1402-1407.

§ 132. — Admissibility.

[a] (Sup. 1860)

Where land was purchased in the husband's name with a legacy left to the wife in the hands of her guardian, declarations by the husband, made at the time of the purchase that the land was purchased for the wife's benefit, are inadmissible to show that the deed, which was absolute on its face, was affected with an express trust in her favor.—*Miller v. Blackburn*, 14 Ind. 62, 77.

[b] (Sup. 1878)

In replevin by a married woman against an officer or creditor of her husband, who seized the products, consisting partly of corn, of her lands, raised by her husband with her consent, evidence is admissible that, after the corn was taken from defendant by the writ of replevin, plaintiff's husband took charge of the corn and sold it as his own, receiving the money and appropriating it to his own use.—*Montgomery v. Hickman*, 62 Ind. 598.

[c] (Sup. 1901)

On foreclosure of a chattel mortgage against a husband, the wife claimed the property, and both testified that it was hers. The wife admitted on cross-examination that she knew at various times that her husband was making bills of sales and chattel mortgages to the mortgagee, and that she stood by and permitted the property to be treated as his. *Held*, that the instruments referred to were admissible on the part of the mortgagee to evidence acts of ownership by the husband, and to support the mortgagee's plea of estoppel, in connection with the wife's admissions.—*Morgan v. Hoadley*, 59 N. E. 935, 156 Ind. 320.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 484-486, 845.

See, also, 21 Cyc. pp. 1407, 1408.

§ 133. — Weight and sufficiency.

[a] (Sup. 1876)

An administrator sued to recover notes claimed as the property of the estate. The evidence showed that the decedent, in his life, procured a third person to convey lands to his wife, for which defendant paid; that the wife, with her husband, afterwards conveyed the land to a purchaser, who gave the notes in controversy for the price; and that defendant held the notes for the widow of decedent, who claimed them as her property. *Held*, that the title to the notes appeared to be in the widow, as against the administrator.—*Garner v. Graves*, 54 Ind. 188.

[b] (Sup. 1882)

In an action by a married woman to recover possession of real estate, evidence examined, and *held* insufficient to warrant an inference that there was an understanding, express or implied, between plaintiff and her husband, that the title to the property, the consideration for which was in part paid with her

money, was to be taken in her name.—Waldron v. Sanders, 85 Ind. 270.

[c] (App. 1891)

In an action to recover possession of cattle, plaintiff and her husband testified that they came from cows given to her by her father, and were her property when taken up. Other testimony showed that she had given the cattle in to the assessor as the property of her husband, who was absent from home; that she signed his name to the assessment sheet, and made oath to it; that the supervisor, after taking up the cattle, read to plaintiff's husband, in her presence and hearing, a notice that the cattle had been impounded as the property of the husband; and that she made no claim to the cattle. *Held* that a finding of the court below, that the cattle were the property of the husband, would not be disturbed.—Miller v. Lively, 1 Ind. App. 6, 27 N. E. 437.

[d] (App. 1895)

The fact that a woman married after entering on the discharge of her duties under an employment contract does not necessarily show that her services were not rendered on her separate account.—Wetzel v. Kellar, 12 Ind. App. 75, 39 N. E. 895.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 487-494.

See, also, 21 Cyc. pp. 1408-1410.

(B) RIGHTS AND LIABILITIES OF HUSBAND.

Assent of husband to charge on separate estate, see post, § 166.

Consent of husband to conveyance, see post, § 184.

Insurable interest in wife's property, see INSURANCE, § 115.

Joinder of husband in conveyance, see post, § 193.

Liability of separate estate for husband's debts, see post, §§ 159, 171.

Property subject to mortgage, see MORTGAGES, § 12.

§ 134. Vested rights.

[a] (Sup. 1857)

It is not in the power of the Legislature to deprive the husband, for the purposes contemplated by the act of 1852, of his right to a life estate, nor his right to convey.—Junction R. Co. v. Harris, 9 Ind. 184, 68 Am. Dec. 618.

[b] (Sup. 1858)

A husband holding lands in trust for his wife cannot, after her death, make a valid sale thereof.—Fulton v. Carey, 10 Ind. 570.

[c] (Sup. 1866)

The husband does not, under the statutes of Indiana, acquire any legal interest or estate in the lands of the wife, but the same and the

profits thereof remain her separate property.—Davis v. Clark, 26 Ind. 424, 89 Am. Dec. 471.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 393, 495, 496.

See, also, 21 Cyc. p. 1411.

§ 136. Right of possession or occupation.

Authority of husband as wife's agent or attorney, see post, § 138.

Power to manage or control, see post, § 137.

[a] (Sup. 1883)

Where a widow claimed that by virtue of Rev. St. 1881, § 5116, she was entitled to recover from the administrator of her deceased husband for rents for lands occupied by herself and husband but belonging to her, the burden is on her to establish an agreement of tenancy or some agreement to pay for the use and occupation of her land.—Davis v. Watts, 90 Ind. 372.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 508-511.

See, also, 21 Cyc. p. 1414.

§ 137. Power to manage or control.

Authority of husband as wife's agent or attorney, see post, § 138.

Power of husband to bind wife's separate estate by contracts for improvements, see post, § 150.

Right of possession or occupation, see ante, § 136.

[a] (Sup. 1868)

Land owned by a married woman in fee, as her separate property, was occupied as a farm by herself and husband, and cultivated by the latter, who, with his wife's assent, sold and marketed the annual products as his own, and used the proceeds in the support of the family. With her assent, he rented a field to be planted with corn, furnishing the team, plows, and seed corn to the tenant, who was to have one-third of the crop. The husband sold two-thirds of the growing crop in payment of an account for medical services rendered by the purchaser to the husband and family. *Held*, in a suit by the wife against the purchaser for gathering and carrying away the ripened corn, that the sale was valid.—Cunningham v. Mitchell, 30 Ind. 362.

[b] (Sup. 1882)

Under 1 Rev. St. 1876, p. 530, § 5; p. 412, § 5, providing that a wife's separate property shall remain her own and authorizing her to make contracts concerning it or to part with it only with her husband's consent, any attempt at making a contract with the husband is without binding force on her.—Hileman v. Hileman, 85 Ind. 1.

[c] (App. 1902)

Where a third person had money which belonged to a married woman, and without her

knowledge or consent, but on the order of her husband, it was received by his partner, and used by the firm as partnership money, being credited to the husband, the firm, and therefore the partner, is liable as for money had and received to the wife's use; neither the firm, nor either of its members, having parted with anything of value therefor; the wife having done nothing to induce the partner to change his condition, or stood by, knowing that he was changing his condition, without disclosing her interest; and any supposition of the partner that the money was the property of the husband, or that he had the right to dispose of it, not having been authorized by the wife, and she not having been responsible therefor.—*Comer v. Hayworth*, 65 N. E. 595, 30 Ind. App. 144, 96 Am. St. Rep. 335.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 512-523.

See, also, 21 Cyc. pp. 1414-1417.

### § 138. Authority as wife's agent or attorney.

Acts of husband rendering property of wife liable to municipal taxation, see MUNICIPAL CORPORATIONS, § 966.

Agency of husband for wife in general, see ante, § 25.

Authority of husband to bind wife's separate estate by contracts for improvements, see post, § 150.

Authority to make contract supporting mechanic's lien, see MECHANICS' LIENS, § 71.

Capacity of married woman to appoint agent, attorney or trustee in general, see ante, § 58.

Notice to husband of intention to claim mechanic's lien as notice to wife, see MECHANICS' LIENS, § 120.

Notice to husband of materials furnished by subcontractor as notice to wife, see MECHANICS' LIENS, § 99.

Power of husband to manage or control separate property, see ante, § 137.

[a] (Sup. 1860)

A wife may be bound by the acts of her husband in reference to her separate property, where they are performed by her authority and approved by her.—*Baker v. Roberts*, 14 Ind. 552.

[b] (Sup. 1876)

Where a married woman has placed in the hands of her husband for collection a promissory note, made to her by a third person, and being her separate property, her husband is not thereby authorized to receive payment in anything but money, and other property received by him cannot be applied as payment, unless his wife has authorized it, or afterwards acquiesces in it, and the burden is on the maker seeking such application to prove such authority or agency.—*Carver v. Carver*, 53 Ind. 241.

Where a husband gets possession, without the consent of his wife, of a promissory note made to her by a third person, and being her

separate property, payments made to him, while he has such possession, by the maker, will not discharge the note or any part of it unless said wife subsequently sanction such payment.—*Id.*

[c] (Sup. 1879)

There is no presumption that a husband has authority from his wife to assign a policy taken out by him for her benefit.—*Pence v. Makepeace*, 65 Ind. 345.

[d] (Sup. 1880)

Where a married woman authorizes her husband to act for her, and as her agent, to contract for the building of a house on her separate real estate, the law gives the mechanics a lien thereon, though she may not have intended to charge the property therewith.—*Jones v. Potchast*, 72 Ind. 158.

[e] (Sup. 1884)

Where a husband, to secure his own debts, has given a mortgage on lands held by him in implied trust for his wife, the wife cannot quiet her title as against the mortgagee unless he had notice of the trust, although he knew of her refusal to sign the mortgage.—*Paulus v. Latta*, 93 Ind. 34.

[f] (Sup. 1885)

If an infant wife, with her husband, executes and acknowledges a deed of her land, and authorizes him to deliver it, and he delivers it after she comes of age, without objection by her, and she says she is satisfied with the consideration, she is bound.—*Sims v. Smith*, 99 Ind. 469, 50 Am. Rep. 99.

A wife may, either by previous authority or subsequent ratification, constitute her husband her agent, so as to be bound by his acts.—*Id.*

[g] (Sup. 1888)

Where a contract for improvements is made by the husband of the owner, a finding that he was not acting as his wife's agent will not be disturbed, where the only evidence as to the agency was the husband's testimony that he had no contract to act as his wife's agent, and that he paid for the improvements with his own money, except \$170 furnished by his wife.—*Shaffer v. Archbold*, 116 Ind. 29, 18 N. E. 56.

[h] (Sup. 1888)

A husband, authorized to sell land for his wife, cannot receive notes in payment; and the burden of showing his authority to do so, or as satisfaction by the wife, is on the purchaser.—*Runyon v. Snell*, 116 Ind. 164, 18 N. E. 522, 9 Am. St. Rep. 839.

Where a husband, acting as his wife's agent in the sale of her real estate, accepts his own note and the note of a third person for the purchase price, in the absence of any evidence showing authority on his part to receive payment in that manner, or that his wife subsequently ratified his acts, the acceptance of such notes instead of money cannot be regarded as payment.—*Id.*

## [I] (App. 1892)

Evidence that a wife lived in the country, and gave no personal attention to certain land in the city; that her husband gave the land his personal attention; and that he had general management of his wife's affairs, and had sold similar land for her,—justified a conclusion that he was her agent for the sale of such land.—*Barnett v. Gluting*, 3 Ind. App. 415, 29 N. E. 154, 927.

No particular words are necessary to establish such agency.—Id.

In an action involving the issue whether a husband was the wife's agent for the sale of her land, evidence that the wife allowed her husband to make similar transactions with other persons is admissible to show the agency.—Id.

In an action involving the issue whether a husband was the wife's agent for the sale of her land, it was proper to instruct the jury that, in determining the agency, they might consider that the alleged agent was husband of the alleged principal.—Id.

## [J] (Sup. 1895)

An agreement between a grantor and his grantee's husband fixing the division line between the land conveyed and that retained by the grantor at a line different from the one stated in the deed, in consequence of which the grantor extended improvements up to the new line, is not binding upon the grantee, when it and the improvements were made without her knowledge.—*Mitchell v. Brawley*, 140 Ind. 216, 39 N. E. 497.

## [K] (App. 1895)

On an issue as to whether payment to a husband was payment to the wife, the exclusion of a check showing payment to the husband was not reversible error.—*Keller v. Reynolds*, 12 Ind. App. 383, 40 N. E. 280.

## [L] (App. 1897)

Where a husband purchases lumber to erect a house upon his wife's land, and there is no evidence that he acted as her agent in so doing, or that she knew of his intention to purchase or promised to pay for it, proof that there was no contract between the husband and wife for the erection of the house would not render the wife liable for the purchase price of the lumber.—*Russell v. Stoner*, 47 N. E. 645, 48 N. E. 650, 18 Ind. App. 543.

Under an issue as to whether defendant's husband acted as her agent in the purchase of material used in building a house on her separate real estate, evidence as to what defendant had said to her husband with reference to how she wanted the house built was properly excluded as immaterial.—Id.

## [M] (App. 1909)

The personal liability of a wife for material and labor expended in improvements on her lands, placed there by her husband's order,

does not depend on whether the creditor knew of the husband's agency at the time of the transaction, but only on the question whether there was in fact such an agency.—*Colt v. Lawrenceburg Lumber Co.*, 88 N. E. 720.

## [N] (App. 1910)

Under Burns' Ann. St. 1908, §§ 7851-7853, abolishing the legal disabilities of married women to make contracts, and authorizing married women to contract with reference to their property, etc., a husband may act as her agent in her business and bind her under the principles applicable to other agencies.—*Wasam v. Raben*, 90 N. E. 636.

## FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 524-537.

See, also, 21 Cyc. pp. 1417-1424.

## § 141. Improvements by husband.

Appellate jurisdiction in action for as dependent on nature of proceeding, see APPEAL AND ERROR, § 41.

Power of husband to bind separate estates for improvements, see post, § 150.

## [a] (Sup. 1872)

If a husband expend money on lands belonging to his wife while he occupies them, it is presumed that he improves them for her benefit, and he cannot recover therefor.—*Lane v. Taylor*, 40 Ind. 495.

## FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 538-540.

See, also, 21 Cyc. pp. 1426, 1427.

## § 142. Services of husband.

As charge on separate estate, see post, § 153.

Right of action by husband for loss of services of wife, see post, § 209.

## [a] (Sup. 1875)

Where a wife employed her husband as agent in the management of her separate business, he has the right to give his personal services and salary to the management of his wife's property without any further compensation than the support and maintenance of himself and family.—*Cooper v. Ham*, 49 Ind. 393.

## FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 541, 542.

See, also, 21 Cyc. pp. 1427, 1428.

## § 143. Advances by husband.

## [a] (Sup. 1899)

A husband asserting a claim against his deceased wife's estate for money used by him before and after their marriage in payment of her debts, as incident to the management of her property as her agent, has the burden of proving that he used his own money.—*Gosnell v. Jones*, 53 N. E. 381, 152 Ind. 638.

## FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 543, 544.

### § 144. Accountability for property and income.

[a] (Sup. 1852)

A husband who comes into possession of money held by his wife in trust, either as her administrator or otherwise, is held as a trustee, and may be compelled to account for it by a bill in chancery.—*Keister v. Howe*, 3 Ind. 268.

[b] (Sup. 1883)

Where a husband with the knowledge and consent of his wife applied the income from her separate estate to the benefit of the family, no charge could accrue against him, in the absence of evidence of an understanding that the wife should be repaid.—*Bristol v. Bristol*, 93 Ind. 281.

A husband collected the rents from his wife's separate property with her consent and with no agreement, express or implied, to account therefor, and used them in building a house, in which he and his wife lived, and in maintenance of the family. *Held*, that after his death she could not maintain a claim therefor against his estate.—*Id.*

[c] (Sup. 1890)

Where a husband, with the consent of his wife, is in the habit of receiving the income, profits, and dividends of her separate estate, and using them for the benefit of the family, it will be presumed that the wife consented and agreed that he should so receive and use them, and the law will not compel him to account.—*Denny v. Denny*, 23 N. E. 519, 123 Ind. 240.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 35, 545-553.

See, also, 21 Cyc. pp. 1429-1432; note, 30 L. R. A. 309.

### § 146. Liabilities to third persons.

[a] (Sup. 1860)

Where a wife, in anticipation of profits from her separate realty, purchases personal property, and executes a note therefor jointly with her husband, his property may be taken on execution.—*Johnson v. Chissom*, 14 Ind. 415.

[b] (Sup. 1867)

A married woman united with her husband in the execution of a mortgage to secure notes given by her for the purchase money of land, and the mortgage contained a covenant by the husband with the wife to pay the debt. *Held*, that the husband was liable on the covenant, notwithstanding the notes were given for the wife's indebtedness, and that the mortgage was a valid lien on the land of both.—*Buell v. Shuman*, 28 Ind. 404.

[c] (Sup. 1876)

The fact that a married woman is not bound by her covenant, in which her husband joins, in the conveyance of her land, does not release him.—*Blair v. Allen*, 35 Ind. 409.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 550-560. See, also, 21 Cyc. pp. 1433, 1434.

### (C) LIABILITIES AND CHARGES.

Actions to charge separate property, see post, § 215.

Judgment against separate property, see post, § 240.

Liability of husband's interest in wife's estate for debts of wife, see CURTESY, § 12.

Ownership and possession of land as affecting right to mechanic's lien, see MECHANICS' LIENS, § 57.

Ratification by wife of act of husband in erecting improvements, as affecting right to mechanic's lien, see MECHANICS' LIENS, § 77.

Requisites of contract by married woman to support mechanic's lien, see MECHANICS' LIENS, § 73.

### § 148. Purchase money and prior incumbrances.

Mortgage executed to secure repayment of money borrowed to discharge lien, see post, § 169.

[a] (Sup. 1868)

Coverture is no bar to a suit to enforce a vendor's lien on real estate for unpaid purchase money.—*Perry v. Roberts*, 30 Ind. 244, 95 Am. Dec. 689.

[b] (Sup. 1882)

A vendor's lien is enforceable against the separate property of a married woman.—*Sample v. Cochran*, 84 Ind. 594.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 567-572, 796.

See, also, 21 Cyc. pp. 1437, 1438; note, 34 Am. Rep. 614.

### § 149. Rights of husband's creditors.

Debts expressly charged, see post, § 167.

Payments by wife out of separate estate as constituting preference of husband's creditor, see BANKRUPTCY, § 165.

[a] (Sup. 1890)

Where a man buys land under an agreement that it shall belong to his wife, and prays for it with money borrowed from one who expects to be, and afterwards is, repaid by the proceeds of a sale of the wife's separate property, the equitable title of the wife is superior to the lien of the husband's judgment creditors.—*Warren v. Hull*, 123 Ind. 126, 24 N. E. 93.

[b] (App. 1910)

A wife invested her capital in a business for the purpose of making a living for herself and family. The husband, who was insolvent, to prevent the fruits of his earnings from being diverted to his debts, managed the business without any contract for compensation, and took from the profits thereof such sums as he required for his individual and family expenses.

es. The business was prosperous, and the wife acquired considerable property. She knew that the husband was insolvent. *Held*, that under Burns' Ann. St. 1908, §§ 7851-7853, abolishing legal disabilities of married women to make contracts, etc., the husband and wife could contract for his services in managing her business, and he could give his services to her, and his creditors had no equity against the property acquired by the wife.—*Wasam v. Raben*, 90 N. E. 636.

[c] (App. 1890)

Property purchased by a married woman in her own name with money received as her separate earnings from caring for the children of her deceased cousin under a contract with their father was not subject to her husband's debts; she having no knowledge at the time she took title that her husband was insolvent.—*Elliott v. Atkinson*, 90 N. E. 779.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 573, 574;

21 CENT. DIG. Execution, § 247.

See, also, 21 Cyc. p. 1439.

**§ 150. Improvements and materials furnished.**

Agency of husband as to purchase of materials, see ante, § 138.

Evidence in actions to enforce, see post, § 232.

Improvements by husband, see ante, § 141.

Necessity of contract to support statutory lien, see MECHANICS' LIENS, § 61.

Necessity of improvement as affecting right to statutory lien, see MECHANICS' LIENS, § 24.

Pleading in actions to enforce, see post, § 229.

[a] A married woman has whatever power is incident to a complete holding and full enjoyment of her separate real estate, but with a restriction on her power to incumber or alienate the same. Where, therefore, an improvement made by a married woman on her real estate is necessary and proper for a full and complete enjoyment of such estate, she can charge her separate property with debts created in making the improvement.—(Sup. 1869) *Lindley v. Cross*, 31 Ind. 106, 99 Am. Dec. 610; (1872) *Capp v. Stewart*, 38 Ind. 479; (1882) *Stephenson v. Ballard*, 82 Ind. 87.

[b] (Sup. 1871)

A married woman may charge her separate property for the cost of such improvements as are necessary to a complete and full enjoyment.—*Johnson v. Tutewiler*, 35 Ind. 353.

Where work is done and materials furnished at a husband's request for buildings erected on the real estate of his wife, the latter is not liable, although she may have subsequently signed a promissory note for such work and materials.—*Id.*

The husband cannot bind the wife's separate estate by contract for improvements.—*Id.*

[c] (Sup. 1872)

Where a married woman is the owner of real estate in her own right, and the proper steps have not been taken to create a mechanic's lien, in the absence of any contract made by her for the improvement of such property, and in the absence of evidence that the improvements were necessary to the enjoyment of the same, neither she nor such real estate can be held for making such improvements.—*Falkner v. Colshear*, 39 Ind. 201.

[d] (Sup. 1875)

In an action to charge the separate real estate of a married woman for materials furnished and work done in the erection of a dwelling house thereon, it should be shown that the house was necessary and proper to the full enjoyment of the separate estate of the wife, and it is not sufficient to show that it was necessary and proper to the use and enjoyment of said real estate by the owner that the house should be built thereon, that plaintiff furnished materials and performed labor in the erection of a house thereon, and that such materials and labor were necessary and proper for the erection of such a house as was built.—*Crickmore v. Breckenridge*, 51 Ind. 294.

[e] (Sup. 1879)

A written contract executed by a married woman, prior to the passage of 1 Rev. St. 1876, p. 550, § 5, by which she acknowledged herself indebted to a person for materials and labor used to improve her separate estate, was void.—*Williams v. Wilbur*, 67 Ind. 42.

[f] (App. 1892)

In an action for work done on defendant's property, the trial court properly permitted defendant to testify that there was an agreement between her and her husband that certain improvements on her property, when made, should be paid for by the husband, though it was shown that plaintiff was not present when such agreement was made.—*Ogden v. Kelsey*, 4 Ind. App. 299, 30 N. E. 922.

In an action for work done on defendant's property, defendant pleaded that, at the time the work was done, she was a married woman; that the work was done on the order of her husband; that she in no way contracted for the work; that it was the separate debt of her husband; and that she had in no way made it her separate indebtedness. *Held*, that the fact that defendant owned the property on which the work was done would not make her liable therefor.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 575-581.

See, also, 21 Cyc. pp. 1441-1444; note, 3

L. R. A. (N. S.) 307; note, 83 Am. St. Rep. 517.

**§ 151. Necessaries and family expenses.**

Liability for necessaries in general, see ante, § 19.

[a] (Sup. 1876)

Where, during the existence of the marital relation, medical treatment is rendered to a married woman at her request and on her promise to pay the same out of her separate estate, such contract is absolutely void, and she is not liable for the value of such services.—*Thomas v. Passage*, 54 Ind. 106.

A note given by a widow for medical attention and treatment rendered to her by the payee during the lifetime of her deceased husband, at her request, and on her promise to pay for it out of her separate estate, is void for want of consideration.—Id.

[b] (App. 1894)

Where a husband applies the principal of his wife's separate property in the support of their family, she may, in the absence of an agreement to repay the same, recover it back.—*Hammond v. Bledsoe*, 11 Ind. App. 202, 38 N. E. 530, 54 Am. St. Rep. 502.

[c] (App. 1895)

Though, by virtue of Rev. St. 1894, § 6900 (Rev. St. 1881, § 5115), allowing a married woman to contract with reference to her separate estate without joining her husband, a wife is bound by her express promise to pay for necessities furnished her, which otherwise would be chargeable to her husband, the law does not imply a promise on her part to pay for necessities so furnished.—*Nelson v. Spaulding*, 11 Ind. App. 453, 39 N. E. 168.

[d] (App. 1903)

A wife is not bound to use her separate personal property for the support of her husband, nor to use the same for the payment of his funeral expenses and the expenses of his last sickness.—*Robinson v. Foust*, 68 N. E. 182, 31 Ind. App. 384, 99 Am. St. Rep. 269.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 582-595, 599.

See, also, 21 Cyc. pp. 1444-1449; note, 15 L. R. A. 717; note, 31 Am. Rep. 697.

#### § 152. Contracts in general.

Contracts for benefit of separate estate, see post, § 162.

Contracts of married women in general, see ante, §§ 79-82, 84-90.

[a] (Sup. 1863)

When a married woman, owning property, is disabled by the terms of the conveyance of it to her use, or by statute, from alienating or incumbering it, it cannot be charged with her debts, except for the purchase money, so as to cause its alienation by judicial or sheriff's sale for the payment of those debts.—*Cox's Adm'r v. Wood*, 20 Ind. 54.

Semble, that a feme covert cannot be personally liable on her contracts, but a judgment may be rendered against her, collectible out of the income of her separate estate; and, if none

such can be found upon which to levy, a receiver may be appointed to take and apply the income in default of her voluntarily paying the judgment.—Id.

[b] (Sup. 1868)

The rule of the common law that a wife cannot enter into an executory contract in regard to her lands has not been changed by statute.—*Stevens v. Parish*, 29 Ind. 260, 95 Am. Dec. 636.

[c] (Sup. 1869)

So far as the profits of a married woman's real estate are concerned, effect will be given to her contract where she has indicated her purpose to deal with such profits.—*Kantrowitz v. Prather*, 31 Ind. 92, 99 Am. Dec. 587.

[d] (Sup. 1869)

Where the contract of a married woman had no connection with the real estate of the wife, and the debt was not contracted for its repairs or improvement, or to secure to her its use and enjoyment, nor did it appear that she intended thereby to charge the rents and profits of her estate, the contract was void at law, and not such an one as equity will enforce against the rents and profits of the wife's separate estate.—*Copeland v. Cunningham*, 31 Ind. 116.

[e] (Sup. 1869)

In this state a married woman can charge her real estate by such contracts only as are reasonably calculated to make the estate profitable to her, or to preserve it, or to protect her title thereto.—*Smith v. Howe*, 31 Ind. 233.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 596-602  
See, also, 21 Cyc. pp. 1450-1456.

#### § 153. Contracts between husband and wife.

Contracts between husband and wife in general, see ante, §§ 39-41, 43-46, 49½, 49¾, 51, 52.

[a] (Sup. 1880)

A husband may contract with his wife in relation to her separate estate, but the law looks with much caution upon such contracts, and requires of the husband the most scrupulous good faith; and, if there be any element of fraud or lack of consideration, the law scrutinizes it with much care, and will only uphold it when it is for the benefit of the wife, or has been made with the utmost good faith.—*Hon v. Hon*, 70 Ind. 135.

[b] (Sup. 1884)

A wife may have general business transactions with her husband, and all contracts made by her with her husband concerning her separate business or her separate property, apparently just and reasonable within themselves, and which would have been valid if made by trustees acting in her behalf, will be enforced.—*Rose v. Rose*, 93 Ind. 179.

[c] (Sup. 1889)

A husband sued his wife, the complaint alleging an indebtedness for money loaned to her, which she expressly promised to pay; that the money was necessary in her separate business, and was obtained to prevent suits being brought against her. *Held*, that under Rev. St. 1881, §§ 5115, 5117, 5130, giving a married woman a right to contract as to her personal property, and carry on her separate business as if sole, except in certain particulars, the wife could borrow the money of her husband, and the complaint was good on demurrer.—*Harrell v. Harrell*, 117 Ind. 94, 19 N. E. 621.

[d] (App. 1896)

A husband cannot recover for work and labor done on his wife's farm, and for taxes paid thereon, in the absence of an express contract.—*Stanley v. Stanley*, 14 Ind. App. 398, 42 N. E. 1031.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. &amp; W. § 603.

See, also, 21 Cyc. p. 1456.

## § 154. Contracts jointly with husband.

[a] (Sup. 1889)

H. and wife owed a balance of the price of land to one M. H. agreed to build a house for M. in payment, and contracted with plaintiff to build it. When finished a balance was due plaintiff on the house, to secure which H. and wife gave a mortgage on the land bought by them, and a note which was payable to M., and by her assigned to plaintiff. *Held*, that the mortgage was given for the joint debt of H. and wife, and was valid.—*Barger v. Hoover*, 120 Ind. 193, 21 N. E. 888.

FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. HUS. &amp; W. § 604.

See, also, 21 Cyc. p. 1456.

## § 156. Bills and notes.

Execution of or indorsement as sureties, see post, § 157.

Notes given for benefit of separate estate, see post, § 162.

Validity in general, see ante, § 85.

[a, b] (Sup. 1878)

The rents and profits of a married woman's separate estate cannot be subjected to the payment of a note executed by her, where by the note itself she agreed to pay from her own separate property the amount stated therein, unless the note was given for the benefit of the maker's separate estate.—*Richards v. O'Brien*, 64 Ind. 418.

[c] (Sup. 1882)

Under Act March 25, 1879, providing that a married woman may contract in reference to her separate property the same as if she were sole, a note by a married woman in reference to her separate property is valid.—*Wulschner v. Sells*, 87 Ind. 71.

[d] (Sup. 1883)

Under Act 1879, relative to the property and contract rights of married women, the note of a married woman for money borrowed to carry on business in which she is engaged on her own account is valid.—*Wallace v. Rowley*, 91 Ind. 586.

[e] (Sup. 1884)

Under Act March 25, 1879, providing that "a married woman may enter into any contract in reference to her separate personal estate, \* \* \* the same as if she were sole, and her separate estate, real and personal, shall be liable therefor on execution or other judicial process," an assignment by indorsement of a note by a married woman binds her separate estate.—*Mathes v. Shank*, 94 Ind. 501.

[f] (Sup. 1885)

Under Rev. St. § 5115, "all the legal disabilities of married women to make contracts are hereby abolished, except as herein otherwise provided," and, under section 5117, they may make contracts concerning their separate personal property. *Held*, that a married woman may contract for the purchase of wearing apparel for herself, and notes executed by her for the price thereof are valid, and may be enforced.—*Arnold v. Engleman*, 103 Ind. 512, 3 N. E. 238.

[g] (App. 1892)

A note executed by a wife partly for the benefit of her husband is valid if any part of the consideration moves to her.—*Morningstar v. Hardwick*, 3 Ind. App. 431, 20 N. E. 929.

[h] (App. 1892)

In an action on a note, governed by the law merchant, brought by indorsees for value, before maturity, and in good faith, against the makers, husband and wife, it is not necessary for plaintiffs to establish, as against the wife, that the consideration was in fact beneficial to her or to her estate, or that there was a sufficient consideration, if it be shown that she contracted as a principal in fact, on a consideration sufficient or insufficient, or if such circumstances be shown as will estop her from denying that she contracted as a principal.—*Potter v. Sheets*, 5 Ind. App. 506, 32 N. E. 811.

[i] (App. 1906)

Where a married woman joined in a note with her husband for a loan, which was secured by mortgage on the wife's separate estate, the holder of the note was only entitled to enforce the note and mortgage as against her, to the extent that the loan was applied to her use and benefit.—*Equitable Trust Co. v. Torphy*, 76 N. E. 639, 37 Ind. App. 220.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. &amp; W. §§ 608-622.

See, also, 21 Cyc. pp. 1457-1462.

**§ 157. Guaranty and suretyship.**

Bills and notes in general, see ante, § 156.

By married women in general, see ante, § 87.

Mortgage or pledge as surety, see post, §§ 169, 171.

Questions for jury, see post, § 235.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 623-630.

See, also, 21 Cyc. pp. 1462-1466.

**§ 158. — In general.**

[a] (Sup. 1889)

A contract made by a married woman, to indorse all notes given in payment for agricultural implements for the sale of which she was agent, is void, under Rev. St. § 5119, prohibiting married women from entering into any contract of suretyship, and declaring the same void.—*Nixon v. Whiteley, Fasler & Kelly Co.*, 120 Ind. 360, 22 N. E. 411.

[b] (Sup. 1892)

A married woman can make no contract charging her separate property for a debt the consideration for which moves solely to another.—*Bowles v. Trapp*, 139 Ind. 55, 38 N. E. 406.

[c] (App. 1895)

The different sections of Rev. St. 1894, §§ 6054, 6060, 6062 (Rev. St. 1881, §§ 5115, 5117, 5119), relating to contracts of suretyship by married women, must be construed together, and the plain intent of the Legislature was to prevent every contract of suretyship in any form whatever, whether it operated on real or personal property of a married woman.—*Goff v. Hankins*, 39 N. E. 294, 11 Ind. App. 456.

Whenever the result of the transaction is such as to impose upon the wife's property a liability to answer for the debt of another, she must be regarded as a surety and entitled to the protection of the statute, whether she be a party to any written contract or not.—*Id.*

[d] (Sup. 1897)

A wife is not estopped to assert that notes secured by mortgage on her separate real estate were executed by her as surety, and hence void, by the fact that they were payable in bank, and have passed to innocent purchasers.—*Leschen v. Guy*, 48 N. E. 344, 149 Ind. 17.

[e] (Sup. 1904)

By deceit, a married woman may estop herself from denying that she is a principal in a loan to pay a suretyship debt.—*Field v. Campbell*, 164 Ind. 389, 72 N. E. 260, 108 Am. St. Rep. 301.

[f] (App. 1906)

Money borrowed by a husband and wife, who constitute a trading partnership, for payment of an antecedent note, due from the firm, but signed by the husband alone, may be recovered from either; the wife being a principal and not a surety thereon.—*Anderson v. Citi-*

*zens' Nat. Bank of Crawfordsville*, 38 Ind. App. 190, 76 N. E. 811.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 623-628.

**§ 159. — Debts of husband.**

Discharge of husband's debts as consideration for conveyance of property, see post, § 183. Mortgage or pledge to secure debt of husband, see post, § 171.

[a] (Sup. 1866)

To an action upon a note against husband and wife, the latter answered that she signed the note as surety for her husband, and that the consideration of the note did not move to her or to her separate estate. *Held*, that the answer was good.—*Coats v. McKee*, 23 Ind. 223.

[b] (Sup. 1885)

Whether a contract executed by a married woman is one of suretyship or not will be determined by a consideration of whether or not it was made by her, or on her behalf, and upon a consideration moving to her, or for the benefit of her personal estate.—*Vogel v. Lechner*, 102 Ind. 55, 1 N. E. 554.

That the husband and wife both appear on the face of the papers to be principals, or that the parties dealt on the basis that both were principals, is of no consequence. The wife has no power to deal as principal, if in fact she was surety.—*Id.*

[c] (Sup. 1892)

Where it appeared that a note executed by a husband and wife was made to secure a loan of money to the husband, which was used by him to pay his individual debts, and that it was borrowed for such use, as was known to the lender when he made the loan, a finding that the debt was that of the husband, and that the wife was surety, would not be disturbed on appeal.—*Wilson v. Logue*, 30 N. E. 1079, 131 Ind. 191, 31 Am. St. Rep. 426.

[d] (App. 1898)

A warranty in the wife's conveyance of her separate realty in discharge of her husband's debt is not a contract of suretyship, within *Burns' Rev. St. 1894, § 6964* (Rev. St. 1881, § 5119), avoiding her contracts of suretyship, the transaction having extinguished the debt.—*Nichol v. Hays*, 50 N. E. 763, 20 Ind. App. 369.

[e] (App. 1898)

Plaintiff executed a note as surety for defendant's husband, after which the husband died insolvent, and defendant at the request of plaintiff, signed a note with him in renewal of the husband's note. *Held*, that the wife did not thereby assume the husband's debt and become liable as principal on the renewal note.—*Sponhaur v. Malloy*, 52 N. E. 245, 21 Ind. App. 287.

[f] (Sup. 1899)

Where a husband and wife executed a note for a consideration moving only to the husband, the relation of suretyship is fixed by the arrangement and equities between the debtors, and is determined by inquiring who received the consideration of the contract, or who, according to the arrangements between the parties, ought to pay the debt.—*Lackey v. Boruff*, 53 N. E. 412, 152 Ind. 371.

Whether a married woman, signing a note with her husband, was principal or surety, will be determined, not from the form of the contract, nor from the basis on which the transaction was had, but from the inquiry, was the wife to receive, either in person or in benefit to her estate, or did she so receive, the consideration upon which the contract rests?—Id.

[g] (Sup. 1904)

One who was surety on a note of a husband, and who subsequently paid the same, was as to the wife, who, on a consideration moving to her estate, assumed her husband's indebtedness, also a surety, and the note which he paid thus fixed the rate of interest between himself and the wife, under *Burns' Ann. St. 1901, § 1233*, providing that a surety on a written instrument who pays the same may recover the rate of interest fixed by the instrument.—*Hamilton v. Hamilton*, 70 N. E. 535, 162 Ind. 430.

[h] (App. 1908)

A married woman cannot be estopped to deny that she is principal, where she executed a note to secure her husband's debt, if the payee knew the facts, and was not deceived by her acts and declarations, notwithstanding *Burns' Ann. St. 1901, § 6962*, which provides that a married woman shall be bound by an estoppel in pais.—*Indianapolis Brewing Co. v. Behnke*, 81 N. E. 119, 41 Ind. App. 288.

FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. HUS. & W. §§ 622, 629, 630.

### § 160. Debts incurred in separate business.

[a] (Sup. 1882)

As by *Rev. St. § 5122*, coverture is no bar to a married woman contracting debts in carrying on any business on her separate account, her real as well as personal property is liable therefor.—*Burk v. Platt*, 83 Ind. 283.

FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. HUS. & W. §§ 631-633.  
See, also, 21 Cyc. pp. 1466, 1467.

### § 162. Contracts for benefit of separate estate.

Contracts in general, see ante, § 152.

Improvements and materials furnished, see ante, § 150.

[a] (Sup. 1862)

Semble, that a married woman may, on general principles, bind her separate estate to pay debts contracted for the benefit thereof.—*Major v. Symmes*, 19 Ind. 117.

A married woman's contract for the services of counsel to protect her rights in real estate claimed by her as her separate property is binding, and the sum falling due from her under such contract may be made a charge on the land.—Id.

[b] (Sup. 1863)

A married woman, acquiring real estate under the Code of 1852, has power to use and charge the rents and profits by her contracts; at all events by such as relate to the land itself.—*Cox's Adm'r v. Wood*, 20 Ind. 54.

[c] (Sup. 1864)

The income of a wife's separate property is liable on her necessary contracts pertaining to such property.—*Moore v. McMillen*, 23 Ind. 78.

[d] (Sup. 1869)

A married woman with a separate estate, and who was in the habit of contracting with regard thereto, cannot charge such estate by written agreement to pay a certain sum to the obligee, if he would tell her the whereabouts of her husband, who had abandoned her; such contract not being for the benefit of her property.—*Smith v. Howe*, 31 Ind. 233.

[dd] (Sup. 1878)

The rule of the common law incapacitating a married woman from binding herself by an executory contract still prevails. Her contract for insurance on her separate property is not one for the betterment of her estate which can be enforced, and she is not liable on her note executed in consideration of a policy therefor.—*American Ins. Co. of Chicago v. Avery*, 60 Ind. 566.

[e] (Sup. 1881)

Prior to Acts 1879, p. 160, a married woman could not charge her separate estate by an agreement to pay an attorney for his services in defending her title thereto.—*Pierce v. Osman*, 79 Ind. 259.

[f] (Sup. 1883)

Prior to the married woman's act of 1879, a married woman was not liable on her contract to pay an attorney for his services in recovering her separate property.—*Stonecipher v. Watson*, 92 Ind. 17.

[g] (Sup. 1885)

Where the estate of a married woman is so incumbered that she is in danger of losing it, though such incumbrance is for the debt of another, if she and her husband contract a loan to relieve the estate from the incumbrance, the consideration inures to her benefit, and she is liable.—*Cupp v. Campbell*, 2 N. E. 565, 103 Ind. 213.

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[h] (Sup. 1936)

Where a wife procured a conveyance to herself of the husband's land, which was incumbered by mortgages, and she borrowed money to pay them off, and gave the lender a note and mortgage signed by herself and her husband, she was liable on the note, as the transaction represented thereby was for the benefit of her estate.—*Scott v. Collier*, 78 N. E. 184, 166 Ind. 644.

By Burns' Ann. St. 1901, § 6960, all the legal disabilities of married women to make contracts are abolished, with certain exceptions, one of which is, under section 6964, that she shall not enter into any contract of suretyship. *Held*, that where a wife procured a conveyance to herself of the husband's land, which was incumbered by mortgages, and she borrowed money to pay them off, and gave the lender a note and mortgage signed by herself and her husband, she was liable on the note, as the transaction represented thereby was for the benefit of her estate.—*Id.*

[i] (App. 1908)

Though a wife is prohibited by statute from selling, conveying, or mortgaging her separate real estate, unless joined by her husband, and from entering into a contract of suretyship, she may borrow money for the betterment of her separate estate, or for the liquidation of lien indebtedness thereon, and, where she borrows the money from her husband under an express contract to repay it, she is bound thereby.—*Townsend v. Huntzinger*, 83 N. E. 619, 41 Ind. App. 223.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. &amp; W. §§ 322,

596, 600, 614, 637-640.

See, also, 21 Cyc. p. 1468.

## § 163. Debts charged on separate estate.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. &amp; W. §§ 641-659.

See, also, 21 Cyc. pp. 1469-1475.

## § 164. — Intent to charge.

[a] The fact that credit for goods sold to a married woman is given to her on the faith of her separate property is not sufficient to create a charge against it. She must herself intend to contract with regard to her separate estate.—(Sup. 1869) *Kantrowitz v. Prather*, 31 Ind. 92, 99 Am. Dec. 587; (1873) *Hodson v. Davis*, 43 Ind. 258.

[b] (Sup. 1869)

To sustain a contract made by a married woman charging her separate property with the payment of a debt, it must appear that she intended to charge the separate estate, or that the contract claimed to be a charge was one reasonably adapted to better her separate estate.—*Kantrowitz v. Prather*, 31 Ind. 92, 99 Am. Dec. 587.

[c] (Sup. 1871)

An intent on the part of a married woman to charge her separate estate must be affirmatively shown, although she is doing business in her own name, with her own money, and by the consent of her husband, and the indebtedness is for goods purchased.—*Hasheagen v. Specker*, 36 Ind. 413.

[d] (Sup. 1873)

A note given by a married woman for goods sold her on the faith of her separate estate is not evidence of her intention to charge such estate with the payment of the debt.—*Hodson v. Davis*, 43 Ind. 258.

[e] (Sup. 1876)

To make the separate estate of a married woman liable for her indebtedness, the complaint must allege that she intended to, or did, charge, or agreed to charge, the indebtedness against her separate estate. The fact that she caused necessary and proper improvements to be made on her real estate does not raise the inference that she intended to create a charge upon it.—*Shannon v. Bartholomew*, 53 Ind. 54.

[f] (Sup. 1877)

In the absence of an express contract by a married woman to charge her separate property with a debt for materials used to improve the same, the whole contract made therefor is unenforceable against such estate.—*Dame v. Coffman*, 58 Ind. 345.

A complaint to enforce a lien against the separate real estate of a married woman for an alleged indebtedness contracted by her for its improvement must show that she intended and agreed to charge the indebtedness on her separate estate; and the fact that she contracted for such improvements and caused them to be placed on her separate lands will not raise an implied contract to charge her estate with the indebtedness.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. &amp; W. §§ 641-648.

See, also, 21 Cyc. pp. 1469-1472.

## § 166. — Joinder or assent of husband.

[a] (Sup. 1866)

Real estate was conveyed to a married woman, who executed a mortgage to secure unpaid purchase money; her husband not joining in the instrument. *Held*, that the mortgage was void, and that a sale under a judgment of foreclosure of the mortgage could not be sustained, although the conveyance had been taken in the name of the wife to defraud the husband's creditors, and plaintiff, to whom the mortgage had been assigned and who purchased the property at such sale, was one of such creditors.—*Abdil v. Abdil*, 26 Ind. 287.

[b] (Sup. 1882)

A married woman cannot divest herself of legal title to real estate by estoppel in pais or by any method, except by deed in which

her husband joins.—*Bumgardner v. Edwards*, 85 Ind. 117.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 652, 653.  
See, also, 21 Cyc. p. 1473.

§ 167. — Debts of husband.

[a] (Sup. 1879)

The taking of the note of a married woman for her husband's debt cannot operate as payment of such debt, though payable at a bank in the state, so as to be governed by the law merchant.—*Little v. American Button-Hole, Over-Seam Sewing-Mach. Co.*, 67 Ind. 67.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 654-659.  
See, also, 21 Cyc. pp. 1473-1475.

§ 168. Mortgage or pledge.

Effect of failure to acknowledge, see ACKNOWLEDGMENT, § 5.

Estoppel of husband entitled to curtesy to question jurisdiction to sell wife's land under mortgage in which he joined, see CURTESY, § 11.

Evidence, see post, § 232.

Of property conveyed to husband and wife, see ante, § 15.

Pleading, see post, § 229.

What law governs, see post, § 180.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 660-691.  
See, also, 21 Cyc. pp. 1475-1490.

§ 169. — In general.

Estoppel to assert invalidity of conveyance, see post, § 198.

Pleading, see post, § 229.

[a] (Sup. 1862)

The statute prohibiting married women from incumbering their real estate, except by joint deed with their husbands, relates only to such direct acts of conveyance and incumbrance as had previously required the husband's consent for their perfection.—*Major v. Symmes*, 19 Ind. 117.

[aa] (Sup. 1863)

The separate mortgage of a feme covert, to secure the payment of purchase money of real estate conveyed to her, is void and inadmissible in evidence.—*Haugh v. Blythe's Ex'rs*, 20 Ind. 24.

[b] (Sup. 1868)

Except that the husband must join in the instrument, the power of a feme covert to mortgage her lands is without limitation. It is not confined to the securing of existing notes and obligations.—*Philbrooks v. McEwen*, 29 Ind. 347.

In a mortgage on a wife's separate estate, executed by both husband and wife, a stipulation that it should stand as security for a note given in renewal of the original note was mere-

ly a description of the indebtedness which it was intended to secure, and was not a conveyance in the sense of the statute enacting that a married woman was not to be bound by any covenants in her deed.—*Id.*

[c] (Sup. 1872)

A married woman may bind herself by her mortgage, to keep the mortgaged premises free from legal taxes and charges.—*Jones v. Schulmeyer*, 39 Ind. 119.

[d] (Sup. 1878)

The word "deed," as used in 1 Rev. St. 1876, p. 550, § 5, disabling a wife from incumbering her lands, "except by deed, in which her husband shall join," means an instrument in writing, signed and delivered.—*American Ins. Co. of Chicago v. Avery*, 60 Ind. 566.

[e] (Sup. 1879)

Where a woman, appointed executrix by her former husband's will, devising lands in equal shares to herself and children to pay debts and support the devisees until the children arrive at majority, obtains an order from the court under which she mortgages the lands to pay the debts of the estate without the knowledge of her second husband, such mortgage does not bind her separate estate, although she is bound as executrix by the court's order.—*Wetherill v. Harris*, 67 Ind. 452.

[f] (Sup. 1880)

A written assignment of an insurance policy issued on the life of a man for his wife's benefit, executed by both husband and wife, to secure the payment of money loaned to the wife to pay for her real estate, is void.—*Godfrey v. Wilson*, 70 Ind. 50.

[g] (Sup. 1880)

Where one negotiated for the purchase of land, had it conveyed to his wife, and jointly with her executed notes for part of the purchase money, which notes were secured by a mortgage on the land executed by the wife only, the mortgage was void.—*Martin v. Cauble*, 72 Ind. 67.

Where a husband has the title to lands purchased by him conveyed to his wife, and joins with her in executing the purchase-money notes, but the wife alone gives a mortgage on the land to secure them, the vendor must first exhaust his remedy against the husband on his personal obligation for unpaid purchase money before selling the land under foreclosure of his vendor's lien.—*Id.*

[h] (Sup. 1882)

A paragraph of a complaint in an action to declare invalid a mortgage, made by a married woman, stating a note made by her and a mortgage by her and her husband of her separate real estate to secure a specified sum of money, on the ground that the same was void under the statute, is demurrable where, though the mortgage contains no express agreement to pay the money, it contains a sufficient description and identification of the debt secured.—*Gregory v. Van Voorst*, 85 Ind. 108.

Under Act March 25, 1879, forbidding a wife to incur her separate property acquired by descent, devise, or gift as a security for the debt of her husband or any other person, and providing that no conveyance or contract by a married woman for the sale of her lands or any interest therein other than leases for three years or less and mortgages for purchase money of such lands shall be valid unless her husband join therein, where a note given by a married woman was void and not given for any of the purposes authorized by the act, but a special finding showed that the credit was given to the wife, the money lent on the security of her separate real estate only, that there was no other contract or loan, and that her husband was permitted with her consent to receive the money, shows a mortgage for the wife's own debt.—Id.

A married woman, her husband joining, may mortgage her land acquired by descent, devise, or gift, to secure her debt for borrowed money, although the note is void as to her, not being given for any of the matters specified in the married women's act of 1879, and although she let her husband have the money; the act providing only that she shall not incur her property thus acquired as a security for her husband's debt.—Id.

[l] (Sup. 1883)

A married woman who executes a mortgage to secure the release of a valid lien cannot escape the consequences of her act by showing that the mortgage was executed to secure the debt of the husband. The benefit moves to her, for her property is relieved from a burden.—Fitzpatrick v. Papa, 89 Ind. 17.

[j] (Sup. 1884)

A married woman, who joins her husband in mortgaging his land and also her land for his debt, is not estopped from insisting that his land shall be exhausted before hers.—Trentman v. Eldridge, 98 Ind. 525.

[k] (Sup. 1885)

Where a married woman executed a mortgage on her land jointly with her husband, she would be bound as a principal only to the extent that the consideration was received by her or inured to her benefit, or the benefit of her estate, and as a surety to the extent that the consideration was received by her husband or any other person, or that it went to pay a debt or liability for which neither she nor her property was bound.—Vogel v. Lechner, 1 N. E. 554, 102 Ind. 55.

Where a married woman executes with her husband a joint note and mortgage on her private property to remove a prior incumbrance thereon, she will not bind her property to the extent of any money applied to the use of her husband, as she will be regarded as his surety, within Rev. St. 1881, § 5119, forbidding contracts of suretyship.—Id.

Where a married woman executes with her husband a joint note and mortgage on her private property to remove a prior incumbrance thereon, she will bind her property to the extent of the money so used, though the balance is applied for the use of the husband, so that as to it she becomes his surety in violation of Rev. St. 1881, § 5119.—Id.

[i] (Sup. 1886)

To hold a married woman as principal upon a note and mortgage signed by her jointly with her husband, it must appear that the debt was made by her for the benefit of herself or her property, and a recital in a mortgage that she is principal will not make her such, for a married woman cannot, by her own act, enlarge her legal capacity to convey or bind her separate estate.—Orr v. White, 106 Ind. 341, 6 N. E. 909.

[m] (Sup. 1886)

Where it unequivocally appears that the wife contracted and received the exclusive benefit of a loan except as it is affected by the statute of limitations, a mortgage given to secure a debt so contracted has the same force and effect as a security, whether it contains an express promise to pay written thereon or not.—Jouchert v. Johnson, 9 N. E. 413, 108 Ind. 436.

[n] (Sup. 1888)

The representations of a married woman as to the fact that she was the purchaser of personal property, and that a note and mortgage were executed to pay for the property thus purchased by her, would estop her from denying the truth of those facts.—Lane v. Schlemmer, 15 N. E. 454, 114 Ind. 296, 5 Am. St. Rep. 621.

So where a married woman executes a negotiable note for the price of property, secured by mortgage on her real estate, and gives to the payee an affidavit that the note and mortgage are executed for the property purchased by her, she is estopped, as against an innocent purchaser for value of the note, relying on the representations in the affidavit, to bring suit to cancel the mortgage and quiet her title to the land, on the grounds that the note was executed as surety of her husband, and that the affidavit was obtained by the fraud and collusion of the husband and payee of the note.—Id.

[o] (Sup. 1888)

Where land mortgaged by a husband and wife had been acquired by the wife as a gift from her husband, and the money borrowed on the mortgage had been used in paying off a former purchase-money mortgage on the land, the mortgage should be enforced against the land to the extent that the borrowed money was thus applied.—Noland v. State ex rel. Wasson, 115 Ind. 529, 18 N. E. 26.

[p] (Sup. 1889)

Where a woman, supposing that her husband, who had been absent and unheard of for

more than seven years, was dead, remarried, and joined with the second husband in a mortgage of her realty, and the first husband afterwards returned, the mortgage was void; 1 Rev. St. 1876, p. 550, declaring that a married woman has no power to incumber her realty, except by deed in which her husband joins.—Cook v. Walling, 117 Ind. 9, 19 N. E. 532, 2 L. R. A. 769, 10 Am. St. Rep. 17.

A married woman, being wholly without power to incumber her land, except by deed in which her husband joins, is not estopped from alleging the invalidity of a mortgage given by her, and joined in by one supposed to be her husband, and with whom she was cohabiting.—Id.

[q] (Sup. 1890)

A mortgage properly executed by a married woman on her separate real estate is a valid and binding security, unless it constitutes a contract of suretyship within the inhibition of Rev. St. 1881, § 5119.—Johnson v. Jouchert, 24 N. E. 580, 124 Ind. 105, 8 L. R. A. 795.

Where a husband and wife joined in a mortgage of her land to secure a loan, the proceeds of which were partially used to purchase other lands for her, the mortgage was valid as to the amount so used, with interest.—Id.

[r] (Sup. 1890)

Notwithstanding a statute disabling a married woman from binding her separate real estate by a contract of suretyship, a mortgage thereof, executed to secure the repayment of money borrowed by the wife, or by the husband and wife, or by either of them, for the purpose of discharging liens on such separate property, is a valid security.—Cochran v. Benton, 126 Ind. 58, 25 N. E. 870.

[rr] (Sup. 1893)

Where a married woman borrows money of the school fund, and gives a mortgage on her separate property, and complies with all the statutory requirements necessary to procure such loan, she cannot, in an action by the state to foreclose the mortgage, set up as a defense the fact that the county auditor, by whom, under the law, the loan was made, applied the money to the payment of her husband's debts, for part of which such auditor was surety.—Lloyd v. State ex rel. Banta, 134 Ind. 506, 34 N. E. 311.

[s] (Sup. 1893)

Where a married woman makes application in her own name for a loan from the school fund, and, joined by her husband, gives the statutory note and mortgage on her separate estate to secure the loan, and is paid the proceeds of the loan, she cannot, in an action by the state to foreclose the mortgage, set up as a defense that she signed the note and mortgage merely as surety for her husband.—State ex rel. Morris v. Frazier, 34 N. E. 636, 134 Ind. 648.

[ss] (Sup. 1898)

Where a husband and wife made affidavit that they were owners in fee simple by entirety of lands which they desired to mortgage, and that the money to be borrowed was to be used to pay off an incumbrance on such land, and to purchase other land to be held by entirety, which was relied on by the person who loaned the money and took the mortgage, and part of the money so obtained was used to pay off an incumbrance for which the wife was jointly liable, and the remainder was by check made payable to and indorsed by both husband and wife, the wife is estopped from claiming that the mortgage was to secure money to pay her husband's debts, and therefore void as to her as a contract of suretyship; nor is the wife benefited by the alleged fact that she and her husband had a secret understanding that the money to be borrowed was not to be used as agreed to in the affidavit which they had sworn to, and that such money was actually used in violation of such affidavit.—Magel v. Milligan, 50 N. E. 564, 150 Ind. 582, 65 Am. St. Rep. 382.

[t] (Sup. 1898)

A married woman, who joins with her husband in a mortgage of land which by unrecorded deed he had conveyed to her, having joined with him in leading the mortgagee to suppose it was still his property, is estopped to assert against the mortgagee, after he has acted to his disadvantage on the supposition, the statute relieving a married woman from liability on a contract of suretyship.—Galvin v. Britton, 49 N. E. 1064, 151 Ind. 1.

[u] (Sup. 1898)

Where a debt secured by a mortgage by husband and wife was \$700, part of which consisted of the husband's note, on which the mortgagee was security, and part was for medical attendance in the husband's family, and \$200 was the amount of a prior lien on the wife's property, the remainder being unaccounted for, a decree against the wife for the full amount was erroneous.—Pritchett v. McGaughy, 52 N. E. 397, 151 Ind. 638.

[v] (App. 1901)

A mortgage on the wife's separate property, executed to secure the repayment of money borrowed to discharge a lien thereon, is valid.—Till v. Collier, 61 N. E. 203, 27 Ind. App. 333.

Where a married woman executed a mortgage to secure the repayment of money borrowed to discharge a lien on her separate property, to which coverture might have been a defense, but which she treated as valid, she was not entitled, in a suit to foreclose, to set up coverture to show that the first lien was in fact invalid, and the consideration for the second mortgage therefore bad.—Id.

[w] (App. 1902)

Where a husband joined with his wife in a mortgage of her land, by which he expressly agreed to pay the money thereby secured, and was given notice of the proceeding to sell the land to pay this debt, with others, after his wife's death intestate, he is precluded from afterwards claiming in partition that the probate court had no jurisdiction to sell all the land thus mortgaged, though *Burns' Rev. St. 1894, § 2642*, provides that if a wife die testate or intestate, leaving a widower, one-third of her real estate shall descend to him, subject, however, to its proportion of the debts of the wife contracted before marriage.—*Pearson v. Kepner*, 63 N. E. 38, 29 Ind. App. 92.

[x] (Sup. 1904)

Where a married woman executes a mortgage on her property, she acting as a guarantor of a debt previously incurred by another, she cannot then legally charge her estate by borrowing money to relieve her property of the mortgage; *Burns' Ann. St. 1901, § 6964*, making a married woman's contract of suretyship void.—*Field v. Campbell*, 72 N. E. 260, 164 Ind. 389, 108 Am. St. Rep. 301.

[y] (Sup. 1906)

By the express provisions of *Burns' Ann. St. 1901, § 6962*, a married woman is prohibited from mortgaging her separate estate except by an instrument in which her husband joins.—*Starkey v. Starkey*, 76 N. E. 876, 166 Ind. 140.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 660-670, 702.

See, also, 21 Cyc. pp. 1475-1483.

### § 171. — Debts of husband.

Burden of proof to show suretyship for debts of husband, see post, § 232.

Cancellation in equity, see CANCELLATION OF INSTRUMENTS, § 39.

Estoppel to assert invalidity of conveyance, see post, § 198.

Evidence, see post, § 232.

Findings, see post, § 235.

Jurisdiction of action to cancel note and mortgage as dependent on situs of property, see COURTS, § 18.

Pleading, see post, § 229.

Verdict, see post, § 235.

[a] A married woman may mortgage or convey her separate estate to secure a debt of her husband, if the latter joins in the execution of the mortgage deed.—(Sup. 1864) *Hubble v. Wright*, 23 Ind. 322; (1865) *Ellis v. Kenyon*, 25 Ind. 134.

[b] (Sup. 1877)

Where a creditor prepared a note and mortgage, which he sent to the debtor in order to secure the signature of his wife, and the debtor falsely represented to the wife that the consideration of the instruments was merchandise

to be shipped to her for her own use, the creditor, having made the husband his agent, was bound by his representations; and, the merchandise not being sent, there was a failure of consideration for the note and mortgage.—*Haskitt v. Elliott*, 58 Ind. 493.

[c] Under 1 Rev. St. p. 550, limiting a married woman's power to incumber her lands to deeds in which her husband joins, she may, with him, execute a valid mortgage on her lands to secure his debt, or a debt contracted by her during coverture, where, by a clause in the mortgage or otherwise, he joins with her in promising to pay the debt.—(Sup. 1878) *Layman v. Shultz*, 60 Ind. 541; (1882) *Sperry v. Dickinson*, 82 Ind. 132.

[d] (Sup. 1880)

The owner of land, together with his wife, executed a mortgage thereon; and his equity was subsequently sold on execution, and a partition made, whereby the wife, who was a second wife and had no issue, received one-third of the land for her life. *Held*, that the mortgage must be first satisfied out of the other two-thirds.—*Medsker v. Parker*, 70 Ind. 509.

[e] (Sup. 1883)

A suit against a wife to foreclose a mortgage on her lands is not defeated by proof that the mortgage was given solely to secure her husband's debt.—*Herron v. Herron*, 91 Ind. 278.

[f] (Sup. 1884)

Act March 25, 1879, depriving a married woman of all power "to mortgage, or in any manner incumber, her separate property acquired by descent, devise, or gift," does not deprive her of the right existing before said act to mortgage or incumber her separate property acquired by contract or purchase.—*Frazer v. Clifford*, 94 Ind. 482.

[g] Rev. St. § 5119, declares that "a married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner; and such contract as to her shall be void." *Held*, that she cannot bind her separate estate by a mortgage executed by her and her husband to secure payment of her husband's debt.—(Sup. 1884) *Allen v. Davis*, 99 Ind. 216; (1885) *Brown v. Will*, 103 Ind. 71, 2 N. E. 283; (1886) *Engler v. Acker*, 106 Ind. 223, 6 N. E. 342; (1887) *Swank v. Hufnagle*, 111 Ind. 453, 12 N. E. 303, 13 N. E. 105.

[h] Under Rev. St. 1881, § 5119, making all contracts of suretyship by a married woman void, a mortgage executed by husband and wife on her land to secure an individual debt of the husband was void.—(Sup. 1884) *Dodge v. Kinsy*, 101 Ind. 102; (1885) *Allen v. Davis*, Id. 187.

[i] (Sup. 1886)

While a wife who joins her husband in mortgaging his real estate has a right to an order directing that his two-thirds of the lands be first sold to satisfy the debt, her contract

is not one of suretyship, and is not void under the statute (Rev. St. 1881, § 5119).—*Oupp v. Campbell*, 103 Ind. 213, 2 N. E. 565.

Where a wife joins in a mortgage on her separate real estate to pay her husband's debt, or to remove an incumbrance which she had no power to make, and which exposed her land to no peril, she is not liable on such mortgage; the statute (Rev. St. 1881, § 5119) making her contract void.—*Id.*

[H] (Sup. 1886)

Although, in 1863, a married woman might mortgage her separate property for the debt of a third person, yet there must have been some consideration therefor, and the mere fact that the mortgage was to secure her husband's debt already incurred would not be sufficient without other consideration.—*Bridges v. Blake*, 106 Ind. 332, 6 N. E. 833.

[J] (Sup. 1886)

Where a married woman is induced to sign a note and mortgage, apparently as principal, in order that her husband may obtain a loan, and the lender pays the money to her with the understanding that she shall give it to her husband, she is surety and not principal.—*Orr v. White*, 106 Ind. 341, 6 N. E. 909.

Where a wife sells inherited land, land purchased with the proceeds is not "property acquired by descent" which, under Act 1879, she is not permitted to mortgage as security for the debt or liability of her husband.—*Id.*

Under the act of 1879, a married woman was liable on a note and mortgage on land, to enable her husband to obtain money, provided the land so mortgaged was not acquired by descent, devise, or gift.—*Id.*

[J] (Sup. 1886)

A married woman, who pledges her separate property by mortgage or otherwise to secure the debt of her husband, occupies the position of a surety.—*Keller v. Orr*, 106 Ind. 406, 7 N. E. 195.

[k] (Sup. 1886)

Where one in good faith, and without notice, advances money on a mortgage executed by a married woman and her husband, on the faith of the representations of the mortgagors that the money is for the sole benefit of the wife, he is not affected by a secret agreement between the husband and the wife that the money should be used by the husband in his business, and therefore void as one of suretyship for the husband, which is especially excepted from the effect of the married women's act of 1881, authorizing married women to contract.—*Ward v. Berkshire Life Ins. Co.*, 108 Ind. 301, 9 N. E. 361.

[kk] (Sup. 1887)

Under the statutes in force in 1875, a wife might mortgage her separate property for her

husband's debt, and a mortgage so made was not rendered invalid by the change in the statute prohibiting the wife from becoming surety, but she has, in such case, the same rights as surety as if she were sole, and may be released by a binding contract for extension of time made between her husband and the creditor without her consent.—*Post v. Losey*, 111 Ind. 74, 12 N. E. 121, 60 Am. St. Rep. 677.

A married woman joined her husband in the execution of a note as surety, and to secure it executed a mortgage on her separate property in the year 1875, at which time under the statutes such a mortgage was valid. After the husband's subsequent discharge in bankruptcy, the creditor with knowledge of all the facts agreed to extend, for a definite period, the time of payment of the note and to reduce the rate of interest, in consideration whereof the husband agreed to pay the debt. *Held*, that this agreement being made without the wife's consent and indorsed on the back of the note, constituted such an alteration of the contract as released the wife's property from liability.—*Id.*

In order that an extension of time of payment may release a surety, it is essential that the payee shall have knowledge of the suretyship; but when a person takes a mortgage on the separate property of a married woman, knowing her to be such, and that it is her separate property, he is bound to inquire as to the consideration, and, unless misled by the wife, he will be held to have acquired knowledge of the facts which prudent inquiry could have discovered.—*Id.*

[I] (Sup. 1887)

A mortgage executed by a married woman to secure her husband's debt, on land acquired by purchase, and not by descent, devise, or gift, was neither void nor voidable under Acts 1879, p. 160, providing that a married woman should not mortgage her separate property acquired by descent, devise, or gift, as security for the debt of any other person.—*Gardner v. Case*, 111 Ind. 494, 13 N. E. 36.

[II] (Sup. 1887)

Under Rev. St. 1881, § 5119, a mortgage by a married woman upon her separate real estate, or upon real estate owned by herself and husband by entireties, to secure her husband's debt, is voidable by her, and in the latter case as to her husband also, unless her conduct has been such as to work an equitable estoppel; and, in a suit to foreclose such a mortgage, an answer averring that the land, which they owned as tenants by entireties, was first conveyed to a trustee, and then to the husband, as part of the same transaction in which the mortgage was made, for the purpose of securing his antecedent debt, and thus avoiding the statute, of all of which plaintiff had knowledge, is good on demurrer.—*McCormick Harvesting Mach. Co. v. Scovell*, 111 Ind. 551, 13 N. E. 58.

[m] (Sup. 1889)

A married woman, in ejectment against her for her separate property, conveyed by her to plaintiff in satisfaction of a mortgage thereon to secure a debt of her husband, cannot show that she was ignorant of the law, and did not know that a mortgage executed by her on her separate property to secure a debt of her husband was not binding on her; it not being alleged that any false statements were made to her by the creditor, or that he knew she was ignorant of her legal rights.—*Wolfe v. McMillan*, 117 Ind. 587, 20 N. E. 509.

[mm] (Sup. 1889)

Where a husband and wife own an estate by the entirety, and join in a mortgage to secure the apparent obligation of both, and defend a suit to foreclose the same on the ground that the debt to secure which the mortgage was given was the debt of the husband, and that the wife received no part of the consideration for which the mortgage was executed, a mere recital in the findings of fact that the husband used the money "mainly in discharging his indebtedness upon which his wife was security," and that he "recognized all the debts paid with the moneys as his individual debts, upon which his said wife was only surety," is not sufficient to sustain a judgment that the mortgage was invalid.—*Security Co. v. Arbuckle*, 119 Ind. 69, 21 N. E. 469.

[n] (Sup. 1889)

A joint debt of husband and wife is a valid consideration for a joinder of the wife in a mortgage on land owned by herself and husband to secure it.—*Barger v. Hoover*, 120 Ind. 193, 21 N. E. 888.

[nn] (Sup. 1890)

Where a husband and wife joined in a mortgage of her land to secure a loan, the proceeds of which are partially used to purchase other lands for her and in part to secure a loan made to the husband and applied to his personal use, the mortgage, though valid, as to the portion of the proceeds used in purchasing other lands for the wife, is void as to the portion used for the benefit of the husband, under Rev. St. 1881, § 5119, inhibiting contracts of suretyship by married women.—*Johnson v. Jouchert*, 24 N. E. 580, 124 Ind. 105, 8 L. R. A. 795.

[o] (Sup. 1891)

Rev. St. 1881, §§ 5117, 5119, declare that a married woman shall not enter into any contract of suretyship, and that all such contracts shall, as to her, be void, but that she shall be bound by an estoppel in pais like any other person. A married woman made personal application for a loan, and gave as security a mortgage upon her separate property, in which her husband joined. She received the money, but at once handed it to him. The mortgagee testified that she had no knowledge of any understanding between wife and husband that the money was being borrowed for the latter.

*Held*, that the wife was estopped to deny the validity of the mortgage.—*Cummings v. Martin*, 128 Ind. 20, 27 N. E. 173.

[oo] (Sup. 1892)

Where a married woman executed a note and at the same time she and her husband mortgaged her separate property to secure payment, the fact that the husband and not the wife received the consideration conclusively established that she was merely a surety.—*Voreis v. Nussbaum*, 31 N. E. 70, 131 Ind. 267, 16 L. R. A. 45.

[ooo] (Sup. 1893)

On foreclosure of a mortgage given by a husband and wife to secure a debt of the husband, a claim by the wife that the land covered thereby was hers, to the knowledge of the mortgagee, is sustained by evidence of the wife and her husband and daughter that she so stated to the mortgagee when the mortgage was executed, and that the mortgagee knew that the title to the land had been in the wife previous to the giving of the mortgage, though the mortgagee denies that the wife ever made to him any claim to the property.—*Klein v. Gantner*, 135 Ind. 699, 35 N. E. 2.

[p] (Sup. 1894)

A married woman, joining with her husband in the execution of a school-fund mortgage to secure a loan to him, is not estopped to deny its validity as to her separate property included therein.—*Welch v. Fisk*, 139 Ind. 637, 33 N. E. 403.

[pp] (Sup. 1895)

A mortgage of the separate property of the wife, executed by her jointly with her husband, to secure the purchase price of goods, reciting that the grantors convey the land, and also the goods "which we have purchased," to secure notes given for the goods, and acknowledging that the grantors own the land equally as tenants in common, and not by entirety, will not bind the wife where the mortgage was procured from the wife after sale and delivery of the goods to the husband alone, who had no authority to act for his wife.—*Cole v. Temple*, 142 Ind. 498, 41 N. E. 942.

[q] (Sup. 1896)

Under Rev. St. 1894, § 6964, prohibiting married women from entering into contracts of suretyship, a mortgage by a wife of her separate property to secure a debt of her husband is void.—*Merchants' & Laborers' Bldg. Ass'n v. Scanlan*, 42 N. E. 1008, 144 Ind. 11.

[qq] (Sup. 1896)

Rev. St. 1894, § 6964 (Rev. St. 1881, § 5119), declares contracts of suretyship of married women void, and section 6972, Rev. St. 1894 (section 5127, Rev. St. 1881), provides that married women, in exercising their powers to contract, shall be bound by estoppel in pais like other persons. *Held*, that where a married woman complies with all the statutory requirements to obtain a loan from the school fund,

and joins with her husband in a mortgage of land held by them as tenants by entireties to secure it, and the auditor, without any objection from her, paid the money to her husband, she was estopped from claiming that the mortgage was given to secure money to pay her husband's debts, and therefore void as a contract of suretyship.—*Trimble v. State ex rel. Stephens*, 145 Ind. 154, 44 N. E. 260, 57 Am. St. Rep. 163.

[qqq] (Sup. 1897)

A husband and wife mortgaged to a building association real estate owned by them as tenants by entireties. The husband was a member of the association, holding two shares of stock, and had received an advance of \$1,000, the par value of the shares. The only promise to pay recited in the mortgage was that of the husband, to pay his weekly dues, interest, premium, fines, and assessments, and upon default in payment the dues, etc., should be considered due, and the mortgage foreclosed. *Held*, that as the mortgage was not given to secure the repayment of money borrowed, it did not bind the wife as principal, though the money was used for the improvement of the real estate.—*Harrison Building & Deposit Co. v. Lackey*, 48 N. E. 254, 149 Ind. 10.

The mortgage as to the wife was a contract of suretyship, and therefore void, under Rev. St. 1894, § 6964.—*Id.*

[r] (Sup. 1897)

A conclusion of law that a mortgage to a corporation on a wife's separate estate, and the notes secured thereby, were executed by her as surety for her husband, and were therefore void, is sustained by findings that the sole consideration was the issuance of corporate stock by the mortgagee to the husband, and that the wife received none of the stock.—*Leschen v. Guy*, 48 N. E. 344, 149 Ind. 17.

[rr] (Sup. 1897)

Evidence that a husband and wife owning land by entireties were induced by a creditor of the husband to convey it to a third person, who reconveyed it to the husband alone; that the husband and wife then mortgaged it to secure the husband's debt; that there was no consideration for the first conveyance or for the reconveyance; that the deeds and the mortgage were executed at about the same time as parts of a continuous transaction; and that the wife did not intend to give absolute title to her husband,—shows that the wife became surety for the husband's debt, and that the transaction was a device to evade the statute making a wife's contracts of suretyship void.—*Grzesk v. Hibberd*, 48 N. E. 361, 149 Ind. 354.

[s] (Sup. 1898)

In an action for foreclosure of a mortgage, an answer averring that the note and mortgage were executed by a married woman, on her separate property, to secure antecedent debts of her husband, and for no other purpose or consideration, is a sufficient answer of

suretyship, so as to render the mortgage and note void as to such married woman.—*Boyd v. Radabaugh*, 50 N. E. 301, 150 Ind. 394.

Evidence that defendant, a married woman, gave a note and mortgage on her separate property, to secure a loan made payable to her by a check, which was to be used, with the knowledge of the mortgagee, to pay debts of the husband, is sufficient to sustain a finding that defendant was only a surety.—*Id.*

[ss] (App. 1901)

Under Acts 1879, Sp. Sess., p. 160, providing, "A married woman shall not mortgage \* \* \* her separate property acquired \* \* \* by gift as a security for the debt \* \* \* of her husband," she cannot be estopped to deny validity of such a mortgage.—*Bentley v. Goodwin*, 60 N. E. 735, 26 Ind. App. 689.

[t] (App. 1901)

Where a married woman executes a trust deed to secure the payment of her husband's debts, it is not void, but voidable, and the defense of coverture is lost when it is not set up before sale under the trust deed.—*Rogers v. Shewmaker*, 60 N. E. 462, 27 Ind. App. 631, 87 Am. St. Rep. 274.

Where a married woman conveys her separate property by deed of trust, the same to be sold and proceeds applied to her husband's debts, and the trust has been executed, a suit to recover the property, on the ground that the instrument was executed as security for her husband's debts after years of acquiescence, comes too late.—*Id.*

[tt] (App. 1901)

A mortgage by a married woman on land conveyed to her, executed to secure the sureties on the husband's notes for the purchase price, is valid in equity.—*Morgan v. Street*, 62 N. E. 99, 28 Ind. App. 131.

[u] (App. 1901)

A mortgage executed by a married woman on her separate estate, providing that the money secured thereby was loaned to her for her own use and business, apart from her husband, that neither her husband nor any other party derived any benefit therefrom, and that she was in no manner surety, does not estop her from showing that the contract was one of suretyship only, and hence void, as prohibited by Burns' Supp. 1897, § 6964 (*Horner's Rev. St. 1901*, § 5119), declaring that a married woman shall not enter into a contract of suretyship as indorser, guarantor, or in any other manner, and that such contracts shall be void.—*Beidenkoff v. Brazee*, 61 N. E. 954, 63 N. E. 577, 28 Ind. App. 646.

[uu] (Sup. 1902)

Where a note of a husband and wife is secured by a mortgage on realty held by them as tenants by entireties, there is no presumption that the consideration was not used for the benefit of such realty, or that she is surety on

the obligation, but the burden is on her to allege and prove such fact.—*Guy v. Liberezn*, 65 N. E. 186, 160 Ind. 524.

[v] (Sup. 1904)

A contract by which a wife received certain mill property, was to be saved harmless from a mortgage on property held by her, and was to have a portion of a certain mortgage debt of her husband paid, and in return was to deed certain property to the other party in the contract, and was also to allow a trustee to collect the profits of the mill property to pay certain debts of her husband, and, when she received a deed thereto, was to mortgage such property to the trustee, constituted an entire contract, and the consideration moving to her therein was sufficient to support the undertaking to mortgage the property to pay her husband's debt.—*Hamilton v. Hamilton*, 70 N. E. 535, 162 Ind. 430.

The promise of a wife, in a contract in which certain benefits moved to her, to mortgage property, which the contract provided was to be deeded to her, to pay her husband's debts, could be availed of and made the foundation of suit by a surety on one of her husband's debts who had paid the same.—*Id.*

A wife, who, on a consideration moving to her estate, agrees to execute with her husband a mortgage on her property to pay her husband's debts, is not a surety, but a principal.—*Id.*

[vv] (Sup. 1904)

In a suit to foreclose a mortgage, the burden was on defendant to prove coverture of a mortgagor, and execution of the mortgage by her as surety, and knowledge of such facts by the mortgagee.—*Webb v. John Hancock Mut. Life Ins. Co.*, 69 N. E. 1006, 162 Ind. 616, 66 L. R. A. 632.

A husband and wife, owning land in entirety, to enable the husband to negotiate a loan for his own benefit, conveyed the land to a third person, who reconveyed to the husband. The deeds were absolute in form. It was agreed between the husband and wife that, when the loan had been made, the land should be reconveyed. The loan was negotiated, the lender knowing nothing of such agreement, or the condition of the prior title, further than was disclosed by the abstract. *Burns' Rev. St. 1901*, § 6964, provides that any contract of suretyship of a married woman shall be void. *Held*, that the lender had a right to rely on the apparent title of the husband to the property, and was not put on inquiry as to any secret agreement between him and his wife by the fact that the transfer of her interest to him was just before the loan was made, or that the consideration stated in the deed was nominal.—*Id.*

[w] (Sup. 1904)

In an action on a note and to foreclose a mortgage given by a married woman, evidence

considered, and *held* to show that the lender was guilty of such want of care in attempting to ascertain whether the woman was acting in the transaction as a principal that the obligation, which was one of suretyship, could not be enforced against her; *Burns' Ann. St. 1901*, § 6964, making a married woman's contract of suretyship void.—*Field v. Campbell*, 72 N. E. 260, 164 Ind. 389, 108 Am. St. Rep. 301.

[ww] (App. 1904)

Notwithstanding *Burns' Ann. St. 1901*, § 6962, providing that a married woman shall be bound by an estoppel in pais like any other person, a married woman is entitled to cancellation of a note and mortgage of her property given by her to secure the debts of her husband, where the mortgagee knows that the wife is to receive no part of the consideration, and that the intent is to secure the debts of the husband, though the mortgage recites that the debt is hers, and she is required to sign an affidavit that the consideration is for her sole use, and also acknowledging herself estopped to claim otherwise than as recited in the affidavit.—*Ft. Wayne Trust Co. v. Sihler*, 72 N. E. 494, 34 Ind. App. 140.

[x] (App. 1905)

To estop a married woman from showing that she is surety on a note and mortgage executed by her and her husband, it must be shown: First, that there was misrepresentation or concealment; second, that such misrepresentation or concealment was made with knowledge of the facts; third, that the party to whom it was made was ignorant of the truth; fourth, that the misrepresentation or concealment was made with the intention that the other party should act upon it; and, fifth, that the other party did act upon it.—*Davis v. Neighbors*, 34 Ind. App. 441, 73 N. E. 151.

[xx] (App. 1906)

In a suit to cancel a deed, a paragraph alleging that plaintiff's husband was indebted on a note on which plaintiff and defendant's mother were sureties, and that to indemnify them plaintiff mortgaged the land to them and afterwards made the deed as further indemnity, and that the deed was in fact a mortgage and void by reason of plaintiff's being a married woman, stated a cause of action.—*Warner v. Jennings*, 76 N. E. 1013, 37 Ind. App. 394.

[y] (App. 1906)

Where special findings show that a husband and wife executed their note and a chattel mortgage on certain articles to secure the same, and that the wife was surety only, and the conclusions of law were against the husband and in her favor, the decree was correct.—*Rudisell v. Jennings*, 38 Ind. App. 403, 77 N. E. 959, 78 N. E. 263.

[yy] (App. 1907)

Defendant conveyed certain of her real estate through an intermediary to her husband, to enable him to mortgage it. The application

for the loan was made by the husband to plaintiff's secretary, who had knowledge of the facts concerning the transfer and its purpose. Part of the loan, secured by a mortgage on the land, was used for the wife's benefit, and the balance for a debt of the husband, which was but a moral obligation of the wife. *Held*, that she was entitled to repudiate the mortgage, except so far as it secured the part of the loan used for her benefit.—*Wredman v. Falls City Savings & Loan Ass'n*, 82 N. E. 476, 40 Ind. App. 478.

[x] (App. 1908)

Where a married woman, to secure an extension of her husband's indebtedness upon an open account, gave an affidavit that she had received the proceeds of goods for which the indebtedness was incurred, and that she considered it her debt, and also gave a note and a mortgage upon her separate property, but the creditor knew all the facts, she is not estopped to deny that she was the principal.—*Indianapolis Brewing Co. v. Behnke*, 81 N. E. 119, 41 Ind. App. 288.

Where a husband is indebted in the form of an open account, and his wife executes a mortgage on her separate real estate to secure the payment of the debt, she is a surety only.—*Id.*

Where a married woman executes a note and mortgage on her separate real estate to secure her husband's indebtedness, the form of the contract will not determine whether she was principal or surety.—*Id.*

The fact that she regarded the debt her own would not change the character of the obligation.—*Id.*

[xx] (App. 1909)

Where a wife joined with her husband in a mortgage on her separate real estate to secure the husband's debt, the wife and her property were but sureties whether the husband signed the note secured or not, so that on the wife's death the husband's interest in the property as between him and the children was chargeable therewith.—*Kinney v. Heuring*, 87 N. E. 1053, rehearing denied 88 N. E. 865.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 671-683, 721; 35 CENT. DIG. MTG. § 864.  
See, also, 21 Cyc. pp. 1483-1488.

### § 172. — Debts of third persons.

[a] (Sup. 1904)

*Burns' Rev. St.* 1901, § 6964 (*Horner's Rev. St.* 1901, § 5119), forbidding married women to enter into contracts of suretyship, prohibits married women from either personally obligating themselves as sureties for another, or mortgaging their separate property as security for the debt of another.—*Webb v. John Hancock Mut. Life Ins. Co.*, 69 N. E. 1006, 162 Ind. 616, 66 L. R. A. 632.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 684-691.  
See, also, 21 Cyc. p. 1490.

### § 175. Enforcement.

Proceedings in actions, see post, §§ 203-244.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 701-710.  
See, also, 21 Cyc. pp. 1492-1496.

### § 176. — In general.

[a] (Sup. 1863)

The income or proceeds arising from the separate real estate of a married woman can only be subjected to the payment of her debts, contracted during coverture, by a proceeding in equity for that particular purpose, and not by any ordinary common-law action and judgment against her.—*Cummings v. Sharpe*, 21 Ind. 331.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 701-708.  
See, also, 21 Cyc. pp. 1492-1495.

### (D) CONVEYANCES AND CONTRACTS TO CONVEY.

Acknowledgment of married woman, see ACKNOWLEDGMENT, §§ 25, 37.

Construction and operation of findings of court as to conveyances and contracts to convey, see TRIAL, § 404.

Conveyance by husband as agent of wife, see ante, § 138.

Conveyances between husband and wife, see ante, §§ 46-48, 52.

Conveyances by husband and wife in general, see ante, § 15.

Conveyances by married women in general, see ante, §§ 69-71, 73, 74, 76.

Conveyances of estates by entirety, see ante, § 14.

Incapacity of wife to convey, as affecting right to mechanic's lien, see MECHANICS' LIENS, § 68.

### § 180. What law governs.

Disabilities and privileges of married women in general, see ante, § 56.

Mutual rights, duties and liabilities, see ante, § 2.

[a] (Sup. 1887)

Under 1 Rev. St. 1876, § 550 (*Rev. St.* 1881, § 5117), where a husband does not join in the execution in Michigan of a mortgage by his wife the mortgage as to her separate land in Indiana, is void.—*Otis v. Gregory*, 13 N. E. 39, 111 Ind. 504.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 712.  
See, also, 21 Cyc. p. 1490.

**§ 183. Consideration.**

[a] (Sup. 1866)

The promise of the wife to convey her interest in land at a future time pursuant to a contract to which her husband was a party and under which the husband and others conveyed their interest in the real estate in question, but to which she was not a party, is without consideration and not binding on her, even though the grantee went into possession under the deed from the other parties and her promise to convey.—*Doran v. Shaw*, 26 Ind. 284.

[b] (Sup. 1882)

Acts 1879, p. 160, prohibiting a married woman from mortgaging or incumbering her real estate acquired by devise, descent, or gift as security for her husband's debts, does not prevent her from conveying her real estate in payment of such debts.—*Kocher v. Christian*, 88 Ind. 81.

[c] (App. 1898)

A discharge of her husband's debt is a sufficient consideration to support the wife's covenant of warranty in the conveyance of her separate real estate, made for that purpose.—*Nichol v. Hays*, 50 N. E. 768, 20 Ind. App. 369.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. HUS. &amp; W. § 721.

See, also, 21 Cyc. p. 1503.

**§ 184. Consent of husband.**

Consent of husband to contract to convey, see post, § 187.

Joinder of husband in conveyance, see post, § 193.

To mortgages or pledges, see ante, §§ 169, 171.

[a] (Sup. 1859)

A wife may, with the consent of her husband, convey her separate real property.—*Johnson v. Rockwell*, 12 Ind. 76.

[b] (Sup. 1860)

A married woman cannot transfer her separate personal property without the consent of her husband.—*Collier v. Connelly*, 15 Ind. 141.

[c] (Sup. 1904)

A wife may, without the consent of her husband, make leases of her land for periods not longer than three years; such a lease not being an incumbrance or conveyance, within the statute which denies her power to incumber or convey her lands save by a deed in which her husband shall join.—*Shipley v. Smith*, 70 N. E. 803, 162 Ind. 526.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. HUS. &amp; W. §§ 716-718.

See, also, 21 Cyc. p. 1500.

**§ 186. Contracts to convey.**

Between husband and wife, see ante, § 46.

Estoppel to assert invalidity, see post, § 198.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. HUS. &amp; W. §§ 722-724.

See, also, 21 Cyc. pp. 1503, 1504.

**§ 187. — Requisites and validity.**

[a] (App. 1901)

Contract for sale of premises of married woman, consisting only of letters, in none of which her husband joined, is not enforceable.—*Bartlett v. Williams*, 60 N. E. 715, 27 Ind. App. 637.

[b] (App. 1903)

A married woman having, under Burns' Rev. St. 1901, § 6961, no power to incumber and convey her lands, except by deed in which her husband joins, her individual contract to sell, and to execute a bond for a deed, is void, and furnishes no consideration for notes for the purchase money.—*Shirk v. Stafford*, 67 N. E. 542, 31 Ind. App. 247.

[c] (App. 1905)

A married woman's contract, executed through a broker to convey her separate real estate, was sufficient to bind the proposing purchaser, though she had no power to convey the land without her husband joining in the conveyance.—*Isphording v. Wolfe*, 75 N. E. 598, 36 Ind. App. 250.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. HUS. &amp; W. §§ 722, 723.

See, also, 21 Cyc. pp. 1503, 1504.

**§ 189. — Enforcement.**

Evidence in actions to enforce, see post, § 232.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. HUS. &amp; W. § 724.

See, also, 21 Cyc. p. 1504.

**§ 190. Conveyances in general.**

Between husband and wife, see ante, §§ 47, 48.

By married infant, see INFANTS, § 30.

Conveyances by attorney in fact, see post, § 196.

Estoppel to assert invalidity, see post, § 198.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. HUS. &amp; W. §§ 716-718, 725-730.

See, also, 21 Cyc. pp. 1505, 1506; note, 99 Am. Dec. 602.

**§ 193. — Joinder of husband.**

Consent of husband, see ante, § 184.

In contract to convey, see ante, § 187.

In mortgages or pledges, see ante, §§ 169, 171.

Joinder by wife in conveyance of husband's land, see ante, § 15.

Joinder in conveyances by married women in general, see ante, § 70.

Joinder of husband to convey wife's interest in property of both, see ante, § 15.

[a] (Sup. 1860)

It is not necessary, in order to evidence the husband's consent to the transfer of a

promissory note, the separate property of his wife, that he should join in the indorsement; but such consent may be shown by other evidence.—*Collier v. Connelly*, 15 Ind. 141.

[b] (Sup. 1863)

A married woman, purchasing and taking the title of land since Code 1852, becomes vested with the fee simple, but without power to alienate or encumber it, except by conveyance made jointly with her husband.—*Cox's Adm'r v. Wood*, 20 Ind. 54.

[c] (Sup. 1865)

Under 1 Gav. & H. p. 258, § 6, providing that the joint deed of the husband and wife shall be sufficient to convey and pass the lands of the wife, the separate deeds executed by husband and wife, respectively, with the husband's oral consent, do not together constitute a fulfillment of the requirements of the statute, and no equity is thereby created which the courts can recognize as sufficient to protect a possession, as the right in equity cannot arise out of an instrument which binds nobody.—*Baxter v. Bodkin*, 25 Ind. 172.

[d] (Sup. 1865)

Husband and wife cannot, by separate deeds, convey the lands of the wife. Such deeds do not create an equity sufficient to protect the possession of a purchaser.—*Id.*

[e] (Sup. 1871)

H., a married woman, without her husband joining, made a deed for certain real estate to S., who was also a married woman, and her infant son. Afterwards S. and her husband conveyed the same real estate to J. *Held*, that S. and her husband had no title or equity to the premises, and hence nothing passed by their deed to J.—*Shumaker v. Johnson*, 35 Ind. 33.

[f] A married woman cannot convey her separate real estate, unless her husband joins in the deed.—(Sup. 1871) *Shumaker v. Johnson*, 35 Ind. 33; (1875) *Scranton v. Stewart*, 52 Ind. 68.

[g] (Sup. 1872)

The separate deed of a married woman is void, and passes no title to her lands.—*Mattox v. Hightshue*, 39 Ind. 95.

[h] (Sup. 1881)

Prior to Act March 25, 1879, the consent of the husband to the transfer of her personal property by a married woman was necessary, but such transfer could be made otherwise than by deed in which the husband joined; it not being material how his consent was evidenced, provided only it was obtained.—*Paulman v. Claycomb*, 75 Ind. 64.

[i] (App. 1895)

A married woman having, by provision of Rev. St. 1881, §§ 5116, 5117 (Rev. St. 1894, §§ 6061, 6062), no power to encumber or convey her real estate, except her husband join in

a deed with her, cannot by herself give rights to oil and gas in her land, with privilege to dig wells, lay pipes, etc., for purposes of removing it.—*Columbian Oil Co. v. Blake*, 13 Ind. App. 680, 42 N. E. 234.

[j] (Sup. 1898)

A lease of her lands by a married woman, simply for the purpose of giving the lessee the right to prospect and operate for gas and oil, is not an "incumbrance or conveyance," as contemplated by Burns' Rev. St. 1894, § 6061 (*Horner's Rev. St. 1897, § 5116*); and hence her husband need not join in its execution.—*Heal v. Niagara Oil Co.*, 50 N. E. 482, 150 Ind. 483.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 716-718.  
See, also, note, 97 Am. St. Rep. 584.

§ 194. — Acknowledgement.

Defective acknowledgment, see ACKNOWLEDGMENT, § 5.

Effect of failure to acknowledge, see ACKNOWLEDGMENT, § 5.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 726; 1 CENT. DIG. ACK. §§ 19-21.

§ 195. — Construction and operation.

Of mortgage, see ante, §§ 169, 171.

[a] (Sup. 1859)

A wife had property, secured to her sole use by an antenuptial contract, held in trust, but with unlimited power of disposition. Part of it was, after marriage, invested in real estate conveyed to her in her own name. By indenture, to which she and her husband were of the one part, the land was conveyed. The indenture concluded, "And the said [wife] hereby relinquishes her dower in the premises." *Held*, that the land was her separate property, and that the indenture was a good conveyance by her; there being no evidence of fraud upon her rights, and it appearing that the price was paid to her husband by her direction.—*Johnson v. Rockwell*, 12 Ind. 76.

[b] (Sup. 1885)

A married woman is bound by her covenants of title in the conveyance of her separate property, under Rev. St. 1881, §§ 5117, 5118, enlarging the powers, rights, and liabilities of married women.—*Marsh v. Thompson*, 102 Ind. 272, 1 N. E. 630.

[c] (Sup. 1896)

Rev. St. 1894, § 6063, and Rev. St. 1881, § 5118, binds a married woman only by her covenants of title in conveyance of her separate property.—*Miller v. Miller*, 39 N. E. 547, 140 Ind. 174.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 333, 729.  
See, also, 21 Cyc. p. 1505.

### § 196. Contracts and conveyances by agents or attorneys.

[a] (Sup. 1843)

Under Rev. St. 1838, p. 313, authorizing a married woman to convey her property by joining with her husband in a deed acknowledged by the proper officer, after having been examined by him separate and apart from her husband, a married woman could not acknowledge a conveyance by an attorney in fact, as it gave no opportunity for such an examination.—*Dawson v. Shirley*, 6 Blackf. 531.

[b] (Sup. 1892)

Rev. St. 1881, § 5117, which declares that a wife shall not enter into any executory contract to sell, convey, or mortgage her land unless her husband join therein, necessarily means a written contract, since no other contract relating to real estate is valid and enforceable under the statute of frauds; and hence a parol contract for the sale of the wife's land, entered into by her husband as her agent, whose authority also rested in parol, is absolutely void.—*Percifield v. Black*, 132 Ind. 384, 31 N. E. 955.

[c] (Sup. 1899)

Where a power of attorney to sell and convey land of a wife is properly executed by the wife and husband, and does not prescribe the form or manner of the conveyance to be executed by the agent, a deed executed by the latter as agent and attorney of the wife and husband in pursuance of the power conveys the title of the wife, though the name of the husband is not inserted in and subscribed to the deed by the agent, and the separate deed of a married woman is void; the intent to fully execute the power being apparent, and the purchase money being paid to and retained by the husband and wife.—*Ellison v. Branstrator*, 54 N. E. 433, 153 Ind. 146.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 732.

See, also, 21 Cyc. p. 1506.

### § 198. Estoppel to assert invalidity.

Application of doctrine of estoppel in general, see ante, § 62.

Estoppel to assert invalidity of mortgage or pledge of separate property, see ante, §§ 169, 171.

Estoppel to claim property as separate property, see ante, § 129.

Estoppel to deny validity of contracts of suretyship, see ante, § 158.

What law governs, see ante, § 180.

[a] (Sup. 1872)

A deed of a married woman void under 1 Gav. & II. St. p. 258, providing that the husband shall join with the wife in conveyance of her separate real estate, and under 1 Gav. & H. St. p. 294, providing that a widow, having remarried while holding real estate by

virtue of a former marriage, shall not alienate such real estate, and that, in event of her death, it shall go to her children by the marriage by virtue of which it came to her, will not estop her from denying the right of a person to possession of her separate property under such deed, though the purchase price has not been repaid to him.—*Mattox v. Hightshue*, 39 Ind. 95.

[b] (Sup. 1882)

Under the law as it stood prior to 1881, a married woman could not contract for the sale of her land, nor, by her conduct, estop herself from asserting her title, even where her vendee took possession under the contract, paid part of the purchase money, and erected valuable permanent improvements on the land.—*Parks v. Barrowman*, 83 Ind. 561.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 733.

See, also, 21 Cyc. p. 1507; notes, 28 Am. Rep. 374; 49 Am. Rep. 87.

### § 200. Effect of termination of coverture.

[a] (Sup. 1878)

A widow may dispose of her separate property, even though it came to her by virtue of her marriage.—*Nesbitt v. Trindle*, 64 Ind. 183.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 736.

See, also, 21 Cyc. p. 1510.

### § 201. Avoidance.

Limitation of action by wife to disaffirm conveyance, see LIMITATION OF ACTIONS, § 73. Of mortgage or pledge of separate property, see ante, § 171.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 735.

See, also, 21 Cyc. p. 1509.

### § 202. Rights and liabilities of purchasers.

Evidence in action to enforce agreement to convey, see post, § 232.

Pleading in action to enforce covenant of title in conveyance of separate estate, see post, § 229.

[a] (App. 1896)

Under Rev. St. 1881, § 5118, married women are made liable on their covenants of warranty in conveyances of their separate real estate, and it is not necessary in a complaint against a married woman to enforce that liability to plead the statute.—*Dickey v. Kalfsbeck*, 50 N. E. 590, 20 Ind. App. 290.

[b] (App. 1903)

One who enters under the void contract of a married woman to sell her land is liable only

for rent.—*Shirk v. Stafford*, 67 N. E. 542, 31 Ind. App. 247.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. HUS. & W. § 737.

See, also, 21 Cyc. p. 1511.

**VI. ACTIONS.**

Abatement by death of wife of husband's right of action for loss of wife's services and society, see **ABATEMENT AND REVIVAL**, § 54. Action by wife against insane husband, see **INSANE PERSONS**, § 89.

Allegations as to separate property in action against wife to foreclose mechanic's lien, see **MECHANICS' LIENS**, § 271.

Change of venue, see **VENUE**, § 79.

Death of wife after judgment ground for abatement of action by her, see **ABATEMENT AND REVIVAL**, § 68.

Decree of foreclosure of mortgage in suit against husband and wife, see **MORTGAGES**, § 488.

For alienation of affections, see post, §§ 322-337.

For criminal conversation, see post, §§ 341-350.

For malpractice or negligence of physicians, see **PHYSICIANS AND SURGEONS**, § 18.

For separate maintenance, see post, §§ 285-299.

Husband and wife as parties plaintiff in action to quiet title, see **QUIETING TITLE**, § 30.

Joinder of causes of action as affected by parties, see **ACTION**, §§ 42, 52.

Marriage of female party to action ground for abatement, see **ABATEMENT AND REVIVAL**, § 34.

Replevin by, see **REPLEVIN**, § 58.

Set-off of claim for services rendered by wife in action on note, see **SET-OFF AND COUNTERCLAIM**, § 41.

**§ 203. Capacity to sue and be sued in general.**

[a] (*Sup.* 1884)

When letters of administration are granted to a married woman, she may sue as administratrix without joining her husband.—*Jenkins v. Jenkins' Adm'r*, 23 Ind. 79.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. HUS. & W. §§ 280, 738, 740-747.

See, also, 21 Cyc. pp. 1512-1517; note, 46 Am. St. Rep. 446.

**§ 204. Statutory provisions.**

[a] (*Sup.* 1884)

1 Rev. St. 1876, p. 551, providing that suits relative to the separate lands of a married woman shall be prosecuted by or against the husband and wife jointly, was repealed by 2 Rev. St. 1876, p. 36, declaring that, when the action concerns the wife's separate property, she might sue alone without joining the husband, as it was in conflict with such previous act and of a later date.—*Wright v. Wright*, 97 Ind. 444.

[b] (*Sup.* 1886)

The statute giving a wife a right of action against her husband for support is remedial, and entitled to a liberal construction.—*Arnold v. Arnold*, 39 N. E. 862, 140 Ind. 199.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. HUS. & W. §§ 739, 748, 749.

**§ 205. Rights of action between husband and wife.**

Admissions as evidence, see **EVIDENCE**, § 248.

Joinder of husband as defendant on refusal to be made plaintiff, see post, § 209.

Statutory provisions, see ante, § 204.

[a] (*Sup.* 1884)

The pending of a suit for divorce precludes the husband from maintaining another suit to enforce a trust for money paid by him for the price of land that had been conveyed by the vendor to the wife.—*Rose v. Rose*, 93 Ind. 179.

[b] (*Sup.* 1889)

By Rev. St. 1881, § 5116, the wife's lands and the rents and profits are her separate property as fully as if she were unmarried. Section 5129 provides that suits in relation to the wife's lands, if she is separated from her husband, shall be prosecuted in her name alone, and section 254 permits her to sue alone, when the action concerns her separate property, or when the action is between herself and husband. *Held*, that the wife may maintain ejectment against the husband for her separate real property.—*Crater v. Crater*, 118 Ind. 521, 21 N. E. 290, 10 Am. St. Rep. 161.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. HUS. & W. §§ 744, 748-755.

See, also, 21 Cyc. pp. 1517-1520; note, 79 C. C. A. 306; note, 5 L. R. A. (N. S.) 611; note, 75 Am. St. Rep. 268.

**§ 206. Rights of action by husband or wife or both.**

Effect of failure to join husband as party plaintiff in action by wife, see post, § 221.

Effect of unnecessary joinder of husband in action by wife, see post, § 221.

Right of wife to compel specific performance of contract, see **SPECIFIC PERFORMANCE**, § 17.

Right of wife to maintain action to enforce right of exemption, see **EXEMPTIONS**, § 146.

Under civil damage laws for wrongful sale of liquor to spouse, see **INTOXICATING LIQUORS**, § 297.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. HUS. & W. §§ 756-758, 760-764, 766-772, 774-782.

See, also, 21 Cyc. pp. 1520-1539.

**§ 207. — In general.**

[a] (*Sup.* 1882)

There is nothing in the statute requiring or permitting the joining of a wife as a co-

plaintiff in her husband's suit for the recovery of land belonging solely to him. Where both join in such a suit, a demurrer is properly sustained.—*Hyatt v. Cochran*, 85 Ind. 231.

[b] (Sup. 1884)

Except in the cases specified by the statute, permitting a married woman to sue alone, the common-law rule is still in force, and her husband must join.—*Hamm v. Romine*, 98 Ind. 77.

[c] (Sup. 1892)

Since by Rev. St. 1881, § 2508, a wife's common-law right of dower has been enlarged into a fee, contingent only on her husband's death, and which may at any time become vested, on a judicial sale of the land, where her inchoate interest is not directed to be barred or sold, a wife, though she may not be a necessary party, has such an interest as makes her a proper party plaintiff with her husband in an action to compel a railroad company to maintain a crossing over its right of way, in accordance with a condition in a deed by the husband and wife of the land for the right of way.—*Lake Erie & W. R. Co. v. Priest*, 131 Ind. 413, 31 N. E. 77.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 756-758.

§ 208. — On contracts.

[a] (Sup. 1860)

A note was transferred to a husband by delivery for a debt which was less than the amount of the note, the difference to be paid to the transferee's wife. *Held*, that the equitable title to the note passed to the husband by the transfer, and that he could sue upon it without joining his wife as plaintiff.—*Speelman v. Culbertson*, 15 Ind. 441.

[b] (Sup. 1863)

Where a note and mortgage are executed to a man and wife to secure money lent from the separate estate of the wife, she may, after her husband's death, sue in her own name, setting out the facts, or she may sue as survivor.—*Shockley v. Shockley*, 20 Ind. 108.

[c] (Sup. 1878)

Where, in a proper proceeding in the proper court, a married woman has been authorized to collect all claims due her absconding husband, she may in her own name, sue and recover from the guardian of minors for her services in boarding them under a contract made with their former guardian, her husband.—*Rooker v. Rooker*, 60 Ind. 550.

[d] (Sup. 1879)

Where a husband, without his wife's knowledge or consent, but as if her agent, bid off certain real estate at a foreclosure sale, and afterwards she was induced, by the sheriff's false representations that the premises included certain valuable improvements, to accept the sale and pay the sheriff part of the purchase

money bid, *held*, that she might maintain an action against the sheriff and judgment creditor to vacate the sale and recover the money paid.—*Case v. Colter*, 66 Ind. 336.

[e] (Sup. 1882)

Where the wife of one of two partners had rendered services to the firm, *held*, that she was entitled to maintain an action in her own name against the other partner, on his agreement to pay the debts of the firm upon dissolution.—*Powers v. Fletcher*, 84 Ind. 154.

[f] (Sup. 1882)

A husband and his wife owned adjoining farms. They lived in the wife's house and upon the products of both farms indiscriminately. They took into their family a grandchild of the husband. After the husband's death, his wife brought suit against the child's father for its support. *Held* that, whether or not the husband could have maintained the action, his wife certainly could not.—*Davis v. Davis*, 85 Ind. 157.

[g] (Sup. 1882)

A married woman joined her husband in the conveyance of his land, in consideration of the vendee's promise to convey to her a certain lot. *Held*, that she could maintain an action against him for his refusal to keep his promise.—*Jarboe v. Severin*, 85 Ind. 496.

[h] (Sup. 1883)

Where a husband contracted in his own name for his wife's benefit, a joint right of action arose in their favor under Code 1852; and under section 368 separate damages might be assessed in favor of each.—*Scotton v. Mann*, 89 Ind. 404.

[i] (App. 1896)

A married woman may sue for compensation for nursing a stranger, as *Burns' Rev. St. 1894*, § 6975, gives her all earnings from any service rendered by her for persons other than her husband.—*Arnold v. Rifner* (Ind. App.) 45 N. E. 618, 16 Ind. App. 442.

[j] (App. 1897)

Where a lease was made with a married man as lessor, in an action thereon judgment cannot be rendered against the tenant in favor of the landlord and his wife, though she joined in the lease, where there is no averment showing any interest of the wife in the subject-matter of the suit.—*Indianapolis Natural Gas Co. v. Spaugh*, 46 N. E. 691, 17 Ind. App. 683.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 756, 757, 760-764.

See, also, 21 Cyc. pp. 1520-1524.

§ 209. — For torts.

Damages for expenses incurred by reason of personal injury to wife, see *DAMAGES*, § 101. Damages to husband for loss of services of wife, see *DAMAGES*, §§ 95, 99, 133. Pleading, see post, § 229.

## [a] (Sup. 1845)

A suit cannot be sustained by husband and wife for a libel on them both. In the case of such libel, there should be two actions, one by the husband for the injury to him, and the other by husband and wife for the injury to the wife.—*Hart v. Crow*, 7 Blackf. 351.

## [b] (Sup. 1860)

A married woman has no right to sue for personal injuries without joining her husband.—*Long v. Morrison*, 14 Ind. 595, 77 Am. Dec. 72.

At common law a husband can release his right of action against a physician for personal injuries to the wife by reason of malpractice, and the wife cannot maintain a separate action for the tort.—*Id.*

An action may be maintained by a husband, in his right as such, for damages sustained by him by being deprived of the society and assistance of his wife by an injury caused by the defendant, although the injury caused her death, if her death was not immediate, so that he was deprived of her society and assistance even for a brief period between the injury and her death.—*Id.*

A husband has a right of action against a physician, for malpractice in treating his wife, for the loss of service.—*Id.*

## [c] (Sup. 1861)

The husband and wife have a joint action for a personal injury to the wife.—*Rogers v. Smith*, 17 Ind. 323, 79 Am. Dec. 483.

For a tort done to a wife, the husband has his separate action for loss of service and expenses.—*Id.*

## [d] (Sup. 1873)

A wife cannot sue for fraud practiced on her husband to induce him to purchase land deeded to her when she has paid no consideration and had no connection with the transaction, except as grantee in the deed.—*Smither v. Calvert*, 44 Ind. 242.

## [e] (Sup. 1881)

The loss by a wife of her husband's society and support is not an injury to the person or character of the wife, within the meaning of the act of March 25, 1879, providing that a married woman may maintain an action in her own name for injury to her person or character.—*Logan v. Logan*, 77 Ind. 558.

Under Rev. St. 1881, §§ 5, 131, authorizing a woman to sue in her own name for injury to her person or character, *held*, that she might maintain an action for slanderous words spoken before the statute went into effect.—*Id.*

Under Practice Act, § 19, providing that, if the consent of any person who should have been joined as plaintiff cannot be obtained, he may be made a defendant, a wife, whose husband refuses to join in the action, may sue in her own name for an injury to her person or

character, joining the husband as a defendant.—*Id.*

## [f] (Sup. 1886)

Presumptively the husband is entitled to maintain a separate action to recover for medical attendance, loss of service, and of the society of his wife, and in an action by the wife for injuries to herself she is limited to recover for injuries to her person, including pain, anguish of mind, and all such other damages as are not presumptively injuries to the husband.—*Ohio & M. R. Co. v. Cosby*, 7 N. E. 373, 107 Ind. 32.

## [g] (App. 1898)

A husband may recover alone damages to a storeroom of which he had possession, caused by an explosion, though the premises were owned by him and his wife as tenants by entireties.—*Sheridan Gas, Oil & Coal Co. v. Pearson*, 49 N. E. 357, 19 Ind. App. 252, 65 Am. St. Rep. 402.

## [h] (App. 1902)

Where a tort is committed upon a married woman, she cannot recover for expense incurred for medicines and medical treatment necessitated by her injuries.—*Efroymsen v. Smith*, 63 N. E. 328, 29 Ind. App. 451.

## [i] (Sup. 1906)

Where a married woman, after being injured in a street car accident through defendant's negligence, incurred expenses for medical treatment on her own behalf, she was entitled to recover therefor as a part of her damages, though her husband was ordinarily chargeable with the payment of her medical bills.—*Indianapolis Traction & Terminal Co. v. Kidd*, 167 Ind. 402, 79 N. E. 347, 7 L. R. A. (N. S.) 143.

## [j] (App. 1906)

A husband is legally bound to pay a bill for medical treatment incurred in the treatment of his wife unless she agree to pay it herself, and where a wife was injured by the negligence of another and a physician was called to treat her, the husband had a right to recover the expense incurred in addition to any damage that might result from the loss of services of the wife, and any amount received in settlement of the claim of the wife and her husband for that purpose was, in the absence of a special agreement to the contrary, the property of the husband.—*Indiana Union Traction Co. v. McKinney*, 78 N. E. 203, 39 Ind. App. 86.

## [k] (App. 1908)

In an action by a husband for loss of the services of his wife through personal injury, the word "services" ordinarily signifies wifely services such as are due from her, and includes the idea of her society.—*Indianapolis & M. Rapid Transit Co. v. Reeder*, 42 Ind. App. 520, 85 N. E. 1042.

A husband may sue for loss of the services and society of his wife resulting from personal

injuries, even though her death ensues, and is not restricted to the remedy prescribed by Burns' Ann. St. 1901, § 285 (Acts 1899, p. 405, c. 177), giving a right of action for wrongful death to the personal representatives of decedent, the damages recovered to inure to the benefit of the widow or widower, if any, or next of kin.—Id.

[l] (Sup. 1909)

The word "services," in the rule allowing a husband to sue for personal injuries negligently inflicted on his wife, included any pecuniary injury suffered by the husband from the loss of the aid, society, and companionship of the wife; and, while the damages from the loss of services, society, and companionship of the wife are not susceptible of direct proof, yet, when the facts are shown, the assessment of compensation must be committed to the sound discretion of the jury.—*Indianapolis Traction & Terminal Co. v. Menze*, 88 N. E. 929.

[m] (Sup. 1909)

A husband suing for pecuniary compensation for injury to his wife may not split up the elements of his damage as to the value of her assistance in his business, her services in the household, her society, and companionship, and his testimony that her services, of which he had been deprived, were worth a specified sum per week to him, must be deemed to cover his entire loss. Rehearing, 88 N. E. 929, denied.—*Indianapolis Traction & Terminal Co. v. Menze*, 89 N. E. 370.

Where a husband seeks pecuniary compensation for an injury to his wife, his damages must be determined as far as practicable on a financial basis, and no allowance can be made for the wife's suffering.—Id.

[n] (App. 1910)

In an action by a husband for loss of his wife's services, due to an alleged negligent injury, the husband could not recover for the wife's physical or mental suffering.—*Cincinnati, L. & A. St. R. Co. v. Cook*, 90 N. E. 1052.

[o] (App. 1910)

Where plaintiffs were owners of certain land as tenants by the entireties, an action for injuries to the land originally brought by the husband alone was sufficient to invoke the jurisdiction of the court over the subject-matter.—*Niagara Oil Co. v. Jackson*, 91 N. E. 825.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 766-772.

See, also, 21 Cyc. pp. 1525-1530, 28 Cyc. p. 45; note, 48 Am. Dec. 619.

§ 210. — In respect of wife's separate property.

Against husband, see ante, § 205.

Pleading, see post, § 229.

Repeal of statutory provisions, see ante, § 204.

[a] A married woman may sue alone in actions concerning her separate property.—(Sup.

1856) *Hollingsworth v. State ex rel. Harvey*, 8 Ind. 257; (1862) *Adams v. Sater*, 19 Ind. 418; (1863) *Gee v. Lewis*, 20 Ind. 149.

[b] By the statute of 1852, a wife is not required to sue by guardian or next friend, except she be under the age of 21 years, in an action concerning her separate property.—(Sup. 1857) *Wilkins v. Miller*, 9 Ind. 100, affirmed *Orme v. Boyd* (1858) 10 Ind. 388.

[c] The wife can join her husband as plaintiff in an action concerning her separate property, though she may bring such action alone.—(Sup. 1861) *Martindale v. Tibbetts*, 16 Ind. 200; (1884) *Roller v. Blair*, 96 Ind. 203.

[d] (Sup. 1861)

In an action of waste, for injuries to the estate of a married woman, her husband must be joined as a plaintiff.—*Bellows v. McGinnis*, 17 Ind. 64.

[e] (Sup. 1875)

A., being the owner of certain land on which there was a mortgage, executed a warranty deed of conveyance thereof to B. Afterwards the mortgage was foreclosed, and, upon the sale under the decree, the land was bid off by the county commissioners for the amount of the judgment; the land being worth a much larger sum. It being claimed by A. and denied by B. that said deed of A. to B. was intended as a mortgage, or a deed of trust, it was agreed by and between A., B., and the county commissioners, at a regular meeting of the board of commissioners, after the expiration of the year for the redemption of the land from the sheriff's sale, the agreement being entered of record, that said county commissioners would pay to either A. or B., whichever should establish title to said land by an action in a court of law or equity, a certain sum, deducting therefrom the amount of the bid of the commissioners at said sale under the decree of foreclosure, that A. and B. should make deeds of conveyance of said land to the county, and that A. (who was a married woman) and her husband should deliver possession to said commissioners, and thereupon said deeds were executed, and possession was given to the commissioners, who received the sheriff's deed for the land. Afterwards an action for possession was brought by B. against A. and her husband, which resulted in a judgment of the circuit court in favor of the defendants, who notified said commissioners of said result, and that A. was the proper person to whom to pay said balance. Suit by A. and her husband against said commissioners to recover said balance. *Held*, that said action against the commissioners was properly brought in the name of the husband and wife.—*Board of Com'rs of Henry County v. Slatte*, 52 Ind. 171.

[f] (Sup. 1881)

A married woman can maintain an action of partition to obtain her share in land which descended to her from her former husband.—*Christy v. Smith*, 80 Ind. 573.

[g] (Sup. 1884)

A suit by a married woman for deceit in procuring a transfer of her separate property is an action concerning her separate property, which, under Rev. St. 1881, § 254, she may maintain alone.—*Mills v. Winter*, 94 Ind. 329.

[h] (Sup. 1884)

Where a complaint by a husband and wife avers that the property described therein belonged to the wife and was obtained from her by fraud, she has a cause of action, as the person who sustains an injury from the fraud of another is the person entitled to sue.—*Roller v. Blair*, 96 Ind. 203.

[i] (Sup. 1884)

Husband and wife may join in a suit to quiet title of the wife's land; and it is immaterial that the judgment is rendered in their favor generally, instead of in favor of the wife alone.—*Indiana, B. & W. R. Co. v. Brittingham*, 98 Ind. 294.

[j] (Sup. 1885)

The party who owns the property injured by the negligence of another is the one who should bring the action for redress, even though such party be a married woman, whose husband manages the property.—*Leeds v. City of Richmond*, 102 Ind. 372, 1 N. E. 711.

[k] (Sup. 1885)

In an action for trespass on the land of a wife, the husband may be joined as plaintiff, though under Rev. St. 1881, § 254, he is not a necessary party.—*Atkinson v. Mott*, 102 Ind. 431, 26 N. E. 217.

[l] (Sup. 1888)

Under Rev. St. 1881, § 5130, entitling a married woman to the earnings of her separate business, she may buy a note with such earnings, and her husband's indorsements will pass the title of the note to her, so as to enable her to sue the maker.—*Wilson v. Wilson*, 113 Ind. 415, 15 N. E. 513.

[m] (Sup. 1888)

Where lands are seized by a railroad, and the owner, a married woman, acquiesces therein for a long time, public rights are so involved that the disability of coverture cannot avail as a defense against such acquiescence.—*Indiana B. & W. R. Co. v. Allen*, 15 N. E. 446, 113 Ind. 581.

[n] (Sup. 1893)

A suit to recover the separate lands of a married woman is maintainable by her alone in her own name.—*Myers v. Jackson*, 135 Ind. 136, 34 N. E. 810.

[o] (Sup. 1894)

Under Rev. St. 1894, § 6974 (Rev. St. 1881, § 5129), in partition of land between married women their husbands are proper parties.—*Bower v. Bowen*, 139 Ind. 31, 38 N. E. 326.

[p] (App. 1898)

A husband may join with his wife in an action concerning her separate property, as

at common law, notwithstanding she may sue alone in such cases, under Horner's Rev. St. 1897, § 254 (Burns' Rev. St. 1894, § 255).—*City of New Albany v. Lines*, 51 N. E. 346, 21 Ind. App. 380.

[q] (App. 1906)

Under Burns' Ann. St. 1901, § 255, providing that a married woman may sue alone when the action concerns her separate property, a married woman owning real estate on which her husband operates a stone quarry, he being the sole owner of the quarrying business, may join with him in a suit to restrain the flooding of the quarry by the damming up of water by defendant.—*American Plate Glass Co. v. Nicoson*, 73 N. E. 625, 34 Ind. App. 643.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 744, 751, 766, 774-782.

See, also, 21 Cyc. pp. 1531-1539.

### § 211. Rights of action against husband or wife or both.

Enforcing specific performance against husband or wife of party to contract, see SPECIFIC PERFORMANCE, § 21.

Recovery of property by purchaser at foreclosure sale, see MORTGAGES, § 544.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 784-794.

See, also, 21 Cyc. pp. 1540-1546.

### § 212. — In general.

[a] (Sup. 1822)

No action will lie against a husband and wife for the acts of the husband.—*Shannon v. Spencer*, 1 Blackf. 526.

[b] (Sup. 1859)

A feme sole, while in the occupation of plaintiffs' premises, married, and continued to so occupy with her husband. Held, that an action to recover for use and occupation for the time that both occupied should be against the husband alone.—*Tobin v. Connery*, 13 Ind. 65.

[c] (Sup. 1901)

The wife of the vendee is not a necessary party to a suit by the vendor of real estate to enforce his lien for unpaid purchase money.—*Sarver v. Clarkson*, 59 N. E. 933, 156 Ind. 316.

[d] (Sup. 1903)

The wife of the vendee under an executory contract for the conveyance of land on his paying the price is not a necessary party to a suit by the vendor to foreclose the vendee's equity in the land.—*Schaefer v. Purviance*, 66 N. E. 154, 160 Ind. 63.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 784-786.

See, also, 21 Cyc. pp. 1540, 1545, 1546.

### § 213. — On contracts.

[a] An action on an antenuptial contract of the wife should be brought against the husband

and wife.—(Sup. 1874) *Shore v. Taylor*, 46 Ind. 345; (1883) *Crawford v. Thompson*, 91 Ind. 266, 46 Am. Rep. 508.

[b] (Sup. 1874)

When a married woman receives money on a parol contract for the sale of her lands, but fails to convey, a personal action cannot be maintained against her to recover the money so paid.—*Sanford v. Wood*, 49 Ind. 165.

[c] (Sup. 1882)

In a suit to foreclose a mortgage upon land bought by a married woman since the execution of the mortgage, her husband is properly made a party to the action, and an averment that he knew of the mortgage is unnecessary.—*Andrews v. Swanton*, 81 Ind. 474.

[d] (Sup. 1884)

Where a wife, holding lands with her husband by entirety, is not made a party to an original foreclosure suit, it is proper to make the husband a party to a second suit brought to reach the wife's interest.—*Curtis v. Gooding*, 99 Ind. 45.

[e] (Sup. 1889)

In an action against a husband and wife upon their joint note and mortgage, a complaint which alleges that the consideration for the note was money borrowed by the defendants, that they executed the mortgage to secure the note, and that they owned the mortgaged land as tenants by the entirety, states a good cause of action against the wife.—*Jenne v. Burt*, 121 Ind. 275, 22 N. E. 256.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 787-790.  
See, also, 21 Cyc. pp. 1541-1543.

§ 214. — For torts.

[a] (Sup. 1885)

A married woman is liable in damages for injuries caused to others by the mismanagement of her separate estate, and her husband need not be joined.—*Mayhew v. Burns*, 103 Ind. 328, 2 N. E. 793.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 791-794.  
See, also, 21 Cyc. pp. 1544, 1545.

§ 215. — To charge wife's separate property.

[a] (App. 1899)

Under Horner's Rev. St. 1897, §§ 5120, 5122, providing that the husband shall not be liable for the contracts of the wife, nor for any debts contracted by her in carrying on her separate business, nor for improvements or repairs made by her order on her separate realty, a complaint against a wife and her husband, who was her agent, for failing to make certain improvements on demised realty as he agreed for her, is bad as to him.—*Richardson v. League*, 52 N. E. 618, 21 Ind. App. 429.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 784.

§ 217. Defenses by husband or wife.

[a] (Sup. 1857)

A promissory note given to a feme covert for moneys belonging to her before her marriage, and remaining her separate property afterwards, cannot be pleaded as a set-off in a suit against her husband.—*McCarty v. Mewhinney*, 8 Ind. 513.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 798, 799.  
See, also, 21 Cyc. pp. 1547, 1548.

§ 220. Time to sue and limitations.

Accrual of right of action by wife for maintenance, see LIMITATION OF ACTIONS, § 50.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 801.  
See, also, 21 Cyc. pp. 1548, 1549.

§ 221. Parties.

In action to enforce assessment for public improvements, see MUNICIPAL CORPORATIONS, § 565.

In action to foreclose mechanic's lien, see MECHANICS' LIENS, § 263.

In foreclosure suits, see MORTGAGES, § 434.

Joining husband in proceeding to condemn wife's land, see EMINENT DOMAIN, § 177.

Striking out parties, see PARTIES, § 65.

Will contest, see WILLS, § 266.

[a] (Sup. 1879)

In an action by a married woman, brought by her in the name of herself and husband, but demanding damages solely in her own right against a physician for malpractice, she alleged as a reason why her husband did not join her in the action that he had abandoned and left the state. *Held*, that a demurrer for defect of parties plaintiff should be sustained, but that such defect is not presented by a demurrer for insufficiency.—*Barnett v. Leonard*, 66 Ind. 422.

[b] (Sup. 1885)

In a suit by husband and wife for trespass on land alleged to have been in the possession of the wife, a recovery cannot be defeated by proof that the land and the crops injured were the joint property of the husband and wife; no objection for defect of parties having been taken by demurrer or answer.—*Atkinson v. Mott*, 102 Ind. 431, 26 N. E. 217.

[c] (Sup. 1886)

In an action by a husband and wife to recover for personal injuries to the wife, the husband is not a necessary party, but it is not improper to join him as plaintiff.—*Ohio & M. R. Co. v. Cosby*, 7 N. E. 373, 107 Ind. 32.

Under Rev. St. 1881, § 5132, authorizing the maintenance of an action by a married woman in her own name for personal injuries, the fact that the husband is joined as a party

plaintiff in the complaint without a cause of action being stated in his favor does not render the complaint demurrable.—Id. .

[d] (Sup. 1890)

Where the husband and wife join in action for personal injuries sustained by the wife, the husband may be dismissed out of the case, and the suit proceed in the name of the wife.—*City of Portland v. Taylor*, 125 Ind. 522, 25 N. E. 459.

[e] (Sup. 1891)

In an action by a married woman, relating entirely to her separate property, where the caption of her complaint contains the name of her husband, but there is no further mention of him, and no attempt is made to state a joint cause of action, such name is surplusage, and the complaint is not demurrable.—*Mississinewa Min. Co. v. Patton*, 129 Ind. 472, 28 N. E. 1113, 28 Am. St. Rep. 203.

[f] (App. 1891)

In a suit by a married woman on a note payable to her husband, which had been assigned to her, where the defendant has pleaded as set-off a judgment recovered against the husband before the note was assigned, it is not error to admit the husband as a party plaintiff to enable him to plead that, at the time the note was assigned, it was within his statutory exemption as a head of a family, since, though he had parted with the note by the assignment, he had a substantial interest with his wife in having it protected by the exemption.—*Pickrell v. Jerauld*, 1 Ind. App. 10, 27 N. E. 433, 50 Am. St. Rep. 192.

[g] (Sup. 1892)

Where land has been conveyed by a mortgagor, the wife of the grantee of the land is a proper party defendant in an action to foreclose.—*Holland v. Holland*, 30 N. E. 1075, 131 Ind. 196.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 707, 802-806; 35 CENT. DIG. MTG. § 1281.  
See, also, 21 Cyc. pp. 1550-1553.

§ 222. Joinder or intervention in actions by others.

[a] (Sup. 1884)

Where land is held by a husband and wife as tenants by the entireties and the wife is not made a party to an original suit to foreclose a mortgage thereon, it is proper, if not absolutely necessary, that the husband should be made a party to a second suit brought to reach the wife's interest.—*Curtis v. Gooding*, 99 Ind. 45.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 807.  
See, also, 21 Cyc. p. 1552.

§ 224. Process.

[a] (Sup. 1843)

In a suit against husband and wife, the process need only be served on the husband; and, such service being made, the subsequent proceedings should be against both the defendants.—*King v. McCampbell*, 6 Blackf. 435.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 808-812.  
See, also, 21 Cyc. pp. 1554, 1555.

§ 225. Appearance and representation of wife by attorney.

[a] (Sup. 1864)

Where married women are made defendants in chancery, their husbands may enter appearances for them by attorney.—*English v. Roche*, 6 Ind. 62.

[b] (Sup. 1881)

In an action against a married woman, she may voluntarily appear and defend.—*Shotts v. Boyd*, 77 Ind. 223.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 813-815.  
See, also, 21 Cyc. p. 1555.

§ 228. Pleading.

Anticipating defenses, see PLEADING, § 67.

Defects or omissions cured by subsequent pleadings, see PLEADING, § 403.

Hearing and determination on demurrer, see PLEADING, § 218.

In action for possession of land, see EJECTMENT, § 79.

In action to foreclose mechanic's lien, see MECHANICS' LIENS, §§ 271, 272.

Pleading partial defense, see PLEADING, § 80.

Pleading right of plaintiff in general, see PLEADING, § 56.

Right of husband to plead payment in suit to enforce mechanic's lien on wife's land, see MECHANICS' LIENS, § 272.

Scope of inquiry and matters considered on demurrer, see PLEADING, § 216.

Time for amendment, see PLEADING, § 245.

Variance between pleading and instrument annexed, filed, or referred to, see PLEADING, § 312.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 816-843.  
See, also, 21 Cyc. pp. 1556-1566.

§ 229. — In general.

Pleading special damages from injury to wife, see DAMAGES, §§ 144, 157.

[a] (Sup. 1818)

Where, in slander against a husband and wife for slanderous words charged to have been spoken by the wife against the plaintiff, the husband alone filed a plea and issue was joined thereon, the issue and trial thereon were void, as a husband and wife cannot separate in pleading.—*Templeton v. Clary*, 1 Blackf. 486.

[b] (Sup. 1822)

A cause of action against the husband cannot be joined with one against a husband and wife.—*Shannon v. Spencer*, 1 Blackf. 526.

[c] (Sup. 1834)

In an action of slander against husband and wife, the declaration must not conclude to the damage of the wife only, but to the damage of husband and wife.—*Throgmorton v. Davis*, 3 Blackf. 383.

[d] (Sup. 1839)

In assumpsit against a husband and his wife for a debt due from the wife *dum sola*, it is no objection to the declaration that the Christian name only of the wife was stated.—*Cox v. Runnion*, 5 Blackf. 176.

[e] (Sup. 1846)

Where husband and wife are made defendants in a suit to foreclose a mortgage, the wife should join in her husband's answer to the bill.—*Comley v. Hendricks*, 8 Blackf. 189.

Though it is the regular practice for the wife to join in the answer of her husband to a bill to foreclose a mortgage, yet her admissions in the answers are not evidence against her, and the allegations of the bill should be proved to authorize a decree against her.—*Id.*

[f] (Sup. 1846)

If husband and wife sue for a battery or slander of the wife, or in trover for a conversion of the wife's goods before marriage, the declaration must conclude to the damage of both plaintiffs.—*Collis v. Bowen*, 8 Blackf. 262.

[ff] (Sup. 1856)

Under the statute it is no objection to a complaint by husband and wife that it does not show in what respect the wife is the meritorious cause of action, though it would perhaps be a good objection at common law.—*Langdon v. Bullock*, 8 Ind. 341.

[g] (Sup. 1866)

Plaintiffs, who were husband and wife, charged in their complaint that certain other persons named and who were alleged to be the brothers and sisters of the defendant made an agreement with the defendant that he should support, maintain, and provide for their mother during her natural life, and that on the making of the agreement certain land was conveyed to the defendant, but that in the meantime the defendant should have possession and control of the same and that he entered into possession thereof, but had failed to support and maintain his mother and that the plaintiffs had been compelled to provide for her at great cost, wherefore they demanded damages. *Held* that, the feme plaintiff not having been a party to the contract for the breach of which she claimed damages, a demurrer to the complaint was properly sustained.—*Doran v. Shaw*, 26 Ind. 284.

[gg] (Sup. 1868)

Where, during the building of a house for a feme sole, she married, and the work was afterwards completed, the complaint, in an action to enforce the lien of the mechanic, need not allege that the real estate was the separate property of the wife.—*Caldwell v. Asbury*, 29 Ind. 451.

[h] (Sup. 1868)

If a complaint by a married woman for the unlawful conversion of her personal property alleges that it is her separate property, it need not show from what source it was derived.—*Schurman v. Marley*, 29 Ind. 458.

[hh] (Sup. 1869)

Suit upon a note payable in bank and a mortgage to secure the same, executed by husband and wife, and assigned to the plaintiff. Answer by the wife showing that the note and mortgage were given for the debt of the husband, and that the land mortgaged was the separate property of the wife, and averring "that she was induced by the persuasions of said payee and the coercion of her said husband to execute said note and mortgage." *Held*, that the answer was bad on demurrer.—*Richardson v. Hittle*, 31 Ind. 119.

[i] (Sup. 1870)

In an action to recover for goods alleged to have been sold and delivered to the defendant, he may show under an answer of general denial that they were sold and delivered to his wife under such circumstances as not to bind him.—*Day v. Wamsley*, 33 Ind. 145.

[ii] (Sup. 1871)

A complaint to enforce a lien alleged that defendants, husband and wife, were indebted for work and labor, as shown by bill of particulars, in erecting a house on real estate belonging to the wife; but the complaint did not set out the particulars of the contract. *Held* insufficient, as failing to show all the facts necessary to establish the liability of the wife.—*Black v. Rogers*, 36 Ind. 420.

[j] (Sup. 1872)

In an action by a husband and wife for damages for failure of defendant to convey a house and lot to the wife within the time limited by a written contract, the complaint alleged that payment had been made by the wife, that the property had been sold on judgment and execution against the defendant, and that plaintiffs had been evicted by the purchaser. The second paragraph was a count for money had and received. The defendant answered by general denial, and also that by agreement between the parties, made after the execution of the contract upon which the suit was based, the land was to be purchased by a friend of the plaintiffs under the judgment and execution, and the purchase money paid therefor to be repaid the purchaser by the wife, and credited by the defendant on a note held against the husband; that the land was so purchased:

that the purchaser had always been ready to convey the land to the wife; but that plaintiffs had refused to repay him, and had voluntarily delivered possession to him. Defendant's deed was tendered with the answer. To this answer plaintiffs filed a reply, alleging coverture when the contract was made. *Held*, that this reply was good.—*De Armond v. Glasscock*, 40 Ind. 418.

## [JJ] (Sup. 1873)

A complaint against husband and wife on a note, alleging that it was executed by both for property sold to the wife, and praying judgment only against the separate property of the wife, presents no cause of action against the husband.—*Hodson v. Davis*, 43 Ind. 258.

## [K] (Sup. 1374)

In an action to foreclose a mortgage executed by a married woman and her husband upon her separate real estate to secure the payment of certain notes made by her alone, an answer, by either the wife or the husband, that the notes were given for personal property bought by the husband; that they were executed by the wife alone, who received no part of the property; that such property was not purchased for the betterment of her estate; and that the mortgaged property was her separate estate,—was good.—*Brick v. Scott*, 47 Ind. 209.

## [kk] (Sup. 1875)

To a suit commenced in this state by a feme sole for money alleged to have been received for her, an answer alleging that since the commencement of the suit the plaintiff has removed to Illinois, and has married, and resides there with her husband, but not stating that the marriage took place in Illinois, is bad.—*Putnam v. Tennyson*, 50 Ind. 456.

## [I] (Sup. 1875)

In an action to charge the separate real estate of a married woman for materials furnished and work done in the erection of a dwelling house thereon, the complaint alleged that the wife had constituted her husband her agent to purchase materials and employ workmen to build the house; that the contract was made with the plaintiff by the husband as such agent; and that, when the plaintiff furnished the materials and performed the work, he did not know that the real estate was the property of the wife, and that the husband was acting as her agent, but he furnished the materials and did the work at the request of the husband, and charged the same to him, and afterwards learned that she was the owner, and that he was acting as her agent. *Held*, that the complaint did not show that the wife, either in person or by agent, so contracted with reference to her separate estate as to make the same liable for the alleged indebtedness.—*Crickmore v. Breckenridge*, 51 Ind. 294.

## [II] (Sup. 1876)

In an action against a married woman on her contract, an averment that she has separate

property is insufficient, as the complaint must specifically describe such property.—*Thomas v. Passage*, 54 Ind. 106.

## [m] (Sup. 1876)

In an action against a married woman and another to recover the purchase price of land sold to her co-defendant, and at his request conveyed to her, an averment in the complaint that such conveyance "was made to said defendant," naming her, "wife of" the grantee, does not show her coverture at the time of the sale.—*Long v. Dixon*, 55 Ind. 352.

## [mm] (Sup. 1880)

In a suit on a note against a husband and his wife and another, the fact of suretyship of any of the makers did not appear upon the face of the note; nor was it established in a cross action between the defendants. Judgment was rendered on the note and paid by the other defendant, who, alleging that he was a surety for his co-defendants, sued the wife to recover the sum so paid; the husband having died insolvent. *Held*, that the plea of coverture was a good defense.—*Daudistel v. Ben-nighof*, 71 Ind. 389.

## [n] (Sup. 1882)

In an action against a husband and wife to foreclose a mortgage, the wife alleged, in a separate answer, that the mortgage was given to secure the debt of her husband, and that the land covered thereby was her separate property, acquired by gift. The mortgage, which was made part of the complaint, was signed by them, and recited that it was made by "J. M. and E. M., his wife." *Held*, that the complaint and answer, together, sufficiently show the relation of the defendants at the time of the execution of the mortgage.—*McCarty v. Tarr*, 83 Ind. 444.

## [nn] (Sup. 1884)

Where the husband joins with the wife in a suit concerning her separate property, no averment of his interest other than the marital relations is necessary in the complaint.—*Roller v. Blair*, 96 Ind. 203.

In a suit by a husband and wife for fraud upon the wife affecting her separate property, it is not necessary to aver that the husband was deceived.—*Id.*

## [o] (Sup. 1885)

In a suit on a promissory note, where one of the defendants in a separate answer sets up a plea of coverture, and that she executed the note as surety for her husband (a contract void under the statute), it is error to refuse to admit evidence of her coverture, plaintiff having rested after merely introducing the note in evidence, although the reply does aver that the note was part of the purchase price for real estate sold to and held by her.—*West v. Hayes*, 104 Ind. 30, 3 N. E. 610.

## [oo] (Sup. 1886)

While, as a general rule, a complaint, to withstand a demurrer, must show a cause of

action in all the plaintiffs, an exception occurs where the plaintiffs are husband and wife, and the action is to recover damages for injury to the person or character of the wife.—*Ohio & M. R. Co. v. Cosby*, 107 Ind. 32, 7 N. E. 373.

[p] (Sup. 1886)

Except as prohibited in Rev. St. 1881, §§ 5117, 5119, a married woman has the same power to make executory contracts as if unmarried; and a complaint upon a note and mortgage executed by her, which does not show that she is surety, or that the mortgage is upon her separate real estate, is good, without an averment that it was for the benefit of herself or her estate.—*McLead v. Etna Life Ins. Co.*, 107 Ind. 394, 8 N. E. 230.

[pp] (Sup. 1887)

Where, in an action upon promissory notes signed by a married woman, she answers that she signed merely as surety for her co-defendant, a reply that the consideration was certain personal property purchased by her for use in her own separate business, is good on demurrer, although it does not allege that such property was ever delivered to or received by her.—*Chandler v. Spencer*, 109 Ind. 553, 10 N. E. 577.

[q] (Sup. 1887)

Cverture is no longer a legal disability, except in special cases particularized by statute; and the fact that the complaint in a suit to foreclose shows that a maker of the notes and mortgage was a married woman when she executed them does not raise a presumption that they were executed by a person under disability, and the complaint need not aver a state of facts creating liability on the part of such maker.—*Bennett v. Mattingly*, 110 Ind. 197, 10 N. E. 209, 11 N. E. 792.

[qq] (Sup. 1887)

Cverture being a personal defense, where a school-fund mortgage has been given by husband and wife on land owned by entireties, to secure the husband's debts, and the land is afterwards sold by them, the fact that they refused to sell subject to the mortgage, but claimed that it was void, and that, though past due, the auditor, admitting its invalidity, had refused to cancel it, or to take any steps to collect the amount due, will not avail such purchaser in support of an action to quiet title.—*Crooks v. Kennett*, 111 Ind. 347, 12 N. E. 715.

[r] (Sup. 1887)

An answer in a suit to foreclose a mortgage, given by a married woman on her separate property as security for her husband, alleging that the wife executed the mortgage under duress by her husband, is insufficient where it does not show that the mortgagee was in any way connected with or had any knowledge of the duress.—*Gardner v. Case*, 111 Ind. 494, 13 N. E. 36.

[rr] (Sup. 1888)

In an action for medical services rendered defendant at her special instance and request, and on her express promise to pay, an answer that, at the time the services were rendered and the alleged promises made, defendant was the wife of A.; that the services were for necessary care and attention rendered her while she was the wife of A.; and that the indebtedness on account of said services was the debt of A., for which defendant could not make herself liable,—is not an argumentative denial, but a confession and avoidance, on the ground of coverture, and so bad under Rev. St. 1881, § 5115, abolishing all the legal disabilities of women to make contracts except in specified cases.—*Elliott v. Gregory*, 115 Ind. 98, 17 N. E. 196.

[s] (Sup. 1888)

Defendant in foreclosure answered that she was a married woman at the time she executed the mortgage, that the land was owned by herself and husband as tenants by the entireties, and that the debt secured was the debt of her husband. *Held*, under Act March 25, 1879, prohibiting a married woman from encumbering her separate property, acquired by descent, devise, or gift, as security for a debt of her husband, that the answer was defective in failing to state that the property was so acquired.—*Noland v. State ex rel. Wasson*, 115 Ind. 529, 18 N. E. 26.

[ss] (Sup. 1889)

Where a husband and wife own a joint estate, and join in a mortgage thereon to secure the apparent obligations of both, and defend a suit to foreclose the same on the ground that the debt to secure which the mortgage was given was the debt of the husband, and that the wife received the note as part of the consideration for which the mortgage was executed, general statements in the pleadings to the effect that the wife executed the note and mortgage as surety for her husband are not a sufficient statement of facts; the question of suretyship depending upon the purpose for which the money was borrowed and to which it was applied.—*Security Co. v. Arbuckle*, 119 Ind. 69, 21 N. E. 469.

[t] (Sup. 1890)

Acts 1879, p. 161, § 10, provides that no married woman shall mortgage her separate property for the debt of her husband. A complaint alleges that a mortgage was given for money loaned to the female mortgagor for the purpose of discharging a lien on the property, and used for that purpose. *Held*, that an answer which does not deny that allegation, but alleges that the debt secured by the mortgage was the separate debt of her husband, is insufficient.—*Stanford v. Broadway Savings & Loan Ass'n*, 122 Ind. 422, 24 N. E. 154.

[tt] (Sup. 1890)

In an action for personal injuries, when the complaint does not show that the plaintiff is a married woman, and it prays for all dam-

ages which might be recovered in such an action, it is not open to the objection that the cause of action is in the husband, because the action is for his money, expended on account of the injuries.—*Michigan City v. Ballance*, 123 Ind. 334, 24 N. E. 117.

[u] (Sup. 1890)

One who purchased a wife's separate real estate cannot plead the invalidity of a mortgage thereon, executed by herself and husband, without showing that the plea is for her benefit, or that he paid her full value without notice of the mortgage, or under an agreement that he should be permitted to set up its invalidity; the plea of coverture being a personal one.—*Johnson v. Jouchert*, 124 Ind. 105, 24 N. E. 580, 8 L. R. A. 795.

[uu] (App. 1892)

In an action on a note executed by husband and wife, an allegation in the wife's answer that she was married to her codefendant when the note was executed casts on plaintiffs the burden of showing in their reply that the contract was one which she had power to make; and an allegation in such reply that the consideration for the note was yielded to her, and that it was beneficial to her separate estate, is insufficient on demurrer, as it should show the nature of the consideration, and wherein her separate estate was benefited.—*Potter v. Sheets*, 5 Ind. App. 506, 32 N. E. 811.

[v] (Sup. 1893)

In an action by a wife to quiet title, a cross complaint alleged that plaintiff's husband owned a certain farm, and one G. another, of which the land in dispute was a part; that such husband was indebted to defendants' ancestor on a note; that the husband and G. exchanged farms, and, by agreement between plaintiff and such ancestor, part of G.'s land was conveyed to plaintiff, and the part in dispute was conveyed to defendants' ancestor as security for such note; that the latter paid certain taxes on the land conveyed to him; that afterwards plaintiff and her husband, by false representations, procured from G. the deed under which she claims title to the land in dispute; and that such ancestor died intestate, leaving defendants as his only heirs. Treating the deed to him as a mortgage, they ask that it be foreclosed, and implead plaintiff's husband. *Held*, that such cross complaint is not open to the objection that it shows such deed was executed to secure the husband's debt, and included the wife's land, which gave her the position of surety.—*Pool v. Davis*, 135 Ind. 323, 34 N. E. 1130.

[vv] (Sup. 1895)

Where, in an action for possession of real estate, plaintiff and his wife alleged that they owned the property as tenants by entirety, they were not entitled to recover in the absence of a finding that they so held the title, though it was not necessary that their title should have been specifically described in order that the

complaint should have stated a cause of action.—*Pittsburgh, C., C. & St. L. R. Co. v. O'Brien*, 41 N. E. 528, 142 Ind. 218.

[w] (App. 1895)

Complaint by a husband for loss of services of his wife owing to an injury received by the latter on a defective bridge held sufficient within the rule laid down in *Board of Com'rs of Jackson County v. Nichols*, 38 N. E. 526, 139 Ind. 611.—*Board of Com'rs of Jackson County v. Nichols*, 40 N. E. 277, 12 Ind. App. 315, 54 Am. St. Rep. 528.

[ww] (App. 1895)

Since the earnings of a married woman ordinarily belong to her husband, the complaint by her to recover such earnings must aver any of the exceptions to the rule which would entitle her to recover.—*City of Bloomington v. Rogers*, 41 N. E. 395, 13 Ind. App. 121.

[x] (App. 1898)

Under Rev. St. 1894, § 6963 (Rev. St. 1881, § 5118), providing that a married woman shall be bound by covenants of title in conveyances of her separate real property as if sole, it is not necessary, in an action for breach of covenant of title against a married woman, to allege that the land was her separate real property.—*Dickey v. Kalfsbeck*, 50 N. E. 590, 20 Ind. App. 290.

[xx] (App. 1898)

Where a complaint wherein a husband and wife are properly joined as plaintiffs states a cause of action in favor of both of them, the statement therein of facts constituting a cause of action in favor of the husband alone, while improper, does not make the complaint demurrable as not stating a cause of action.—*City of New Albany v. Lines*, 51 N. E. 346, 21 Ind. App. 380.

[y] (Sup. 1900)

*Burns' Rev. St. 1894, § 6964 (Rev. St. 1881, § 5119; Horner's Rev. St. 1897, § 5119)*, prohibits a married woman from entering into a contract of suretyship, and declares that such a contract, as to her, shall be null and void. *Held*, that an answer to a complaint on a note and mortgage alleging defendant's ownership of the mortgaged premises; her coverture; that the note was given for her husband's debt; that she signed it as surety, and received none of the consideration; and that it did not inure to the benefit of her separate estate,—brought defendant within the provisions of the statute, and hence constituted a sufficient defense to the note.—*Field v. Noblett*, 56 N. E. 841, 154 Ind. 357.

A complaint on a note and mortgage executed by a married woman, alleging that defendant solicited the loan, and represented that it was for her sole use and benefit, and that plaintiff paid the loan to her, did not state facts sufficient to estop her from showing that the contract was one of suretyship, and hence void, as prohibited by *Burns' Rev. St. 1894, §*

6964 (Rev. St. 1881, § 5119; Horner's Rev. St. 1897, § 5119).—Id.

Burns' Rev. St. 1894, § 6964 (Rev. St. 1881, § 5119; Horner's Rev. St. 1897, § 5119), declares that a married woman shall not enter into a contract of suretyship, as indorser, guarantor, or in any other manner, and that such contract shall be void. *Held*, that a complaint on a note executed by a married woman alone, and secured by a mortgage on her separate estate, need not allege that her contract was not one of suretyship.—Id.

Where the first paragraph of a complaint on a note secured by mortgage executed by a married woman alleged that plaintiff loaned her the money, and the execution of the mortgage by her and her husband, and the second paragraph contained the same allegations, and alleged that the mortgaged premises were her separate property, and that she solicited the loan, representing that it was for her sole use, and that plaintiff paid the money to her, the second paragraph imposed no additional burden on plaintiff, since proof of the note and mortgage would have established a prima facie case under either paragraph; and hence it was error to sustain a demurrer to a paragraph of the answer which alleged that defendant's undertaking was one of suretyship, and therefore void, as prohibited by Burns' Rev. St. 1894, § 6964 (Rev. St. 1881, § 5119; Horner's Rev. St. 1897, § 5119).—Id.

[yy] (Sup. 1903)

In an action by a married woman on a note given to her in Illinois for money acquired by her while living with her husband in that state, the defense that under the common law, presumed to be in force in Illinois, the money for which the note was given was the property of the husband, for which the wife could not maintain an action, was not available without being pleaded, it being presumed under Burns' Rev. St. 1901, § 235, giving the wife power to sue alone where the action concerns her separate property, that the note was her separate property.—Winklebleck v. Winklebleck, 67 N. E. 451, 160 Ind. 570.

[z] (Sup. 1904)

Where the note of a married woman was sold by the payee, and subsequently paid by her, it was not necessary for the maker, in an action against the payee for money had and received, to allege her coverture and suretyship in order to maintain the action on that ground.—Harbaugh v. Tanner, 71 N. E. 145, 163 Ind. 574.

[zz] (App. 1908)

Under Burns' Ann. St. 1901, § 6964, providing that a contract of suretyship made by a married woman is void, in an action upon a note and mortgage, executed by a husband and wife, if the allegations of the complaint show that the mortgage is upon the wife's separate real estate, it must also be shown that the wife was principal, and not surety, or it will

not be sufficient to withstand a separate demurrer of the wife for want of facts.—Indianapolis Brewing Co. v. Behnke, 41 Ind. App. 288, 81 N. E. 119.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 816-835, 838, 840, 841.

See, also, 21 Cyc. pp. 1556-1564.

#### § 230. — Defense of coverture.

See ante, § 229.

Pleading contract of suretyship, see ante, § 87.

[a] (Sup. 1823)

Plea that plaintiff, pending the writ had married, and that her husband was still living. *Held* that, as the time of the alleged marriage was since the last continuance, the plea could not be set aside on motion for not expressly alleging the coverture to have taken place puis darrein continuance.—Templeton v. Clary, 1 Blackf. 288.

[b] (Sup. 1836)

In a suit by a husband and wife upon a note payable to the wife, marriage must be alleged.—Vandagriff v. Tate, 4 Blackf. 174.

[c] (Sup. 1874)

Coverture is a special defense that must be pleaded, and evidence thereof cannot be admitted under a general denial.—Johnson v. Miller, 47 Ind. 376, 17 Am. Rep. 699.

[d] (Sup. 1876)

Where the complaint, in an action against a married woman on her contract, does not affirmatively show her coverture when the contract was made, she must set up her disability in her answer to make it available.—Long v. Dixon, 55 Ind. 352.

[e] (Sup. 1880)

In an action by a mortgagor on a policy of fire insurance payable to the mortgagee, where both the insurer and the mortgagee were made defendants, an answer averring that at the time of the making of the alleged agreement set forth in the complaint between the mortgagee and the plaintiff as mortgagor that any sum which might be paid by the insurer in case of loss was to be credited on plaintiff's note, and that the payment was to operate in the reduction of the debt owing by plaintiff on the mortgage debt, the mortgagee was a married woman does not state facts sufficient to constitute a defense to the action, coverture being a personal defense which a married woman may or may not plead as she sees fit, but, if not pleaded by her, it cannot be made an available defense to or by any of her co-parties.—Ætna Ins. Co. of Hartford, Conn., v. Baker, 71 Ind. 102.

[f] (Sup. 1881)

In an action by husband and wife to recover for injuries received by the former on a defective sidewalk, defendant, by pleading in

bar, instead of in abatement, admits the capacity of the plaintiff to sue.—*City of Huntington v. Breen*, 77 Ind. 29.

[g] (App. 1901)

Where the complaint does not disclose coverture, an objection that it seeks to enforce a married woman's contract concerning land, in which her husband did not join, is not well taken.—*Rader v. Sheets*, 59 N. E. 1090, 26 Ind. App. 479.

[h] (Sup. 1903)

In an action by a married woman on a note given to her in Illinois for money acquired by her while living with her husband in that state, a plea of no consideration was insufficient to raise the question of the wife's alleged inability to sue.—*Winklebleck v. Winklebleck*, 67 N. E. 451, 160 Ind. 570.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 804, 835-840.

See, also, 21 Cyc. pp. 1564-1566.

§ 231. Evidence.

Admissibility of letters written by the wife to her husband in action against the husband for necessities furnished wife, see WITNESSES, § 191.

Admissions as evidence, see EVIDENCE, § 258. Declarations by husband or wife as evidence against the other, see EVIDENCE, § 248.

In action for malpractice or negligence of physician, see PHYSICIANS AND SURGEONS, § 18. Married woman's separate property, see ante, §§ 131-133.

Of agency of husband for wife as to separate property, see ante, § 138.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 844-848.

See, also, 21 Cyc. pp. 1567-1571; note, 56 L. R. A. 817.

§ 232. — In general.

Evidence as to damages by loss of services of wife, see DAMAGES, § 172.

[a] (Sup. 1863)

A title bond was taken to a husband, and afterwards the deed was made to the wife. Subsequently, in proceedings to subject this land to an execution against the husband, as being his property, it was held that the whole circumstances, as they occurred at and in reference to said purchase, might be properly shown by the defendants to elucidate their proceedings in the business.—*Howe v. Yopst*, 20 Ind. 409.

[b] (Sup. 1863)

A husband being liable for the torts and frauds of his wife committed during coverture, in a civil action for an alleged burning of a mill by the wife it was competent for plaintiff to prove that, within a short period before the burning, she had made threats expressive

of her intentions to set fire to the mill.—*Ball v. Bennett*, 21 Ind. 427, 83 Am. Dec. 356.

[c] (Sup. 1879)

In an action against the widow and heirs of decedent to enforce an alleged agreement to convey land, made by decedent to plaintiff in the former's lifetime, proof that a husband of one of the heirs had agreed with decedent as to the location of a corner of the land is inadmissible unless it is shown that he was authorized by his wife to make such agreement.—*Long v. Brown*, 66 Ind. 160.

[d] (Sup. 1880)

When a contract is made with a married woman for the erection or repair of a building, and a lien is sought to be enforced under the statute, it may be assumed that the contract was fair and conscionable, until the contrary appears.—*Vail v. Meyer*, 71 Ind. 159.

[e] (Sup. 1885)

The burden of proof is upon the person making a contract with a married woman, in which she might be surety, to show that she either did, or was to, receive the benefit of it.—*Vogel v. Lechner*, 102 Ind. 55, 1 N. E. 554; *Cupp v. Campbell*, 103 Ind. 213, 2 N. E. 565.

[f] In a suit to affect the separate estate of a married woman through a contract made with her during her coverture, it must affirmatively appear that the contract sought to be enforced against her was one which she had the power to make.—(Sup. 1886) *Jouchert v. Johnson*, 108 Ind. 436, 9 N. E. 413, followed (1889) *Long v. Crosson*, 119 Ind. 3, 4 L. R. A. 783, 21 N. E. 450, and *Stewart v. Babbs*, 120 Ind. 568, 22 N. E. 770.

[g] A mortgagee who loans money to a married woman for the benefit of her separate estate is not concluded from showing that fact by taking a negotiable note of the husband as part of the same transaction.—(Sup. 1886) *Jouchert v. Johnson*, 108 Ind. 436, 9 N. E. 413, affirmed *Johnson v. Jouchert* (1890) 124 Ind. 105, 24 N. E. 580, and followed *Noland v. State ex rel. Wasson* (1888) 115 Ind. 529, 18 N. E. 26.

[h] (Sup. 1889)

In ejectment for recovery of land, evidence of defendant, a married woman, that she was ignorant of the law, and did not know that a mortgage executed by her on her separate property to secure the debt of her husband, was not binding on her, is inadmissible, especially where it was not shown that the interested party had made any statements to her which misled her, or that he ever had any knowledge that she was ignorant of her legal rights.—*Wolfe v. McMillan*, 20 N. E. 509, 117 Ind. 587.

[i] (Sup. 1889)

Where a husband and wife join in a mortgage on their estate by the entireties to secure the apparent obligation of both, and defend a suit to foreclose the same on the ground that

the obligation was that of the husband alone, and that the wife received no part of the consideration for the mortgage, and that it was invalid as to her under Rev. St. 1881, § 5119, they must show affirmatively that the debt was not for their joint benefit.—*Security Co. v. Arbuckle*, 119 Ind. 69, 21 N. E. 469, followed *Jenne v. Burt* (App. 1889) 121 Ind. 275, 22 N. E. 256, and *Miller v. Shields* (App. 1890) 124 Ind. 166, 24 N. E. 670, 8 L. R. A. 406.

[j] (Sup. 1890)

Under Rev. St. 1881, § 5115, relating to contracts with married women, where an action is brought against a married woman upon her individual note, secured by a mortgage upon her separate property executed by herself and husband, the burden of proof is upon her to show that she occupies the relation of a surety or guarantor, and therefore comes within the disabling clause of the statute (section 5119).—*Miller v. Shields*, 124 Ind. 166, 24 N. E. 670, 8 L. R. A. 406.

[k] (App. 1892)

Where, in an action for work done on defendant's property, it was shown that defendant's husband first spoke to plaintiff about doing the work; that, when done, it was charged to the husband on plaintiff's book; and that the payments made were by the husband,—there was evidence to sustain a verdict for defendant.—*Ogden v. Kelsey*, 4 Ind. App. 209, 30 N. E. 922.

[l] (App. 1895)

Where medicines were furnished and professional services were rendered a wife, evidence that such wife told plaintiff that she wanted him paid, and that a third person heard her say that she would pay him, is sufficient to sustain a finding that such wife promised to pay for the services.—*Nelson v. Spaulding*, 39 N. E. 168, 11 Ind. App. 453.

[m] (Sup. 1896)

In an action by a married woman to recover money alleged to have been paid under duress, plaintiff, who was the only witness as to the duress, testified that defendant, his attorney, and the sheriff, accompanied by her husband, came to her house, and threatened to take her husband,—who had been arrested the night before for drunkenness, and released from jail,—unless she paid a claim for which her goods had been attached as surety for her husband. Defendant, his attorney, and the sheriff testified that the payment was voluntary. *Held*, that a finding for defendant on the issue of duress would not be disturbed.—*Stanley v. Dunn*, 42 N. E. 908, 143 Ind. 495.

[n] (App. 1896)

In an action on a note given by husband and wife, where there was plea of payment, it appeared that the husband was also indebted to plaintiff individually, and that, as agent for his wife, he had transferred to plaintiff certain claims due her, which had been credited on

his individual indebtedness. There was no objection made to this application of credit either by the husband or by the wife, who had opportunities for knowing the facts. *Held* that, the burden of proof as to payment being on the defendants, a finding that the application of credit had been acquiesced in by the wife, and that the note had not been paid, will not be set aside on the ground that the evidence was insufficient to support it.—*Moore v. McPheeters*, 16 Ind. App. 696, 43 N. E. 972.

[o] (App. 1897)

Defendant introduced a bond given by plaintiff and defendant's husband to a loan association to guarantee the association against loss, etc. The bond recited that whereas defendant's husband had entered into a contract with defendant "to make certain improvements on real estate \* \* \* belonging to [defendant], and described as follows," etc., the lot being the one described in the complaint. *Held* competent, as tending to show that plaintiff dealt with defendant's husband, and not through him with defendant.—*Russell v. Stoner*, 18 Ind. App. 543, 47 N. E. 645, 48 N. E. 650.

Evidence in plaintiff's examination in chief that he knew defendant's husband, and at the time the house was erected he was insolvent, and that lumber merchants would not sell him material, was irrelevant.—*Id.*

In an action to charge defendant with material alleged to have been bought by her, through her husband as agent, and used in building a house on her separate real estate, and for which plaintiff alleged she afterwards promised to pay, testimony that she tried to borrow money with which to build the house is irrelevant.—*Id.*

[p] (App. 1899)

In an action on a note which it was claimed was signed by a wife for the husband, evidence as to who paid the interest was material.—*Foster v. Honan*, 53 N. E. 667, 22 Ind. App. 252.

[q] (Sup. 1900)

Where a complaint was based on a note executed by a wife alone, and secured by a mortgage on her separate real estate, there is no presumption that she was a surety, and the burden is on her to allege and prove that she executed the note and mortgage as surety, and not as principal.—*Field v. Noblett*, 56 N. E. 841, 154 Ind. 357.

[r] (Sup. 1904)

Where a note given by a wife is signed by her alone, the burden is on her, in an action on the note, to show her suretyship.—*Harbaugh v. Tanner*, 71 N. E. 145, 163 Ind. 574.

[s] (App. 1908)

Where, in replevin by a married woman for a certificate of shares of bank stock, there was evidence that she owned the stock, that her husband was indebted to defendant, who de-

manded security, that the husband informed him that his wife owned the stock and would furnish the same as security, that she signed an indorsement of the certificate to defendant, that she obtained neither money nor property for the assignment of the certificate to defendant, and that none of the money obtained thereby was expended for the benefit of her separate property, the jury could find that the wife indorsed the certificate to defendant to secure her husband's individual debts, and that defendant knew that the certificate was her individual property, so that the wife's contract was one of suretyship, and voidable under Burns' Ann. St. 1901, § 6964.—*Opperman v. Citizens' Bank of Michigan City*, 85 N. E. 991.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. HUS. & W. §§ 738, 844-848.

**§ 233. — Proof of marriage.**

[a] (Sup. 1844)

In assumpsit against husband and wife on a promissory note made by the wife *dum sola*, and non assumpsit pleaded, the plaintiff must prove the marriage.—*Wallace v. Jones*, 7 Blackf. 321.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. HUS. & W. §§ 844, 845.

**§ 235. Trial.**

Conformity of findings and conclusions of court to pleadings, issues and proofs, see TRIAL, § 396.

Error in instructions cured by withdrawal or giving other instructions, see TRIAL, § 206.

Facts and conclusions to be found by court, see TRIAL, § 391.

Instructions as to agency of husband for wife as to separate property, see ante, § 138.

[a] (Sup. 1846)

Whether a wife is her husband's agent by express or implied authority is a question entirely for the jury.—*Casteel v. Casteel*, 8 Blackf. 240, 44 Am. Dec. 763.

[b] (Sup. 1881)

An instruction that a married woman cannot be deprived or divested of her property by her husband or any other person "without her agreement and consent" is improper in using the conjunctive, instead of the disjunctive, between the words "agreement" and "consent."—*Paulman v. Claycomb*, 75 Ind. 64.

[c] (Sup. 1881)

In suit against husband and wife to enforce a lien against her real estate, defenses pleaded by her are available for him; and if he sets up separate defenses, while she makes a counterclaim for damages and prays that plaintiff's lien be canceled or satisfied, a general verdict for defendants is good.—*Floore v. Steigelmayer*, 76 Ind. 479.

[d] (Sup. 1881)

In an action by a married woman to recover a deposit on the purchase of certain land under a contract that the deed should be made to her in her own name free of incumbrances, on the ground that defendant conveyed certain land, including the land in question, to the brother of plaintiff's husband, and took a mortgage from him for a portion of the price, and then caused the land in question to be conveyed to plaintiff's husband, subject to the mortgage without her consent, answers to special interrogatories that plaintiff's husband had been her general agent for ten years last past with authority to take and use property belonging to plaintiff in his own name, but that there had been a revocation of such agency, that there was no proof that the husband's grantor was insolvent when the suit was brought, and that the husband took the deed from his brother and not from defendant, were not irreconcilably in conflict with the general verdict in favor of plaintiff.—*Carver v. Leedy*, 80 Ind. 335.

[e] (Sup. 1887)

Rev. St. 1881, § 5119, provides that any contract of suretyship, entered into by a married woman, shall be void. In an action to foreclose a mortgage executed by defendant and her husband on land held by them as tenants by entireties, the court found, as a special finding of fact, that the defendant executed the mortgage in order that her husband might obtain the money loaned thereon, and not for the purpose of obtaining any money herself. *Held*, that this finding of fact is not such a conclusive finding that the defendant was a surety as will warrant the conclusion of law that the mortgage is void as to her.—*Bartholomew v. Pier-son*, 112 Ind. 430, 14 N. E. 249.

[f] (App. 1891)

In an action involving the issue whether a husband was the wife's agent for the sale of her land, where the evidence established a prima facie agency, it was proper to instruct the jury that they might consider the wife's failure to deny the agency.—*Barnett v. Gluting*, 3 Ind. App. 415, 20 N. E. 154, 927.

[g] (Sup. 1898)

In an action against a husband and wife to foreclose a mortgage, the wife answered, setting up the marriage, and alleging that the mortgage was not given for the purchase money of the land, and that she did not join in its execution. It was found in the special finding that the mortgage was given for the purchase money, but it was not found whether such defendant was the wife of her codefendant at the time of its execution. *Held*, that this fact must be taken as found against the wife.—*Brunson v. Henry*, 52 N. E. 407, 152 Ind. 310.

[h] (Sup. 1904)

In a suit to foreclose a mortgage, where the special finding was silent in regard to

knowledge of the mortgagee as to the fact of a mortgagor's coverture, it would be treated as an express finding of that fact against such mortgagor, as no omission of fact can be supplied by intendment in a special finding.—*Webb v. John Hancock Mut. Life Ins. Co.*, 69 N. E. 1006, 162 Ind. 616, 66 L. R. A. 632.

[i] (Sup. 1904)

The question whether one loaning money to a married woman made such an investigation as would warrant him in treating the woman as a principal in the transaction is, when the facts are undisputed, a question of law.—*Field v. Campbell*, 72 N. E. 260, 164 Ind. 389 108 Am. St. Rep. 301.

[j] (App. 1905)

Where the landlord occupied a room in the house of the tenant under an agreement by the tenant that the landlord should have the room cared for in payment for the rent, and during illness the landlord was cared for by the tenant's wife, it is a question for the jury whether she did so as performing services for her husband and family, or pursuant to an independent agreement between herself and the landlord, for whom they were rendered.—*Kennedy v. Swisher*, 73 N. E. 724, 34 Ind. App. 676.

[k] (App. 1906)

Where defendant was a married woman at the time she executed the note sued on jointly with her husband, since deceased, and interrogatories returned with a general verdict in favor of plaintiff did not show that the antecedent debt for which the note was given was not a debt of a partnership composed of herself and her husband, nor exclude the possibility of defendant ever having received any benefit in person from the execution of the note sued on, the answers to such interrogatories were not in irreconcilable conflict with the general verdict.—*Anderson v. Citizens' Nat. Bank of Crawfordsville*, 76 N. E. 811, 38 Ind. App. 190.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 589, 849-852.

See, also, 21 Cyc. pp. 1572-1575.

§ 237. Judgment.

Conclusiveness of judgment as against spouse, see Judgment, § 693.

Equitable relief against, see JUDGMENT, §§ 437, 438.

Motion in arrest, see JUDGMENT, § 267.

Revival of judgment against widow of judgment debtor, see JUDGMENT, § 865.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 853-864; 30 CENT. DIG. Judgm. § 1188.

See, also, 21 Cyc. pp. 1575-1585; note, 55 Am. Dec. 599.

§ 238. — In general.

Lien of judgment against husband, see JUDGMENT, §§ 752-802.

[a] (Sup. 1835)

If, in a suit brought by the state on the relation of a feme sole, the relator's subsequent marriage be suggested, and the plaintiff recover, the judgment should be for the state on the relation of the husband and wife.—*Trimble v. State ex rel. Hobagh*, 4 Blackf. 42.

[b] (Sup. 1843)

A husband is a proper party to a scire facias on a justice's transcript of a judgment rendered against his wife while sole.—*Campbell v. Baldwin*, 6 Blackf. 364.

[c] (Sup. 1852)

Where the subject-matter of a bill against a husband and wife relates to the separate property of the wife, a decree by default against the wife on an answer of the husband on behalf of himself and the wife, confessing the bill, is erroneous.—*Work v. Doyle*, 3 Ind. 436.

[d] (Sup. 1870)

In an action by a married woman concerning her separate property, the husband not himself joining in the complaint, the plaintiff alleged that she was a married woman, and therefore she joined her husband as a party plaintiff. Held, that there was no error in the fact that nothing was said as to the husband in the verdict or judgment; nor it seems would this have been error had the husband been made a party plaintiff properly by himself joining in the complaining.—*McCormick v. Hyatt*, 33 Ind. 546.

[e] (Sup. 1873)

A joint judgment rendered against a married woman and her husband on a promissory note executed by them jointly, the wife failing to plead her coverture, is not a nullity, but is a lien on the real estate of the wife.—*Wagner v. Ewing*, 44 Ind. 441.

[f] (Sup. 1874)

If a married woman fails to make the defense of coverture to an action on her contract, and a judgment is rendered thereon, she is bound by the judgment.—*Landers v. Douglas*, 46 Ind. 522.

[g] (Sup. 1876)

In an action to revive a judgment, brought by the administrator of the deceased assignee, the complaint alleged that the defendant wife, as the real owner of the judgment in a trust capacity, had, with the consent of her husband, also a defendant, but without his joining therein, assigned it in writing, on the entry thereof in the order book, to the plaintiff's intestate, who was her successor in trust. Held, that the complaint was good against a demurrer for want of sufficient facts.—*Starnes v. Underwood*, 54 Ind. 48.

[h] (Sup. 1876)

Land owned by a married woman was sold under a decree against her and her husband for the foreclosure of a mortgage thereon. The purchaser, upon receipt of the sheriff's deed, brought an action jointly against the husband and wife to recover possession, and the value of rents and profits for the time during which the wife had held over after the expiration of the year of redemption. *Held*, that a joint judgment for possession, although the husband occupied the land only by the sufferance of the wife, and against the wife for the rents, is proper.—*Clements v. Robinson*, 54 Ind. 599.

[i] (Sup. 1876)

Though the promissory note of a married woman, executed during her coverture, is void, yet if, in an action thereon, she make default, and a judgment be rendered against her, she is forever estopped from denying or collaterally attacking it.—*Burk v. Hill*, 55 Ind. 419.

[j] (Sup. 1878)

Where it appears on the face of the complaint in an action against a husband and wife on a note and to foreclose a mortgage securing payment thereof that the wife was a married woman at the time the contract was made and judgment is rendered thereon against her by default, she is not estopped to show her coverture as a defense.—*Emmett v. Yandes*, 60 Ind. 548.

[k] (Sup. 1881)

A personal judgment against a husband and wife on the promise, contained in their mortgage on her real estate, to secure the debts of a firm of which he was a member, *held* erroneous; such promise being void on her part, and he having pleaded the nonjoinder of the other joint makers on the firm notes.—*Moffitt v. Roche*, 77 Ind. 48.

[l] (Sup. 1882)

Rev. St. 1881, § 5117, providing that a married woman shall not enter into any contract to sell, convey, or mortgage her land, and cannot convey or mortgage the same unless her husband join in the contract, conveyance, or mortgage, does not prevent a judgment against a married woman from becoming a lien on her land.—*Burk v. Platt*, 88 Ind. 283.

[m] (Sup. 1884)

A judgment creditor of a husband suffered default in an action to foreclose a mortgage on the husband's real estate, executed by both husband and wife before the judgment became a lien, on the representation by the mortgagee that judgment would be taken against both husband and wife. Judgment was taken against the husband and creditor only, and provided that any surplus on the sale should be paid to the husband. *Held*, that he was not entitled to have the default set aside, as his judgment was no lien on the wife's interest, and if he had wanted payment out of the surplus he

should have filed a cross complaint.—*De Armond v. Preachers' Aid Soc.*, 94 Ind. 59.

[n] (Sup. 1884)

A judgment against a married woman is valid as against a collateral attack.—*Wright v. Wright*, 97 Ind. 444.

[o] (Sup. 1884)

A judgment foreclosing the lien of a drainage assessment upon lands held by a husband and his wife as tenants by entireties, both of whom were parties to the suit, is valid, although a personal judgment was rendered against the husband alone.—*Barren Creek Ditching Co. v. Beck*, 99 Ind. 247.

[p] (Sup. 1890)

Where a complaint alleges a joint cause of action by a husband and wife, and the evidence shows that the former had no interest in the cause of action, judgment may properly be rendered in favor of the latter, under Rev. St. § 568, providing that judgment may be given for or against one of several plaintiffs, and that the court may determine the ultimate rights of the parties as between themselves.—*Nicodemus v. Simons*, 121 Ind. 564, 23 N. E. 521.

#### FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. HUS. & W. §§ 853-855, 858-864.

See, also, 21 Cyc. pp. 1575-1578, 1581-1585.

#### § 239. — Against wife personally.

[a] (Sup. 1859)

In a suit for the foreclosure of a mortgage given by a husband and wife to secure a bond or note given by the husband alone, judgment for the recovery of the money should not be rendered against the wife.—*Kirk v. Ft. Wayne Gaslight Co.*, 13 Ind. 56.

[b] (Sup. 1874)

A married woman joined with her husband in a mortgage upon her separate real estate to secure the payment of certain notes made by her alone. The mortgage contained no express agreement for the payment of the sum of money, or other identification of a debt secured by the mortgage than the reference to the notes. *Held*, that there could be no personal judgment against the wife, because the notes were void as to her, nor against the husband, because he did not sign the notes or in any manner agree to pay the debt.—*Brick v. Scott*, 47 Ind. 299.

[c] (Sup. 1875)

Where, in an action against husband and wife for slanderous words spoken by the wife, the husband dies after verdict and before judgment, the widow is liable to a separate judgment against herself alone.—*Sunman v. Brewin*, 52 Ind. 140.

[d] (Sup. 1878)

An action cannot be maintained by a married woman to have a personal judgment render-

ed against her upon a simple contract declared void, though her coverture and the nature of the indebtedness appear on the face of the complaint in such case; the proper remedy being by an action to review such judgment.—*Hinsey v. Feeley*, 62 Ind. 85.

[e] (Sup. 1881)

A personal deficiency judgment taken against a husband and wife, defendants in a suit to foreclose a mortgage given by them, is not void, and cannot be collaterally attacked, though it is error to permit the same to be taken against the wife.—*Gall v. Fryberger*, 75 Ind. 98; *Dill v. Vincent*, 78 Ind. 321.

[f] (Sup. 1886)

Any contract which a married woman may lawfully execute may be enforced against her by personal judgment in a court of competent jurisdiction.—*Fawcner v. Scottish-American Mortg. Co.*, 107 Ind. 555, 8 N. E. 689.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 855, 856, 860, 862.

See, also, 21 Cyc. p. 1580.

§ 240. — Against wife's separate property.

[a] (Sup. 1859)

A feme sole, while in the occupation of plaintiff's premises, married, and continued with her husband to occupy the same premises. *Held*, that an action for use and occupation for the time she occupied as a feme sole should be brought against her and her husband, but, unless it was shown that he received the property from her at the marriage or afterwards, the judgment in the case should be rendered against her separate property.—*Tobin v. Connery*, 13 Ind. 65.

[b] (Sup. 1880)

1 Rev. St. 1876, p. 550, § 3, provides for and authorizes a personal judgment against a married woman, upon her contract made before marriage, to be levied on her property only, then owned or thereafter acquired by her.—*Smith v. Beard*, 73 Ind. 159.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 857.

See, also, 21 Cyc. p. 1580.

§ 241. Execution.

Death of husband during life of wife as affecting title of purchaser at sale of wife's land on execution against husband, see EXECUTION, § 265.

[a] (Sup. 1862)

In a decree of foreclosure against husband and wife, judgment that execution for any deficiency issue against "the defendants" is wrong. Such execution should issue against the husband alone.—*Gebhart v. Hadley*, 19 Ind. 270.

[b] (Sup. 1866)

Under the statute changing the common law, and making all lands of the judgment debtor, whether in possession, reversion, or remainder, liable to be sold on execution against the debtor owing the same, or for whose use the same are held, the right of survivorship attaching to the owners of the estate held by the husband and wife as tenants by the entireties does not constitute a contingent or vested remainder, so as to render it liable to sale on execution for the debts of the husband or wife during their joint lives, but is a mere incident to the estate.—*Davis v. Clark*, 26 Ind. 424, 89 Am. Dec. 471.

[c] When a married woman fails to interpose the defense of coverture to a suit, she is estopped from availing herself of such fact after judgment to avoid execution.—(Sup. 1872) *McDaniel v. Carver*, 40 Ind. 250; (1872) *Elson v. O'Dowd*, Id. 300.

[d] (Sup. 1877)

A husband and wife may maintain an action to enjoin the sheriff from levying upon and selling, on an execution against the husband, land held by them as tenants by entireties.—*Hulett v. Inlow*, 57 Ind. 412, 26 Am. Rep. 64.

[e] (Sup. 1882)

Where a married woman is a member of a firm, and judgment is rendered against her and her partner on a firm debt, injunction will not lie to enjoin the satisfaction of the judgment out of her land.—*Burk v. Platt*, 88 Ind. 283.

[f] (Sup. 1885)

A sale of land upon a judgment against the husband alone does not carry the interest of the wife.—*Wright v. Tichenor*, 104 Ind. 185, 3 N. E. 853.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 865-870.

See, also, 21 Cyc. pp. 1585-1588.

§ 242. Enforcement of judgment against wife's separate property.

[a] (Sup. 1869)

In a suit by a married woman to recover personal property levied upon an execution issued on a judgment against her husband, there was no error in admitting in evidence a written agreement between her brother who gave her the money with which the property was bought and her trustee under which the money was advanced to her; its execution having been proved.—*Bellows v. Rosenthal*, 31 Ind. 116.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 871.

See, also, 21 Cyc. p. 1588.

§ 243. Appeal and error.

[a] (Sup. 1873)

Where a complaint against a husband and wife prays judgment only against the separate property of his wife, the husband, by virtue of the marital relation, can join in an appeal from

a judgment against the property of the wife.—*Hodson v. Davis*, 43 Ind. 258.

[b] (*Sup.* 1873)

If a complaint to recover for work done and materials furnished in erecting a house on the real estate of a married woman alleges that the materials were furnished and the work was done at her request, and that the same were necessary, it will be inferred that it was proved on the trial that her contract related to the betterment of her real estate, and the court should render judgment charging such estate with the value of such improvement.—*Sharpe v. Clifford*, 44 Ind. 346.

[c] (*Sup.* 1898)

Where a husband and wife unite in an assignment of error, the assignment will be good as to both if it is good as to the wife.—*Magel v. Milligan*, 50 N. E. 564, 150 Ind. 582, 65 Am. St. Rep. 382.

[d] (*Sup.* 1900)

Where the third paragraph of an answer to a complaint on a note and mortgage alleged defendant's coverture, and that her undertaking was one of suretyship, and the fourth paragraph alleged the same, and that plaintiff had knowledge of the facts alleged in the third, the erroneous sustaining of a demurrer to the third paragraph was not harmless error, on the ground that the same evidence was admissible under the fourth, since the fourth imposed a greater burden on defendant, by requiring proof that plaintiff had knowledge of the facts alleged therein.—*Field v. Noblett*, 56 N. E. 841, 154 Ind. 357.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 872-874;

2 CENT. DIG. APP. & E. § 1912; 3 CENT.

DIG. APP. & E. § 2987.

See, also, 21 Cyc. pp. 1589, 1590.

§ 244. Costs.

[a] (*Sup.* 1875)

Where a married woman sues in her own name for her separate property, and fails to maintain her action, she is liable for costs as other persons in like cases.—*Adams v. Waters*, 50 Ind. 325.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 875-877.

See, also, 21 Cyc. p. 1591.

## VII. COMMUNITY PROPERTY.

As vested right, see CONSTITUTIONAL LAW, § 96.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 878-1045.

See, also, 21 Cyc. pp. 1633-1719; notes, 96 Am. St. Rep. 916, 126 Am. St. Rep. 99.

## VIII. SEPARATION AND SEPARATE MAINTENANCE.

Alimony in actions for divorce, see DIVORCE, §§ 199-288.

Effect of separation on disabilities of coverture, see ante, § 65.

Effect of separation on husband's liability for necessities for wife, see ante, § 19.

Stipulations and agreements as to alimony in actions for divorce, see DIVORCE, § 236.

§ 277. Separation agreements.

Bar to or release of dower, see DOWER, § 42.

Contract against public policy, see CONTRACTS, § 111.

Election between separation agreement and dower, see DOWER, § 58.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 1046-1061.

See, also, 21 Cyc. pp. 1592-1598; note, 38

C. C. A. 608; note, 83 Am. St. Rep. 859.

§ 278. — Requisites and validity.

[a] (*Sup.* 1820)

Where, on the separation of husband and wife, the husband bound himself by deed to pay to a trustee a certain sum annually for four years for his wife's maintenance, reserving the right to deduct from the amount whatever he should have to pay for debts subsequently contracted by her, semble that, though he be not in any respect indemnified against her debts, the contract is valid as against him, though in such case it will not be enforced to the prejudice of one of his creditors or purchasers.—*Reed v. Beazley*, 1 Blackf. 97.

[b] (*Sup.* 1868)

An agreement between husband and wife, made in view of separation, and fully executed on the part of the husband, for a fair and reasonable consideration, may be upheld in equity, although made by parol; and the intervention of a trustee is not necessary.—*Dutton v. Dutton*, 30 Ind. 452.

[c] (*Sup.* 1896)

A contract between a husband and wife, in view of separation, whereby, in consideration of a conveyance of a just and fair proportion of his property, she relinquishes all her rights in his property, as wife or widow, not having been rescinded, is binding.—*Hilbish v. Hattle*, 145 Ind. 59, 44 N. E. 20, 33 L. R. A. 783.

[d] (*App.* 1899)

A wife cannot recover support provided for in a contract with her husband which recites that they were living apart "by reason of the abandonment one of the other," since, the contract failing to show that she left him for reasons justified by law, she has no claim for support, and hence the contract to furnish it is without consideration.—*Scherer v. Scherer*, 55

N. E. 494, 23 Ind. App. 384, 77 Am. St. Rep. 437.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. HUS. & W. §§ 1046-1053; 11 CENT. DIG. CONTRACTS, §§ 515, 517.

See, also, 21 Cyc. pp. 1592-1594.

**§ 279. — Construction and operation.**

[a] (Sup. 1820)

On the separation of a husband and wife, the husband bound himself by deed to pay to a trustee a certain sum annually for four years for his wife's maintenance, reserving the right to deduct from the amount whatever he should be obliged to pay for debts which she might subsequently contract. *Held*, that the contract was obligatory at law against the husband.—*Reed v. Beazley*, 1 Blackf. 97.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. HUS. & W. §§ 1054, 1056-1060.

See, also, 21 Cyc. pp. 1595-1598.

**§ 282. Right to allowance for maintenance.**

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. HUS. & W. §§ 1062-1073.

See, also, 21 Cyc. pp. 1598-1603.

**§ 283. — Of wife.**

[a] (Sup. 1878)

The relief provided by 1 Rev. St. 1876, p. 553, for a married woman "deserted by" her husband, cannot be had by one who leaves her husband, though she have good cause for so doing.—*Stanbrough v. Stanbrough*, 60 Ind. 275.

The word "abandonment," as used in 1 Rev. St. 1876, p. 553, is the act of willfully leaving the wife with intent to cause a palpable separation from her, and implies an actual desertion of the wife by the husband.—*Id.*

[b] (App. 1893)

A husband who contracts a venereal disease from adulterous intercourse, and inoculates his wife therewith, in consequence of which she leaves him, taking her children with her, is guilty of a desertion of the wife, within the meaning of Rev. St. 1881, § 5132, cl. 1, which renders the husband liable for the support of his wife and children on his desertion of them. *Stanbrough v. Stanbrough*, 60 Ind. Ind. 275, explained.—*Carr v. Carr*, 6 Ind. App. 377, 33 N. E. 805.

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. HUS. & W. §§ 1062-1073.

See, also, 21 Cyc. p. 1598.

**§ 285. Actions for separate maintenance.**

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. HUS. & W. §§ 1074-1099.

See, also, 21 Cyc. pp. 1603-1610; note, 77 Am. St. Rep. 228.

**§ 286. — Nature and form.**

[a] (Sup. 1878)

1 Rev. St. 1876, p. 553, providing relief for a wife who is deserted by her husband, does not contemplate a personal judgment as for alimony, but only provides for the rental or sale of the deserting husband's property from time to time for the temporary support of the wife.—*Stanbrough v. Stanbrough*, 60 Ind. 275.

[b] (Sup. 1896)

An action by a wife against the husband for support under the statute on the ground that he had abandoned her without making provision for her and her children is a purely statutory action.—*Arnold v. Arnold*, 39 N. E. 862, 140 Ind. 199.

**§ 296. — Pleading.**

[a] (Sup. 1885)

A complaint by a wife for separate support because of desertion, which failed to allege that the desertion was without cause, *held* cured by verdict.—*Harris v. Harris*, 101 Ind. 498.

[b] (Sup. 1889)

Rev. St. 1881, § 5132, provides that a wife may sue for the support of herself and children, among other cases, when the husband has deserted her; and section 5133 prescribes that the complaint shall set forth at least one of the grounds specified in the preceding section. *Held*, when the complaint alleged that defendant had frequently abused plaintiff without cause, charged her with infidelity, threatened her life, and driven her away from home, compelling her to take her infant children with her, that an objection that the complaint did not sufficiently charge defendant with desertion must be raised by demurrer, and cannot be considered when raised for the first time after trial.—*Walter v. Walter*, 117 Ind. 247, 20 N. E. 148.

[c] (App. 1893)

While a prayer for a money judgment in the sum of \$2,000 is not to be commended, under Rev. St. 1881, § 5133, requiring the complaint in an action by a wife against her husband for the support of herself and infant children to state the sum necessary for such support, yet a demurrer will not be sustained to the complaint in the absence of a direct attack thereon for this reason.—*Carr v. Carr*, 6 Ind. App. 377, 33 N. E. 805.

In an action by a wife against her husband for the support of herself and infant children, an allegation in the complaint that the husband, without cause, had "abandoned" her and them, is a sufficient allegation of "desertion," under Rev. St. 1881, § 5132, cl. 1, which provides that a married woman may ob-

tain provision for the support of herself and infant children when the husband shall have "deserted" her and them without cause, not leaving her or them sufficient provision for her or their support.—Id.

Under Rev. St. 1881, § 5132, cl. 4, which enables the wife to obtain provision for the support of herself and infant children where the husband renounces the marriage covenant, and refuses to live with the wife in the conjugal relations, by joining himself to a sect or denomination, the doctrine of which requires a renunciation of the marriage covenant, an allegation in the complaint that the husband had "renounced the marriage relation" is insufficient, in the absence of an averment that he had joined himself to such a sect or denomination.—Id.

[d] (Sup. 1895)

In an action for support by a wife against her husband, where the complaint did not state what amount would be necessary to the maintenance of the plaintiff and her children, as required by section 6978, 3 Rev. St. 1894 (section 5133, Rev. St. 1881), it was fatally defective.—Arnold v. Arnold, 140 Ind. 199, 39 N. E. 862.

In an action by a wife against her husband for failure to support, there must be a reasonably fair attempt in the complaint to bring the case within the terms and conditions of the statute authorizing such action.—Id.

[e] (App. 1905)

In a suit by a wife for separate maintenance, a general allegation of desertion is sufficient to justify the admission of evidence that the desertion was without cause.—Smith v. Smith, 74 N. E. 1008, 35 Ind. App. 610.

Under a charge of desertion, in an action of support, the wife may prove the cause thereof as bearing on the amount of allowance.—Id.

In an action by a wife for separate support on the ground of desertion and failure to provide through drunkenness, denials of intoxication, desertion, and mistreatment, and allegations that plaintiff lived separate from defendant of her own will, and without cause, and had never offered to return to defendant, or asked him for money, were provable under the general denial.—Id.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 1089.

See, also, 21 Cyc. p. 1605.

## § 297. — Evidence.

[a] (Sup. 1889)

Rev. St. 1881, §§ 5132, 5133, provide that a wife may sue for the support of herself and children, among other cases, when the husband has deserted her. *Held* that, in such an action, evidence of the husband's conduct towards the wife immediately before and during the year previous to the separation is competent as bearing

on the question of the husband's desertion.—Walter v. Walter, 117 Ind. 247, 20 N. E. 148.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 1090.

See, also, 21 Cyc. p. 1607.

## § 298. — Amount of award.

[a] (Sup. 1859)

In a proceeding by the wife for support, the court may ascertain the cause and the circumstances of the abandonment, and, if it occurred under circumstances mitigating or justifying it, it would seem that an equitable case is not made out for giving more than what necessity requires for a support, in connection with the wife's own earnings, where the property of the husband amount to but \$700.—Chapman v. Chapman, 13 Ind. 396.

[b] (App. 1899)

In a proceeding by a wife against her husband for support of herself and child, a verdict of \$200 is not excessive, where the husband has \$1,100 at interest, and draws \$40 a month as wages.—Brackett v. Brackett, 55 N. E. 783, 23 Ind. App. 530.

[c] (App. 1902)

In an action by a wife for support it appeared that the defendant had deserted plaintiff and had assaulted her. Defendant was able-bodied and employed, and was earning wages, and owned certain personal property. *Held*, that a judgment against defendant for \$50, payable in monthly installments of \$5, was sustained.—Dorsey v. Dorsey, 64 N. E. 475, 29 Ind. App. 248.

[d] (App. 1905)

Under Burns' Ann. St. 1901, § 6979, relative to suits by wife for separate maintenance, and providing that the court may make such orders and allowances in the nature of alimony as may seem just and equitable, the court is justified in such an action in ordering the payment of a weekly allowance instead of a sum in gross.—Smith v. Smith, 74 N. E. 1008, 35 Ind. App. 610.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 1093.

See, also, 21 Cyc. p. 1607.

## § 299. — Judgment, and enforcement thereof.

Collateral attack thereon, see JUDGMENT, § 479.

[a] (Sup. 1859)

In a suit by a wife, whose husband has abandoned her, under St. 1857, asking that a conveyance of his land, in which she joined, may be set aside, and that she may be allowed a support out of it, where there is but a nominal judgment for alimony, the conveyance of the land will not be disturbed for the collection of the judgment, at least, till after a refusal or failure to pay that nominal judgment without such disturbance.—Chapman v. Chapman, 13 Ind. 396.

## [b] (App. 1901)

Burns' Rev. St. 1894, §§ 6977-6982, 6984-6986, empowering the wife to sue for support on abandonment, authorize the suit in the county of her residence, direct that the complaint set forth the property of the husband in the state, and provide for the sale of such property by commissioner, and that on confirmation the purchaser's title shall not be questioned collaterally if the court had jurisdiction of the husband by service of process. A wife sued for support in the county of her residence, and on return of summons without service process was issued for the husband in another county, and served by leaving copy at his last place of residence. Decree for support was rendered, and in such latter county ordered sold, and a commissioner appointed for the sale, when a transcript of a judgment against the husband was filed. *Held* that, as the court had jurisdiction of the husband's person and control of the land when the transcript was filed, the commissioner's deed conveyed the title as against a purchaser at execution sale under the judgment lien.—*Comstock v. Brandon*, 61 N. E. 686, 27 Ind. App. 475.

## [c] (App. 1906)

Under the express provisions of Burns' Ann. St. 1901, § 6980, the court may, in an action by a wife for separate maintenance, authorize the wife to lease or mortgage the husband's real estate, and apply the proceeds and rents to the payment of alimony.—*Smith v. Smith*, 74 N. E. 1008, 35 Ind. App. 610.

## FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 1004-1097.

See, also, 21 Cyc. pp. 1608-1610.

## IX. ABANDONMENT.

Abandonment of wife as barring curtesy, see CURTESY, § 11.

As class legislation, see CONSTITUTIONAL LAW, § 208.

Evidence of in action by wife for malpractice or negligence of physician, see PHYSICIANS AND SURGEONS, § 18.

## § 302. Nature of offense.

## [a] (Sup. 1896)

Where a wife, child, or children are at the time of being deserted by the husband or father left with a comfortable support, whether such provision was made by the husband or father or is possessed in the right of the wife, child, or children, the desertion is not criminal within Rev. St. 1881, § 2133, declaring that "whoever, without cause, deserts his wife, child or children, and leaves such wife, child or children a charge upon any of the counties of the state, or without provision for a comfortable support shall be fined."—*State v. Rice*, 5 N. E. 906, 106 Ind. 139.

## FOR CASES FROM OTHER STATES.

SEE 26 CENT. DIG. HUS. & W. § 1100.

See, also, 21 Cyc. p. 1611.

## § 305½. Penalties and actions therefor.

New trial, see PENALTIES, § 37.

Pleading matter in abatement, see PLEADING, § 107.

## [a] (Sup. 1901)

On a prosecution under Acts 1895, p. 167, for a fraudulent marriage, it was not necessary that the complaint disclose that relatrix at the time of the marriage had been seduced by defendant or was the mother of a bastard child.—*Latschaw v. State ex rel. Latschaw*, 59 N. E. 471, 156 Ind. 194.

On a prosecution under Acts 1895, p. 167, the complaint was not insufficient because it charged that defendant fraudulently entered into the marriage with intent to escape a criminal prosecution, and it appeared the particular prosecution which defendant desired to avoid was bastardy; the pleader seeming from misapprehension to have considered bastardy as criminal and so termed it in the complaint.—*Id.*

Prosecutions under the statute providing for the bringing of actions for fraudulent marriages (Acts 1895, p. 167) are not criminal, but are civil.—*Id.*

Under Act 1895, p. 167, giving an action against a husband for after fraudulently marrying the wife abandoning her, the facts alleged in the complaint must be substantially sufficient to bring the case within the statute.—*Id.*

In an action to recover the penalty which Acts 1895, p. 167, gives to an abandoned wife against a husband who has fraudulently married her to avoid civil or criminal liability for bastardy, a complaint that one G., who was under prosecution for bastardy, preferred by A., married said A. with intent to escape a criminal prosecution, who was then and there pregnant with a bastard child by said G., and that said G. did unlawfully abandon her, etc., states a cause of action under the statute, though the statutes used the words "mother of the bastard child," and the pleading "pregnant with" such child.—*Id.*

Acts 1895, p. 167, § 4, provides that the practice in actions of an abandoned wife against a husband, who married her to avoid liability for bastardy, shall be governed by the laws governing prosecutions for bastardy. By Bastardy Act, § 15 (Burns' Rev. St. 1894, § 1004; Horner's Rev. St. 1897, § 992), the court, and not the jury, fixes the amount which defendant ought to pay. *Held* error, in an action under the former statute, to submit the assessment of damages to the jury under instructions.—*Id.*

In an action for a statutory penalty by an abandoned wife against a husband who had fraudulently married her to avoid prosecution for bastardy, an instruction that, if the jury should find certain issuable facts to be true,

they might infer or conclude that the marriage was fraudulent on the part of defendant, and had been entered into by him to avoid the consequences of a bastardy prosecution, and that then their verdict should be for plaintiff, was improper, such conclusion being a question of fact, and not of law.—Id.

[b] (Sup. 1903)

The word "abandon," in Burns' Rev. St. 1901, § 7298a, providing that any male person, who, being at the time under or liable to a prosecution for seduction or bastardy, fraudulently enters into a marriage with the female who has been seduced, or who is the mother of the bastard child, with the intention of thereby avoiding such prosecution, and who, within two years after the marriage, shall abandon his wife, or cruelly or inhumanly mistreat his wife, or fail and neglect to reasonably provide for her support, shall be liable to a penalty, means a physical abandonment, and does not include a constructive abandonment.—*Milbourne v. State ex rel. Milbourne*, 68 N. E. 684, 161 Ind. 364.

In an action under Burns' Rev. St. 1901, § 7298a, providing that any male person who, being at the time under or liable to a prosecution for seduction or bastardy, fraudulently marries the female who has been seduced, or who is the mother of the bastard child, with the intention of avoiding the prosecution, and who within two years thereafter abandons his wife or neglects to provide for her, etc., shall be liable to an action for the recovery of a penalty, an instruction that the evidence admitted tending to show the treatment of the husband by the wife might be considered by the jury, together with the other evidence in the case, in determining the relations existing between the husband and the wife, and, if the husband abandoned the wife, whether he had any sufficient cause therefor, was not erroneous, as informing the jury that the evidence could only be considered on the question whether he had any sufficient cause to abandon the wife.—Id.

[c] (App. 1903)

Burns' Rev. St. 1901, § 7298a, subjects to a penalty any male person who, having become civilly or criminally liable for bastardy or seduction, shall marry the wronged female with intent to escape prosecution, and afterwards maltreat, desert, or fail to provide for her. Section 7298b provides that the action shall be instituted in the name of the state "on the relation of the wife, but such wife shall not be liable for" costs, except, etc. Section 7298d provides the practice to be followed, assimilating it to that in bastardy proceedings, and permits the defendant to be released from jail after a year's imprisonment if he is unable to satisfy the judgment, and the judge deems him sufficiently punished. *Held*, that a divorce obtained by the wife after the husband's desertion, and before the institution of suit under these statutes, was no defense there-

to.—*State ex rel. Lannoy v. Lannoy*, 65 N. E. 1052, 30 Ind. App. 335.

[d] (App. 1906)

Burns' Ann. St. 1901, § 7298a, prescribes a penalty for fraudulent marriages contracted to avoid seduction or bastardy proceedings, where the man contracting the marriage abandons or fails to provide for his wife. Section 7298b provides that the action for the penalty shall be instituted in the name of the state, on the relation of the wife. Section 7298d provides that the action "shall be governed by the laws now in force governing prosecutions for bastardy." Section 1004 authorizes the court in bastardy proceedings to fix the amount to be paid by defendant and to prescribe the terms of payment. *Held* that, in actions to recover the penalty prescribed for a fraudulent marriage, it is within the sole province of the trial court to fix the amount of the penalty, although the trial is had by a jury.—*State ex rel. Richeson v. Richeson*, 75 N. E. 846, 36 Ind. App. 373.

Under Burns' Ann. St. 1901, § 7298a (Acts 1895, p. 167, § 1), a male person, guilty of bastardy or seduction, who marries the female concerned, and who, without just cause, deserts her or mistreats her within two years, is liable to a penalty in her favor in a sum not less than \$200.—Id.

In an action for a penalty for a fraudulent marriage to avoid liability in bastardy proceedings, where defendant married the relatrix, a child of 14, assuring her that he would live with her and take care of their child, and at the end of two weeks, without cause, deserts her, leaving her without support, he is guilty of a fraudulent marriage.—Id.

### § 312. Indictment or information.

[a] (Sup. 1886)

An indictment charging desertion of his wife by defendant "without making provision for her comfortable support" does not charge an offense within Rev. St. 1881, § 2033, as to deserting a wife and leaving her "without provision for comfortable support."—*State v. Rice*, 106 Ind. 139, 5 N. E. 906.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 1109.

See, also, 21 Cyc. p. 1613.

### § 313. Evidence.

[a] (Sup. 1879)

On an issue as to whether plaintiff abandoned his wife, evidence that just before the alleged abandonment took place the wife, who was staying with her mother, told plaintiff that her folks did not want him to come there, and that he had better go somewhere else and get work, was material and relevant.—*Dye v. Davis*, 65 Ind. 474.

#### FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 1110.

See, also, 21 Cyc. p. 1614.

**§ 315. Judgment or order.**

Failure to comply with order as contempt, see CONTEMPT, §§ 20, 33.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 1112.

See, also, 21 Cyc. p. 1616.

**X. ENTICING AND ALIENATING.****§ 322. Nature and form of remedy.**

[a] (App. 1892)

The action for alienating a wife's affections is not based upon the loss of the wife's services, but upon the loss of the consortium.—*Adams v. Main*, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. Rep. 266.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 1117.

**§ 323. Right of action.**

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 1118, 1119.

See, also, 21 Cyc. pp. 1617, 1622.

**§ 324. — By husband.**

[a] (Sup. 1885)

One who wrongfully entices another's wife to leave him and go to another state, and remain there with him for 10 days, without her husband's consent, is liable to the husband in an action therefor, although there may have been no adultery.—*Higham v. Vanosdol*, 101 Ind. 160.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 1118.

See, also, 21 Cyc. p. 1617; note, 44 Am. St. Rep. 845.

**§ 325. — By wife.**

[a] A wife may maintain an action for enticing away and alienating the affections of her husband.—(Sup. 1891) *Haynes v. Nowlin*, 129 Ind. 581, 29 N. E. 389, 14 L. R. A. 787, 28 Am. St. Rep. 213; (1892) *Wolf v. Wolf*, 130 Ind. 599, 30 N. E. 308; (1893) *Reed v. Reed*, 6 Ind. App. 317, 33 N. E. 638, 51 Am. St. Rep. 310; (1893) *Holmes v. Holmes*, 133 Ind. 386, 32 N. E. 932; (1895) *Railsback v. Railsback*, 12 Ind. App. 659, 40 N. E. 276, 1119.

[b] (Sup. 1891)

Since the statutes have given to married women the right to sue alone for injuries to their persons and property, a married woman can maintain an action in her own name against one who wrongfully entices her husband from her, and thereby deprives her of his consortium and support. *Logan v. Logan*, 77 Ind. 558, declared not an authority under subsequent statutes.—*Haynes v. Nowlin*, 129 Ind. 581, 29 N. E. 389, 14 L. R. A. 787, 28 Am. St. Rep. 213.

[c] (App. 1891)

A divorced woman may maintain an action for damages for alienating the affection of her former husband.—*Postlewaite v. Postlewaite*, 1 Ind. App. 473, 28 N. E. 99.

[d] (Sup. 1893)

Alienation of affections of a woman's husband being a violation of her personal rights, she may sue therefor in her own name, under Rev. St. 1881, § 5131, providing that a married woman may sue in her own name for an injury to the person.—*Holmes v. Holmes*, 32 N. E. 932, 133 Ind. 386.

[e] (App. 1897)

She who deprives a husband of his wife's society and services, and causes her to leave him, is liable to an action for damages.—*Jonas v. Hirschburg*, 48 N. E. 656, 18 Ind. App. 581.

[f] (App. 1905)

A divorced wife is entitled to maintain an action against her former mother-in-law for alienation of the affections of her husband by acts maliciously done, which were calculated to produce such result.—*Gregg v. Gregg*, 75 N. E. 674, 37 Ind. App. 210.

[g] (App. 1908)

A wife may maintain an action for damages for the malicious alienation of her husband's affections.—*Workman v. Workman*, 43 Ind. App. 382, 85 N. E. 997.

[h] (App. 1810)

The gist of an action by the wife for alienating her husband's affections is the loss of the society, assistance, and conjugal affection, or consortium, of the husband.—*Farneman v. Farneman*, 90 N. E. 775.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 1119.

See, also, 21 Cyc. p. 1617; notes, 3 L. R.

A. (N. S.) 470, 4 L. R. A. (N. S.) 643; notes, 28 Am. St. Rep. 217, 46 Am. St. Rep. 472.

**§ 326. Defenses.**

[a] (Sup. 1885)

In an action for enticing away plaintiff's wife, it is no defense that she went willingly, and defendant did nothing but furnish the means and opportunity for the elopement.—*Higham v. Vanosdol*, 101 Ind. 160.

[b] (App. 1908)

Where a father or mother is charged with the alienation of a husband's or wife's affection, the *quo animo* is the important consideration; that is, was it malicious, or was it inspired by a proper regard for the welfare and happiness of the child?—*Workman v. Workman*, 43 Ind. App. 382, 85 N. E. 997.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 1120.

See, also, 21 Cyc. pp. 1619–1621.

**§ 329. Time to sue and limitations.**

Accrual of right of action as affecting limitations, see **LIMITATION OF ACTIONS**, § 53.

**§ 332. Pleading.**

[a] Allegation and proof of adultery is not necessary to sustain an action for alienating a wife's affections.—(App. 1892) *Adams v. Main*, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. Rep. 266, following *Higham v. Vanosdol* (1885) 101 Ind. 160.

[b] (App. 1893)

Where the action for the alienation of the affections of plaintiff's husband is against the latter's parent, the complaint is defective if it fails to allege that the acts complained of were done maliciously.—*Reed v. Reed*, 6 Ind. App. 317, 33 N. E. 638, 51 Am. St. Rep. 310.

[c] (App. 1897)

In an action to recover damages for alienating the affections of plaintiff's wife, the complaint need not allege that plaintiff was without fault.—*Townsend v. Cleveland Fire Proofing Co.*, 47 N. E. 707, 18 Ind. App. 568.

[d] (App. 1897)

A husband's complaint for alienating his wife's affections, alleging that the wife was persuaded to "abandon him, his house and home, and to live away and apart from him," makes it sufficiently clear that he and the wife were living together.—*Jonas v. Hirschburg*, 48 N. E. 656, 18 Ind. App. 581.

A complaint for alienating a wife's affections need not allege that complainant was without fault, nor that the husband and wife were living peaceably and happily together, nor need it state in detail the means and language used to accomplish such alienation.—*Id.*

[e] (App. 1898)

In an action for alienating a wife's affections, the complaint need not set forth what was said by defendant to the wife, or the character of the statements whereby her affections were alienated.—*Bockman v. Ritter*, 52 N. E. 100, 21 Ind. App. 250.

A complaint for alienating a wife's affections, stating that, four years before, defendant began to poison the wife's mind, does not show that it is barred by the two-years limitation, when it appears that the wife did not leave her husband, and declare she would no longer live with him, until two weeks before suit commenced.—*Id.*

Failure, in a complaint for alienating a wife's affections, to aver that defendant knew she was plaintiff's wife, is obviated by averment that defendant knowingly, purposely, and maliciously alienated the affections of plaintiff's wife from him, and broke up his family.—*Id.*

[f] (App. 1905)

Where a complaint, in an action for alienation of the affections of plaintiff's husband,

alleged their marriage with the consent and approbation of defendant, who was the husband's mother, the birth of issue, and an alleged separation by the alienation of the affections of plaintiff's husband by defendant by the use of malicious means described, the result of which was that he became so cruel to plaintiff that she was compelled to separate from him, an amendment alleging that, when plaintiff and her husband were married, he had great love for her, which continued until lost and alienated by defendant's acts, was not objectionable as materially changing the case made by the complaint.—*Gregg v. Gregg*, 75 N. E. 674, 37 Ind. App. 210.

In an action by a wife against her husband's mother for alienation of the affections of her husband, the complaint must aver that the acts charged against defendant were maliciously done; the presumption being that the mother had acted for the best interest of her child.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 26 CENT. DIG. HUS. & W. § 1123.

See, also, 21 Cyc. p. 1623.

**§ 333. Evidence.**

Admissions as evidence, see **EVIDENCE**, § 248.

Opinion evidence, see **EVIDENCE**, §§ 471, 474½.

Presumption from failure to call witness, see **EVIDENCE**, § 77.

*Res gestæ*, see **EVIDENCE**, § 121.

[a] (Sup. 1861)

In an action for seducing the wife of the plaintiff, the opinion of a witness that she was not furnished with a house suitable to live in was incompetent.—*Dallas v. Sellers*, 17 Ind. 479, 79 Am. Dec. 489.

[b] (Sup. 1873)

In an action for debauching the wife of the plaintiff, a letter from the wife of the defendant to the wife of the plaintiff, not shown to have been written by the authority of the defendant, is inadmissible as evidence against the defendant.—*Underwood v. Linton*, 44 Ind. 72.

[c] (Sup. 1885)

In an action for enticing away plaintiff's wife, statements by the wife to a third person, on the day of her leaving, that her husband did not treat her as he should, and that she would never live with him again, *held* inadmissible in mitigation of damages, not being a part of the *res gestæ* nor imputing cruelty.—*Higham v. Vanosdol*, 101 Ind. 160.

[d] (App. 1892)

Plaintiff, in an action for alienating his wife's affections, showed that while the children were sick their mother left them, and accompanied defendant to places of amusement. *Held*, that testimony offered by defendant of a general character as to how the wife treated her children was properly excluded, as not within the issue of the effect on the wife of de-

defendant's conduct.—*Adams v. Main*, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. Rep. 266.

[e] (App. 1906)

In a suit by a wife for alienation of the affections of her husband, the law presumes generally that the husband has conjugal affection for his wife, and the burden is on the defendant to prove the contrary.—*Gregg v. Gregg*, 75 N. E. 674, 37 Ind. App. 210.

[f] (App. 1906)

Evidence in an action for the alienation of the affections of plaintiff's husband by his father held insufficient to support a verdict for plaintiff.—*Workman v. Workman*, 43 Ind. App. 382, 85 N. E. 997.

Where a father or mother is charged with the alienation of a husband's or wife's affection, the motive of the parent in harboring or sheltering the child is presumed to be good until the contrary appears.—*Id.*

[g] (App. 1910)

In an action for alienating plaintiff's husband's affections, it appeared that defendant, while consulting an attorney on other matters, stated that her son, plaintiff's husband, wanted to know how long he would have to wait to get a divorce, and that the lawyer told her that they would have to be separated for two years. It also appeared that, when defendant reported such fact to her son, she laughed. Held not to show either malice or continued effort on the part of defendant to keep her son and plaintiff separated.—*Farneman v. Farneman*, 91 N. E. 968, denying rehearing, 90 N. E. 775.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 1124.

See, also, 21 Cyc. pp. 1624, 1625.

### § 334. Damages.

[a] (App. 1892)

The loss of services is an element of damage in an action for alienation of a wife's affections, and such loss does not depend upon actual separation of the parties, but may be based upon the lessening in value or efficacy of her services, even though she continues to perform them.—*Adams v. Main*, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. Rep. 266.

[b] (App. 1906)

In an action for alienation of affections, damages are recoverable for loss of the consortium, regardless of the question of loss of service.—*Gregg v. Gregg*, 75 N. E. 674, 37 Ind. App. 210.

Exemplary damages may be given in an action by a wife against the mother of her husband for alienation of the husband's affections.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 1125.

See, also, 21 Cyc. pp. 1621, 1622.

### § 335. Trial.

[a] (App. 1892)

In an action for alienating the affections of plaintiff's wife, an instruction that, if defendant gave presents and attentions to plaintiff's wife with plaintiff's consent, with no evil intent, and not intending to alienate her affections, and never had carnal knowledge of her, plaintiff cannot recover, even though, as a consequence of such acts, she conceived a fondness and affection for defendant, does not leave it to be inferred that want of consent would render defendant liable, and is not objectionable. If defendant desires a charge upon the effect of want of consent, he should request it.—*Adams v. Main*, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. Rep. 266.

[b] (App. 1892)

A special verdict which finds that false and malicious statements were made to plaintiff's husband, with the purpose and effect of alienating his affections, and that plaintiff was without blame, will support a judgment in her favor, though the nature of the statements made by defendant does not appear.—*Railsback v. Railsback*, 12 Ind. App. 659, 40 N. E. 273, 1119.

[c] (App. 1897)

A special verdict, finding that defendant acted maliciously in causing a separation of plaintiff and his wife, and not showing any act on plaintiff's part that would cause his wife to leave him, sufficiently finds that malice existed on defendant's part.—*Jonas v. Hirschburg*, 48 N. E. 656, 18 Ind. App. 581.

[d] (App. 1909)

In an action for alienation of a husband's affections, malice is a jury question of fact, and not one of law.—*Kelso v. Kelso*, 43 Ind. App. 115, 86 N. E. 1001.

In an action against a parent for alienation of a husband's affections, an instruction held erroneous as to good cause or legal ground for defendant's act.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 1126.

See, also, 21 Cyc. p. 1626.

### § 337. Judgment.

[a] (App. 1897)

A judgment for alienating a wife's affections, and persuading her to leave her husband, will not be set aside, though they become reunited pending the appeal.—*Jonas v. Hirschburg*, 48 N. E. 656, 18 Ind. App. 581.

## XI. CRIMINAL CONVERSATION.

Concealment of cause of action as affecting limitations, see LIMITATION OF ACTIONS, § 104.

**§ 340. Nature and form of remedy.**

[a] (Sup. 1845)

Case is the proper form of action to recover for criminal conversation.—*Van Vacter v. McKillip*, 7 Blackf. 578.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 1127.

See, also, 21 Cyc. p. 1629.

**§ 341. Right of action.**

[a] (Sup. 1883)

A woman cannot, by consenting to criminal conversation with a man other than her husband, deprive her husband of his right of action against her paramour.—*Wales v. Miner*, 89 Ind. 118.

[b] (Sup. 1889)

In an action by a husband for the seduction of his wife, an instruction that plaintiff cannot recover if the wife consented to the sexual intercourse is erroneous.—*Moore v. Hammons*, 119 Ind. 510, 21 N. E. 1111.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 1128.

See, also, 21 Cyc. pp. 1626, 1627.

**§ 342. Defenses.**

[a] (Sup. 1877)

Condonation of a wife's adultery with one person is no defense to an action against another for criminal conversation.—*Clouser v. Clapper*, 59 Ind. 548.

[b] (Sup. 1882)

In an action for criminal conversation, the fact that the intercourse took place after plaintiff and his wife had finally separated, and that before commencement of the action she had obtained a divorce, was no defense.—*Michael v. Dunkle*, 84 Ind. 544, 43 Am. Rep. 100.

[c] (Sup. 1883)

It is no defense to an action for criminal conversation that plaintiff and his wife were divorced before the suit was brought.—*Wales v. Miner*, 89 Ind. 118.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 1129.

See, also, 21 Cyc. pp. 1627, 1628.

**§ 347. Pleading.**

[a] (Sup. 1864)

It is a sufficient allegation of marriage, in a complaint for criminal conversation with the plaintiff's wife, that at the time she was debauched she was his wife.—*Hauck v. Grautham*, 22 Ind. 53.

[b] (Sup. 1864)

In an action for criminal conversation, it is not competent for the defendant to plead in bar a want of virtue in the plaintiff and his wife; and it does not need to be pleaded at all in order to authorize evidence of the fact to be produced in mitigation of damages.—*Harrison v. Price*, 22 Ind. 165.

[c] (Sup. 1883)

The complaint, in an action for the seduction of plaintiff's wife, need not set forth the means by which the seduction was accomplished, nor that the woman seduced was plaintiff's wife at the time of suit brought, nor that defendant knew her to be plaintiff's wife when he seduced her.—*Wales v. Miner*, 89 Ind. 118.

It is not error, in an action for criminal conversation in which the statute of limitation is pleaded, to permit plaintiff to prove acts of guilt between defendant and his wife occurring more than two years before suit brought, without first having proved some such act occurring within that period.—*Id.*

[d] (Sup. 1884)

In an action for criminal intercourse with plaintiff's wife, the complaint may allege the time of the acts of connection, with a continuando, and evidence may be offered for any time covered by the complaint.—*Lemmon v. Moore*, 94 Ind. 40.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 1130, 1131.

See, also, 21 Cyc. pp. 1629, 1630.

**§ 348. Evidence.**

[a] (Sup. 1845)

In a suit for criminal conversation, evidence that the plaintiff is ill-tempered, and that previous to the illicit intercourse charged he and his wife lived unhappily, and occasionally came to blows, is inadmissible in mitigation of damages.—*Van Vacter v. McKillip*, 7 Blackf. 578.

[b] (Sup. 1856)

In an action against one for debauching plaintiff's wife, the confessions of the wife are inadmissible against defendant.—*McVey v. Blair*, 7 Ind. 590.

[c] (Sup. 1861)

The defendant, in a suit for crim. con., cannot show that at and before the time of the seduction charged no affection existed between the plaintiff and his wife.—*Dallas v. Sellers*, 17 Ind. 479, 79 Am. Dec. 489.

[d] (Sup. 1873)

Cruelty of the plaintiff towards his wife is admissible in mitigation of damages in an action for seducing the wife.—*Coleman v. White*, 43 Ind. 429.

[e] (Sup. 1879)

In an action for crim. con., written declarations by the wife, not proved to have been authorized by, or in the possession of, defendant, cannot be read in evidence against him.—*Underwood v. Linton*, 54 Ind. 468.

[f] (Sup. 1877)

In an action for criminal conversation, the general bad character of the wife, if not caused by her seduction by the defendant, may be given

in evidence in mitigation of damages.—Clouser v. Clapper, 50 Ind. 548.

[g] (Sup. 1880)

In an action for criminal conversation with the plaintiff's wife, the defendant may show, in mitigation of damages, that the wife consented to the adultery.—Ferguson v. Smethers, 70 Ind. 519, 36 Am. Rep. 186.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. §§ 1132, 1133.

See, also, 21 Cyc. pp. 1630-1632; note, 48 Am. Dec. 115.

### § 349. Damages.

Evidence in mitigation of damages, see ante, § 348.

[a] (Sup. 1880)

The jury, in estimating the damages, cannot consider the injury done the "happiness, reputation, and honor of the plaintiff's family."—Ferguson v. Smethers, 70 Ind. 519, 36 Am. Rep. 186.

[b] (Sup. 1883)

A verdict of \$1,000 in favor of plaintiff, suing for criminal conversation inducing a divorce, will not be set aside as excessive, although plaintiff's wife may have been somewhat easily led astray.—Wales v. Miner, 89 Ind. 118.

Seduction of the wife being in the nature of a fraud on the husband, exemplary damages may be allowed in all cases of guilt.—Id.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 1134.

See, also, 21 Cyc. pp. 1628, 1629.

### § 350. Trial.

[a] (Sup. 1883)

In an action for the seduction of plaintiff's wife, it was within the discretion of the court to permit the plaintiff to prove acts tending to show adultery between plaintiff's wife and defendant that occurred more than two years before the bringing of the suit without having first proved some such act within the two years.—Wales v. Miner, 89 Ind. 118.

[b] (Sup. 1884)

In an action by a husband for damages for criminal intercourse with his wife, no question of venue being involved, the failure of the jury to specify the place of connection in answer to defendant's interrogatory is immaterial.—Lemon v. Moore, 94 Ind. 40.

FOR CASES FROM OTHER STATES,

SEE 26 CENT. DIG. HUS. & W. § 1135.

See, also, 21 Cyc. p. 1632.

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**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

# IMPROVEMENTS.

## *Scope-Note.*

[INCLUDES rights and liabilities arising from the making of improvements on real property by others than the owners of the soil.

[EXCLUDES allowances and other remedies in respect of such improvements, under occupying claimants acts or otherwise, in particular classes of actions (see *Ejectment*; *Trespass to Try Title*; *Partition*; and other specific heads). For complete list of matters excluded, see cross-references, post.]

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**§ 3. Ownership.****[a] (Sup. 1841)**

A fence placed upon land by the occupant is by its annexation to the soil part of the realty.—*Seymour v. Watson*, 5 Blackf. 555, 36 Am. Dec. 556.

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SEE 27 CENT. DIG. IMPROV. §§ 2, 3.

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**§ 4. Compensation.**

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**[a] (Sup. 1858)**

The value of the defendant's improvements at the time of the recovery of the land is the measure of his claim for improvements under 2 Rev. St. p. 172, § 617.—*McGill v. Kennedy*, 11 Ind. 20.

**[b] (Sup. 1876)**

Where, during a delay occurring between the date of the sale and the conveyance of the real estate of the defendant to a third person, the plaintiff, being the tenant of the defendant on such real estate, makes certain improvements thereon without any authority from any one, and the defendant undertakes with the plaintiff to collect, and does collect, of such third person the value of such improvements for the plaintiff, the defendant thereby becomes the agent of the plaintiff, and is liable to the latter for the amount so collected in an action therefor, and cannot introduce evidence on the trial of such cause to show that such improvements were made without authority.—*Reed v. Dougan*, 54 Ind. 306.

**[c] (Sup. 1877)**

Since, under the common law, one who makes improvements on land of another under the belief that he is himself the owner must lose his improvements in case of the recovery of the land from him by legal proceedings, one who desires to recover for improvements made by him on the land of another under the erroneous belief that he was the owner must proceed under the occupying claimant law, which alone authorizes any compensation when the land is recovered from him.—*Westerfield v. Williams*, 59 Ind. 221.

**[d] (App. 1902)**

One holding a determinable fee in land, which will be divested on her death prior to the death of other designated persons, is not an occupying claimant, within *Burns' Rev. St. 1901*, § 1087, entitling an occupying claimant

to pay for improvements made in good faith; and therefore her executor cannot recover for improvements made in good faith, on her death prior to the death of the remaindermen.—*Pulse v. Osborn*, 64 N. E. 59, 30 Ind. App. 631.

FOR CASES FROM OTHER STATES,

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CONTRACTS, § 92.

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HUSBAND AND WIFE, §§ 69, 79.

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INSANE PERSONS, §§ 60, 72.

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PRINCIPAL AND SURETY, § 8.

INCENDIARISM.

See ARSON.

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# INCEST.

## Scope-Note.

[INCLUDES sexual intercourse between persons related to each other within such degrees that marriage between them is prohibited by law; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.

[EXCLUDES capacity to marry (see *Marriage*) and marriage between persons within prohibited degrees or between prohibited races (see *Miscegenation*). For complete list of matters excluded, see cross-references, post.]

## Analysis.

- § 2. Statutory provisions.
- § 3. Elements of offenses.
- § 4. — In general.
- § 5. — Relationship, and knowledge thereof.
- § 7. — Consent of parties and use of force.
- § 8. Defenses.
- § 9. Indictment or information.
- § 10. — Requisites and sufficiency.
- § 12. Evidence.
- § 13. — Admissibility.
- § 16. Trial.

## Cross-References.

See—

Extent of punishment. CRIMINAL LAW, § 1208.  
Words imputing crime of as constituting libel  
or slander. LIBEL AND SLANDER, §§ 7, 54.

### § 2. Statutory provisions.

Implied repeal of statute by re-enactment, see  
STATUTES, § 166.

FOR CASES FROM OTHER STATES,

See 22 Cyc. pp. 43, 44.

### § 3. Elements of offenses.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Incest, §§ 2-6.

See, also, 22 Cyc. pp. 45-48.

### § 4. — In general.

[a] (Sup. 1849)

Under Rev. St. p. 969, declaring that if any brother and sister, being of the age of 16 years and upwards, shall have sexual intercourse together, having knowledge of the consanguinity, every brother and sister so offending shall be deemed guilty of incest, and on conviction thereof shall be imprisoned, etc., it is necessary, in order to constitute the offense, that both the brother and sister shall be at least 16 years of age at the time of the intercourse.—*Lumpkins v. Justice*, 1 Ind. 557, Smith, 322.

FOR CASES FROM OTHER STATES.

SEE 27 CENT. DIG. Incest, § 2.

See, also, 22 Cyc. p. 45.

### § 5. — Relationship, and knowledge thereof.

Allegations of knowledge in indictment, see  
post, § 10.

[a] (Sup. 1826)

An illicit intercourse between a man and his wife's sister is not incestuous.—*Dukes v. Clark*, 2 Blackf. 20.

[b] Knowledge of the relationship existing between the parties is essential to create the crime of incest.—(Sup. 1849) *Lumpkins v. Justice*, 1 Ind. 557, Smith, 322; (1859) *Griggs v. Vickroy*, 12 Ind. 549.

[c] (Sup. 1875)

A common knowledge of the relationship is essential to the crime of incest.—*Baumer v. State*, 49 Ind. 544, 19 Am. Rep. 691.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Incest, §§ 3, 4

See, also, 22 Cyc. pp. 45-47.

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**§ 7. — Consent of parties and use of force.**

[a] (Sup. 1886)

The assent of both parties is not essential to constitute the crime of incest.—Norton v. State, 106 Ind. 163, 6 N. E. 126.

Under Rev. St. 1881, § 1900, declaring that if any stepfather shall have sexual intercourse with his stepdaughter, knowing her to be such, he is guilty of incest, it is immaterial whether he used force or not.—Id.

FOR CASES FROM OTHER STATES,  
SEE 27 CENT. DIG. Incest, § 6.  
See, also, 22 Cyc. p. 47.

**§ 8. Defenses.**

Voluntary drunkenness, see CRIMINAL LAW, § 53.

FOR CASES FROM OTHER STATES,  
SEE 27 CENT. DIG. Incest, § 7.  
See, also, 22 Cyc. pp. 48, 49.

**§ 9. Indictment or information.**

FOR CASES FROM OTHER STATES,  
SEE 27 CENT. DIG. Incest, §§ 8-10.  
See, also, 22 Cyc. pp. 49-53.

**§ 10. — Requisites and sufficiency.**

[a] (Sup. 1850)

An indictment for incest, averring that defendant "unlawfully did have sexual intercourse with his daughter B., the said B. then and there knowing that she, the said B., was his \* \* \* daughter," was bad, in not averring that defendant had intercourse with his daughter "knowing her to be such"; the word "unlawfully" not being equivalent to that allegation.—Williams v. State, 2 Ind. 439.

[b] (Sup. 1875)

An indictment for incest, under 2 Gav. & H. St. p. 452, § 45, providing that "if any stepmother and stepson shall have sexual intercourse together, having knowledge of their relationship," they shall be guilty of incest, must allege that both parties had such knowledge.—Baumer v. State, 49 Ind. 544, 19 Am. Rep. 691.

FOR CASES FROM OTHER STATES,  
SEE 27 CENT. DIG. Incest, § 9.  
See, also, 22 Cyc. pp. 49-52.

**§ 12. Evidence.**

FOR CASES FROM OTHER STATES,  
SEE 27 CENT. DIG. Incest, §§ 11-13.  
See, also, 22 Cyc. pp. 53-59.

**§ 13. — Admissibility.**

[a] (Sup. 1859)

In a prosecution for incest, evidence of sexual acts between the parties subsequent to the act charged is not admissible.—Lovell v. State, 12 Ind. 18.

[b] (Sup. 1878)

On a trial for incest, declarations of the prosecuting witness that she had become pregnant by sexual intercourse with another than the defendant are irrelevant and inadmissible.—Kidwell v. State, 63 Ind. 384.

[c] (Sup. 1884)

Under an indictment for incest committed on a particular day, after evidence of intercourse, evidence of prior acts of indecent familiarity is admissible to strengthen the evidence of the particular act.—State v. Markius, 95 Ind. 464, 48 Am. Rep. 733.

[d] (Sup. 1891)

On a trial for incest, evidence of prior acts of sexual intercourse between the parties is admissible.—Leforge v. State, 129 Ind. 551, 29 N. E. 34.

FOR CASES FROM OTHER STATES,  
SEE 27 CENT. DIG. Incest, § 11.  
See, also, 22 Cyc. pp. 53-56.

**§ 16. Trial.**

[a] (Sup. 1881)

There is no impropriety in charging the jury, on a prosecution for incest, that a man having ordinary will power and capacity, and unimpaired by disease, is bound to restrain his lustful passions.—Colee v. State, 75 Ind. 511.

FOR CASES FROM OTHER STATES,  
SEE 27 CENT. DIG. Incest, § 14.

**INCHOATE DOWER.**

See DOWER, §§ 29-53.

**INCLOSURE.**

See FENCES.

**INCOME.**

See—

Disposition by will. WILLS, §§ 504, 573, 618.  
Married woman's separate estate. HUSBAND AND WIFE, §§ 125, 144.  
Rights and liabilities of life tenants as to income of property. LIFE ESTATES, § 15.  
Rights of devisees and legatees. WILLS, § 728.  
Of heirs and distributees. DESCENT AND DISTRIBUTION, § 79.  
Trust. WILLS, § 684.

**INCOMPATIBILITY.**

Of office affecting right of person to hold two offices, see OFFICERS, § 30.

**INCOMPETENCY.**

See—

Attorney to become bail or surety. ATTORNEY AND CLIENT, § 17.  
DRUNKARDS.  
INSANE PERSONS.

Municipal agent or servant as ground of liability of municipality for injuries to third persons. **MUNICIPAL CORPORATIONS**, § 746.  
 Railroad employes causing accident to trains. **RAILROADS**, § 292.  
 Servant, ground for discharge. **MASTER AND SERVANT**, § 30.  
 Liability of master for injuries to third persons. **MASTER AND SERVANT**, § 303.  
 Teacher, ground for discharge. **SCHOOLS AND SCHOOL DISTRICTS**, § 141.

## INCONSISTENCY.

*See—*  
 Allegations of indictment or information. **INDICTMENT AND INFORMATION**, § 73.  
 Of pleading. **PLEADING**, §§ 21, 34, 49, 53, 93.  
 Alternative remedies. **ELECTION OF REMEDIES**, § 3.  
 Conduct and claims, as ground of estoppel. **ESTOPPEL**, §§ 64-95.  
 Description of boundaries. **BOUNDARIES**, § 3.  
 Express repeal of inconsistent acts and provisions of statutes. **STATUTES**, § 157.  
 Findings of court. **TRIAL**, § 398.  
 Of jury. **TRIAL**, §§ 358, 359.  
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 Revocation of will, by subsequent inconsistent disposition of property. **WILLS**, § 182.  
 Instructions to jury—  
   **CRIMINAL LAW**, § 810.  
   **TRIAL**, § 243.  
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 Statements by witnesses inconsistent with testimony as ground for impeachment. **WITNESSES**, §§ 379-397.

## INCONTESTABLE CLAUSE.

In insurance policy, see **INSURANCE**, §§ 400, 684.

## INCONTINENCE.

*See—*  
**ADULTERY**.  
 Criminal conversation. **HUSBAND AND WIFE**, §§ 341-350.  
**FORNICATION**.  
**INCEST**.  
**LEWDNESS**.  
 Words imputing unchastity as constituting libel or slander. **LIBEL AND SLANDER**, § 7.

## INCORPORATION.

*See—*  
**ASSOCIATIONS**, § 24.  
**BUILDING AND LOAN ASSOCIATIONS**, § 3.  
**CORPORATIONS**, §§ 1-29.  
 Electric companies. **ELECTRICITY**, § 3.

Insurance companies. **INSURANCE**, §§ 32, 52.  
**MUNICIPAL CORPORATIONS**, §§ 7-21.  
 Mutual benefit associations. **INSURANCE**, § 692.  
 Railroad companies. **RAILROADS**, § 14.  
 Street railroad companies. **STREET RAILROADS**, § 14.  
 Warehouse companies. **WAREHOUSEMEN**, § 4.

## INCORPOREAL HEREDITAMENTS.

*See—*  
**EASEMENTS**.  
 Trespass to. **TRESPASS**, § 11.

## INCORRIGIBLE CHILDREN.

See **INFANTS**, § 16.

## INCREASE.

*See—*  
 Animals, right to offspring. **ANIMALS**, § 20.  
 Sale of as including. **SALES**, §§ 4, 5.  
 Capital stock of corporations. **CORPORATIONS**, § 66.  
 Compensation of public officers—  
   **MUNICIPAL CORPORATIONS**, § 164.  
   **OFFICERS**, § 100.  
   **STATES**, § 63.  
 Valuation of property by corporation. **TAXATION**, § 400.  
 Or amount of tax by reviewing boards or officers. **TAXATION**, § 469.  
 Value of converted property by act or expenditure of defendant in trover. **TROVER AND CONVERSION**, § 52.

## INCRIMINATION.

*See—*  
 Compelling accused to criminate himself. **CRIMINAL LAW**, § 393.  
 Witness to criminate himself. **WITNESSES**, § 297.

## INCUMBRANCES.

*See—*  
 Adjustment on partition. **PARTITION**, § 88.  
 Assumption of by purchaser as payment of price of land. **VENDOR AND PURCHASER**, § 181.  
**CHATTEL MORTGAGES**.  
 Contribution on payment or discharge. **CONTRIBUTION**.  
 Covenants against, as covenants of title. **COVENANTS**, §§ 42, 46.  
   As covenants running with the land. **COVENANTS**, § 64.  
   Damages for breach. **COVENANTS**, § 127.  
   Performance or breach. **COVENANTS**, § 96.  
 Liabilities of devisees on incumbrances created by testator. **WILLS**, § 840.  
 Of heirs on incumbrances created by intestate. **DESCENT AND DISTRIBUTION**, § 129.  
**LIENS**.  
**MECHANICS' LIENS**.

**MORTGAGES.**

Priority of dower. DOWER, §§ 23-27.

Sale of property of decedents subject to. EXECUTORS AND ADMINISTRATORS, § 385.

**On particular species of property, estates or interests.**

*See—*

Common property, mutual rights, duties, and liabilities of co-tenants as to. TENANCY IN COMMON, § 30.

Exempt property—

EXEMPTIONS, §§ 79-88.

HOMESTEAD, §§ 127-131.

Land sold, rights and liabilities as between vendor and purchaser. VENDOR AND PURCHASER, § 197.

Rights and liabilities as between vendor or purchaser and third persons. VENDOR AND PURCHASER, § 211.

Property in hands of receiver. RECEIVERS, § 89.

Property insured, promissory warranties, covenants, or conditions subsequent. INSURANCE, § 330.

Representations, warranties, or conditions in policy or application therefor. INSURANCE, § 283.

Property of intestate. DESCENT AND DISTRIBUTION, §§ 119-151.

Of married woman's separate estate. HUSBAND AND WIFE, §§ 148-176.

Passing to purchaser at execution sale. EXECUTION, § 268.

Purchased at tax sale. TAXATION, §§ 732, 733, 784.

Sold as defect in title of vendor defeating contract of sale. VENDOR AND PURCHASER, § 134.

**INDEBITATUS ASSUMPSIT.**

*See* ASSUMPSIT, ACTION OF.

**INDEBTEDNESS.**

*See—*

Charge on married woman's separate property.

HUSBAND AND WIFE, §§ 148-176.

Claims due testator as passing by will. WILLS, § 559.

Deduction from valuation of property for taxation. TAXATION, §§ 354-356, 381, 402.

**Of particular classes of persons.**

*See—*

CORPORATIONS, §§ 447-487.

COUNTIES, §§ 149-196.

Grantor, element of fraud as to creditors or subsequent purchasers. FRAUDULENT CONVEYANCES, § 54.

Intestate, liability of heirs and distributees.

DESCENT AND DISTRIBUTION, §§ 119-151.

MUNICIPAL CORPORATIONS, §§ 859-877, 882-905.

RAILROADS, §§ 146-200.

SCHOOLS AND SCHOOL DISTRICTS, §§ 90-92, 95-97.

STATES, §§ 113-167.

Testator, liability of devisees and legatees.

WILLS, §§ 827-848.

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UNITED STATES, §§ 79-90.

**INDECENCY.**

*See—*

Mailing obscene matter. POST OFFICE, §§ 30-32.

OBSCENITY.

Transmission of message containing indecent matter. TELEGRAPHS AND TELEPHONES, § 42.

**INDECENT EXPOSURE.**

*See* OBSCENITY, § 3.

**INDECENT PUBLICATIONS.**

Mailing, *see* POST OFFICE, §§ 30-32.

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# INDEMNITY.

## Scope-Note.

[INCLUDES contracts to make good or compensate for loss or damage, sustained or anticipated, from acts or omissions of others as well as those of the person indemnified, or to protect against claims of or liabilities to third persons; nature, requisites, validity, incidents, construction, operation, and effect of such contracts in general; bonds and other instruments in writing promising such indemnity; and rights, liabilities, and remedies of the parties.

[EXCLUDES contracts of guaranty (see *Guaranty*) or insurance (see *Insurance*); indemnity mortgages (see *Mortgages*; *Chattel Mortgages*); rights of particular classes of persons or officers to demand indemnity, and matters relating only to indemnity given to any of them (see *Guardian and Ward*; *Executors and Administrators*; *Trusts*; *Officers*; *Sheriffs and Constables*; and other specific heads); contracts of indemnity by particular classes of persons (see *Infants*; *Insane Persons*; and other specific heads), partners (see *Partnership*), and corporations (see *Corporations*); and requirements of statute of frauds (see *Frauds, Statute of*). For complete list of matters excluded, see cross-references, post.]

## Analysis.

- § 1. Nature of obligation.
- § 2. Requisites and validity of contracts.
- § 4. — Bonds of indemnity.
- § 5. Construction and operation of contracts.
- § 6. — In general.
- § 7. — Parties.
- § 8. — Subject-matter.
- § 9. — Scope and extent of liability.
- § 11. — Accrual of liability.
- § 13. Implied contracts.
- § 14. Conclusiveness, as against indemnitor, of former adjudication against indemnitee.
- § 15. Actions on contracts.

## Cross-References.

### See—

Against mechanics' liens. **MECHANICS' LIENS**, §§ 314-317.

Application of statute of frauds. **FRAUDS**, **STATUTE OF**, §§ 19-21.

Authority of administrator of surety to take indemnity from principal. **EXECUTORS AND ADMINISTRATORS**, § 91.

Contracts influencing action of administrative officer. **CONTRACTS**, § 131.

### GUARANTY.

### Mortgages—

**CHATTEL MORTGAGES**, § 113.

**MORTGAGES**, §§ 18, 120, 145, 151, 186.

Foreclosure for breach of condition. **MORTGAGES**, §§ 405, 450, 458, 464.

Release, admissions by demurrer in action to restrain. **PLEADING**, § 214.

Pleading matters of fact or conclusions relating to. **PLEADING**, § 8.

### PRINCIPAL AND SURETY.

Recovery over by replevin bail paying execution. **EXECUTION**, § 177.

### To particular classes of persons.

### See—

County from town for damages paid caused by defect in town bridge. **BRIDGES**, § 38.

Defendant in actions on lost instruments. **LOST INSTRUMENTS**, § 18.

Executor or administrator, by legatee or distributee of estate of decedent. **EXECUTORS AND ADMINISTRATORS**, § 299.

Guardian. **GUARDIAN AND WARD**, § 68.

Municipality, by independent contractor as affecting liability of city for negligent acts of contractor. **MUNICIPAL CORPORATIONS**, § 751.

Municipal officers, power of city to contract. **MUNICIPAL CORPORATIONS**, § 226.

Party injured by contempt of court. **CONTEMPT**, §§ 73-79.

Police officers, contract by municipality. **MUNICIPAL CORPORATIONS**, § 180.

**SHERIFFS AND CONSTABLES**, §§ 89, 90, 144, 145.

Surety by principal. **PRINCIPAL AND SURETY**, §§ 147, 173-190½, 193.

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§ 1. Nature of obligation.

Guaranty distinguished from, see GUARANTY, § 4.

FOR CASES FROM OTHER STATES,  
SEE 27 CENT. DIG. Indem. § 1.  
See, also, 22 Cyc. pp. 79, 80.

§ 2. Requisites and validity of contracts.

FOR CASES FROM OTHER STATES,  
SEE 27 CENT. DIG. Indem. §§ 2-6.  
See, also, 22 Cyc. pp. 80-84; note, 40 Am. Dec. 425.

§ 4. — Bonds of indemnity.

[a] (Sup. 1872)

While, under 2 Gav. & H. St. p. 153, § 202, the avowed holder of money to which there are conflicting claims may be required to deposit with the court either the money itself or security, it does not require a bond of indemnity, to be given by a plaintiff, as assignee of a deposit in a bank, where no certificate of deposit has been given, and the depositor cannot be found, after due notice, to answer as to his interest in the sum claimed by plaintiff.—*Swingle v. Bank of the State of Indiana*, 41 Ind. 423.

[b] (Sup. 1875)

The purchaser of a certain undivided portion of a stock of goods at the time of the sale executed to the seller a bond to indemnify him against the payment of a like portion of his debts and liabilities. In an action on said bond, on demurrer to an answer which admitted its execution, *held*, that the defendant could not rely in defense upon a fraudulent representation, alleged to have been made by the seller to the buyer at the time of the transaction, to the effect that there were no such debts and liabilities.—*Davis v. Fearis*, 52 Ind. 128.

[c] (Sup. 1878)

A corporation, having purchased of A. certain real estate, gave to him, as part of the consideration, its bond, with sureties, conditioned to assume and pay, and hold the said A. harmless on, a note, not matured, given by A. to other parties; such bond providing that, if A. should be compelled to pay the note, he might have his action on the bond against the corporation and its sureties, if the same was paid by him. The payee of such note, the same being due and unpaid, brought suit against A., the indorsers, and the principal and sureties on the bond. *Held*, that the bond was given upon sufficient consideration.—*South Side Planing Mill Ass'n v. Cutler & Savidge Lumber Co.*, 64 Ind. 560.

FOR CASES FROM OTHER STATES,  
SEE 27 CENT. DIG. Indem. §§ 2-6.  
See, also, 22 Cyc. pp. 80-84.

§ 5. Construction and operation of contracts.

FOR CASES FROM OTHER STATES,  
SEE 27 CENT. DIG. Indem. §§ 7-28; 34 CENT. DIG. Mast. & S. § 1240.  
See, also, 22 Cyc. pp. 84-95.

§ 6. — In general.

[a] (Sup. 1845)

A written promise of indemnity, whether under seal or not, is assignable under the statute.—*Fletcher v. Piatt*, 7 Blackf. 522.

[b] (Sup. 1900)

A grantee in a warranty deed of 160 acres of land took an indemnity mortgage from the grantor on other land to secure himself against the assertion of a claim, which was known to exist in favor of a third person as to a part of the land. *Held*, that the purchaser having conveyed the land, by warranty deed, to another, the benefit under the indemnity mortgage passed with the land to his grantee, and he could be restrained from releasing such mortgage.—*Rowe v. Hamburger*, 57 N. E. 534, 154 Ind. 604.

FOR CASES FROM OTHER STATES,  
SEE 27 CENT. DIG. Indem. §§ 7, 9, 18, 19;  
34 CENT. DIG. Mast. & S. § 1240.  
See, also, 22 Cyc. pp. 84, 85.

§ 7. — Parties.

[a] (App. 1898)

A bond given by stockholders to secure the directors for becoming sureties for loans provided that any liability incurred by reason of the bond should be in proportion to the amount of stock held by each obligor at the time of incurring the liability, and that no recovery should be had against any obligor for a sum greater than his share thereof, in the proportion which the amount of stock held by him bore to the whole amount of stock issued. *Held* to create a several, and not a joint, liability.—*Spencer v. McLean*, 50 N. E. 769, 20 Ind. App. 626, 67 Am. St. Rep. 271.

FOR CASES FROM OTHER STATES,  
SEE 27 CENT. DIG. Indem. § 8; 11 CENT. DIG. Contracts, § 781.  
See, also, 22 Cyc. pp. 85, 86.

§ 8. — Subject-matter.

[a] (Sup. 1845)

Where an action is brought on a bond indemnifying the obligee from certain judgments which were liens on land purchased by him, and defendant pleads non damnificatus, a replication that executions were levied on the land and the rents for seven years offered for sale does not show a breach of the conditions of the bond and is therefore insufficient.—*Loyd v. Marvin*, 7 Blackf. 464.

[b] (Sup. 1869)

A contract, wherein a railroad company agrees to pay for whatever damage may be done

to a landowner's property by the running of cars through his land, does not compel the company to pay for damages arising from the owner's negligence, and he is negligent if he confines his animals in an inclosure embracing a portion of the track with no appliances to restrain them from loitering on it.—*Indianapolis, P. & C. R. Co. v. Brownenburgh*, 32 Ind. 199.

[c] (*Sup.* 1877)

A bond of indemnity, executed by the officers of a railroad company, reciting that the county has levied a special tax on the property of the obligees, and that one of the obligees, for himself and the others, has appealed from the levy, and conditioned that, if such obligee would dismiss his appeal and the obligees would pay the tax, the obligors would refund, in an action on the bond, the complaint, failing to allege that the entire tax had been paid by the obligees, is defective, as the bond contemplated the payment of the whole tax.—*Hicks v. Zion*, 58 Ind. 548.

[d] (*App.* 1893)

R. mortgaged certain land to a loan association. At the same time he executed an indemnifying bond, with sureties, which recited that the loan had been made to R., and was secured by a mortgage on the land; that buildings were being erected thereon; and that liens might attach for work done and material furnished. The bond provided that if R. paid for such work and material, and saved the association harmless from all claims, of whatever kind, that might affect its interests as mortgagee, the obligation was to be void. R. never owned the land, and an action was commenced on the bond to recover the loan. *Held*, that the indemnifying bond only protected the association against the liens of mechanics and material men, and did not cover the failure of title.—*Guaranty Sav. & Loan Ass'n v. Rutan*, 6 Ind. App. 83, 33 N. E. 210.

[e] (*App.* 1895)

A partnership between W. and S. was dissolved, the latter continuing the business, assuming the debts of the firm, and agreeing to pay W. for his interest; but, having failed to keep his agreement, W. brought suit for the appointment of a receiver and an accounting, and thereafter a written contract was executed by which W. relinquished his interest in the firm assets, and defendants, creditors of S., purchased the stock, and undertook—First, to pay "all the debts of the firm of S. & W., as set forth in Exhibit C, aggregating \$4,235.31"; second, to secure and save harmless W. from all liabilities incurred as member of the firm of S. & W. The partnership owed \$1,500 in addition to the sum named in the schedule of liabilities, which fact neither W., who had not been an active partner, nor defendants, knew, though their opportunities of knowledge were equal. *Held*, that defendants were liable for all debts for which W. was responsible as a member of the firm.—*Wood v. Lindley*, 12 Ind. App. 258, 40 N. E. 283.

[f] (*App.* 1896)

A share of certain money distributed by order of court was allotted to a married woman, and paid to her attorney. Before paying it over to his client, he exacted from her a bond of indemnity to hold him harmless if he was compelled to refund it, which was given and signed by her husband as surety. The order of distribution was afterwards set aside, and the attorney assigned the bond to the person by the final order entitled to the money. *Held*, that there having been no recovery against the attorney, and there being no liability for the money on his part, the assignee could not recover on the bond.—*Warum v. Derry*, 14 Ind. App. 442, 42 N. E. 1123.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Indem. §§ 10-15; 34 CENT. DIG. Mast. & S. § 1240.

See, also, 22 Cyc. pp. 86, 87.

## § 9. — Scope and extent of liability.

[a] (*Sup.* 1845)

A bond conditioned to indemnify the obligee and save him harmless from the operation of certain judgments, which were liens on land purchased by him, is a bond of indemnity against damages arising from the judgments.—*Loyd v. Marvin*, 7 Blackf. 464.

[b] (*Sup.* 1864)

When the instrument deviates the least from a simple contract of indemnity against damage, even where indemnity is the sole object of the contract, and where, in consequence of the primary liability, of other persons, actual loss may be sustained, the measure of damages is actual compensation for probable loss.—*Devol v. McIntosh*, 23 Ind. 529.

On the dissolution of a partnership, a partner purchased his copartner's interest, and agreed to pay all demands against the firm, and save the copartner harmless. *Held*, that the copartner could recover against the partner the entire unpaid firm debts.—*Id.*

[c] (*Sup.* 1837)

An instrument whereby a third person agrees to secure and protect, at any time payment must be made, the surety on a promissory note, obligates the signer to take such measures as are necessary for the surety's security and protection whenever the payment of the note after its maturity might be required either by the payee or the surety.—*Nixon v. Beard*, 12 N. E. 131, 111 Ind. 137.

[d] (*Sup.* 1839)

Where there is an agreement by one person to indemnify another for any loss he might sustain by reason of entering into a recognizance for the appearance of a defendant to answer an indictment, the person indemnified by such an agreement is entitled to recover the amount of the recognizance, and the costs of taking judgment thereon, together with interest from the date of payment.—*Keesling v. Frazier*, 119 Ind. 185, 21 N. E. 552.

## [e] (App. 1898)

Where an agreement in a bond given to protect a surety, providing for attorney's fees, is not dependent on any condition, the surety can recover such fees upon paying any part of the debt secured.—*Spencer v. McLean*, 50 N. E. 769, 20 Ind. App. 626, 67 Am. St. Rep. 271.

## [f] (App. 1908)

Plaintiffs and defendant being stockholders in an unsuccessful corporation, plaintiffs borrowed \$2,000 on their individual notes to pay the corporation's debts, and defendant gave them his note, bearing an indorsement reciting that it was given to indemnify plaintiffs against "any loss on amount secured by them for money borrowed by" plaintiffs, and that it was "collectible only in case, when the same is due and unpaid on said note, in proportion to any unpaid balance, to amount of stock held at organization of said company." The parties expected that corporate profits would discharge the \$2,000 debt incurred by plaintiffs, and that none of the stockholders would be required to pay anything on that account. *Held*, that the indorsed agreement meant that, when the note matured, if any part of the \$2,000 had been paid, there should be collected from defendant on his note only such sum as his share of the stock proportionately bore to the unpaid debt, and that, since none of the \$2,000 had been paid and defendant's note was past due, defendant was liable for the full amount of his note.—*Helms v. Appleton*, 43 Ind. App. 482, 85 N. E. 733, 86 N. E. 1083.

## FOR CASES FROM OTHER STATES.

SEE 27 CENT. DIG. INDEM. §§ 16, 17.

See, also, 22 Cyc. pp. 87-90.

## § 11. — Accrual of liability.

## [a] (Sup. 1865)

To entitle the obligee in a bond of indemnity to recover, he must, in general, show actual payment by him. It is not sufficient to prove his liability.—*Francis v. Porter*, 7 Ind. 213.

## [b] (Sup. 1857)

For the breach of a bond conditioned for the payment of partnership debts of a firm of which plaintiff was a member, and the exemption of plaintiff from all liability on account of the partnership, plaintiff can recover nominal damages though he has sustained no actual damage.—*Tate v. Booe*, 9 Ind. 13.

## [c] (Sup. 1864)

Where the condition of the contract is that the promisor will "pay" the debt and save the promisee harmless therefrom, liability accrues on the failure to pay the debt at maturity, and a right of action accrues on the contract without any payment by the promisee.—*Devol v. McIntosh*, 23 Ind. 529.

## [d] (Sup. 1884)

Where the contract contains a promise to "pay," the promisee can maintain an action

thereon without paying the debt.—*Malott v. Goff*, 96 Ind. 496.

## [e] (Sup. 1887)

The person indemnified may pay the amount due, without waiting until he is compelled to pay by suit, and bring his action for indemnity.—*Nixon v. Beard*, 111 Ind. 137, 12 N. E. 131.

## [f] (App. 1908)

Where there is a direct promise to pay a debt indemnified against, suit will lie for breach of the contract in favor of the indemnitee, upon maturity of the debt and without payment of the debt by him.—*Helms v. Appleton*, 43 Ind. App. 482, 85 N. E. 733, 86 N. E. 1023.

## FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. INDEM. §§ 21-25; 8

CENT. DIG. BONDS, § 239.

See, also, 22 Cyc. pp. 90, 93.

## § 13. Implied contracts.

## [a] (Sup. 1860)

A. leased to B., who assigned to C., who dug a hole, through which, after the lessor had resumed possession, water flowed and injured a neighbor, D., who was indemnified therefor by A. *Held* that, even if A. could recover from C. the cost of filling up the hole, he could not recover the damages paid to D., unless upon proof that the damage would not have occurred except for the hole.—*Dipple v. Douglas*, 14 Ind. 535.

## [b] (Sup. 1868)

As between the owner and the contractor for the erection of a building, if there is no provision in the contract that the contractor shall have exclusive possession of the lot, or that he shall keep the area properly guarded during the progress of the work, there is no implied obligation that the contractor shall keep it so guarded, and, whatever liability he may incur to others by leaving it unguarded, if he has performed his work according to the contract, he is not liable over to the owner for damages recovered against the latter for such injury.—*Silvers v. Nerdlinger*, 30 Ind. 53.

## [c] (Sup. 1877)

A municipality against which a judgment is recovered on account of a defect in a street, resulting from another's negligence, has a remedy over against the latter.—*Town of Centerville v. Woods*, 57 Ind. 192.

## [d] (Sup. 1881)

In an action by a city to recover over against a citizen the amount which it had been compelled to pay to satisfy a judgment against it for personal injuries in an action for negligence, the complaint should show such state of facts as would have made a defendant liable had the action been brought against him instead of the city, and it is insufficient if it does not allege that the person injured was free from negligence contributing to his injury —

*Catterlin v. City of Frankfort*, 79 Ind. 547, 41 Am. Rep. 627.

Where a municipal corporation is held by judgment for damages in consequence of the unsafe condition of its sidewalk, it has a remedy over against the person causing the nuisance, unless, as between it and him, it was itself a wrongdoer.—Id.

[e] (Sup. 1882)

A municipal corporation may maintain an action against one who makes its streets dangerous for damages it has been compelled to pay to one who has received injuries because of the unsafe condition of the street.—*City of Elkhart v. Wickwire*, 87 Ind. 77.

A pump, erected for public purposes, was used by the public, and thereby ice accumulated around it on the sidewalk, whereby a person was injured. *Held*, that a citizen could not be rendered liable at the suit of the city, which had been compelled to pay damages, simply because he owned the adjoining lot and made more use of the pump than others.—Id.

[f] (App. 1892)

Appurtenant to an abutting property there was an area in the sidewalk on a public street; a portion of its length was covered by a flagstone; the balance remaining open, for means of access and for light to the basement. Owing to a heavy rain, the wall under the flagstone gave way, so as to make it a dangerous obstruction to the sidewalk and render its removal necessary, which was accomplished with the consent and assistance of the municipality, and that part of the area was left open for a period of three weeks, resulting in injury to a pedestrian, who recovered judgment therefor against the municipality. *Held*, in an action by the city against the abutting property owners, that defendants could not escape liability by showing that the particular part of the area formerly covered by the flagstone, and which caused the injury, was of no benefit to and not used by them, such area being an entirety.—*Wickwire v. Town of Angola*, 4 Ind. App. 253, 30 N. E. 917.

Where such area was constructed by defendants' grantor in pursuance of municipal authority, defendants are not thereby relieved from liability resulting from a failure to keep it in safe condition, where they maintain and use it, the area being presumptively a beneficial appurtenance to the realty.—Id.

[g] (Sup. 1905)

Where the master is held liable for the negligence of the servant, he has a cause of action against such servant for indemnity.—*Indiana Nitroglycerin & Torpedo Co. v. Lipincott Glass Co.*, 165 Ind. 361, 75 N. E. 649.

[h] (App. 1907)

Where a city is compelled to pay damages because of the negligence of a contractor, it may recover over against him, and if he is given notice of the action against it he is

bound by the judgment rendered therein.—*Fleming v. City of Anderson*, 39 Ind. App. 343, 73 N. E. 266.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Indem. §§ 29-35; 2

CENT. DIG. Anim. §§ 321, 324; 34 CENT.

DIG. Mast. & S. §§ 1237, 1240.

See, also, 22 Cyc. pp. 95-100.

§ 14. Conclusiveness, as against indemnitor of former adjudication against indemnitee.

[a] (Sup. 1858)

If defendant was not notified of the prior action against plaintiff, the judgment in that action is prima facie, but not conclusive, evidence against him in an action on his contract of indemnity.—*Tam v. Shaw*, 10 Ind. 463.

[b] (Sup. 1881)

If a municipal corporation is held by judgment for damages in consequence of the unsafe condition of its sidewalk, it has a remedy over against the person causing the nuisance, unless, as between it and him, it was itself a wrongdoer; but such person is not concluded by such judgment, unless he had notice of and an opportunity to defend that action, and, if he had not, the injured person must be shown to have been free from negligence.—*Catterlin v. City of Frankfort*, 79 Ind. 547, 41 Am. Rep. 627.

[c] (Sup. 1882)

In an action by a city against a property owner to recover the amount which as damages it has been compelled to pay by reason of injuries resulting from an excavation in a street in front of defendant's property, it appeared that in the action against the city, it was settled and adjudged that the excavation was made and left in an unsafe and unguarded condition, and that the party injured, without fault on her part, fell into such excavation, and that defendant property owner was notified of the action against the city and appeared and made defense. *Held*, that defendant was barred from contesting any of the facts so adjudicated, though not precluded from pleading and proving that she did not make the excavation.—*McNaughton v. City of Elkhart*, 85 Ind. 384.

[d] (Sup. 1882)

Where a person who wrongfully and negligently causes a public street to be made unsafe for travel is notified of an action instituted by one who has suffered injury because of such wrongful or negligent act, a judgment will be conclusive against him as to the questions adjudicated in that action.—*City of Elkhart v. Wickwire*, 87 Ind. 77.

[e] (Sup. 1892)

In an action by a quarry company against a railroad company for breach of contract to furnish proper cars to carry stone, whereby a quarryman was killed, defendant is estopped to demur to the complaint for want of an allegation that the quarryman was free from con-

tributory negligence, where its general solicitor represented the administrator of the quarryman in an action against the quarry company for causing death by wrongful act, had refused to defend on notice that the quarry company would hold it liable for all damages recovered, and had secured a judgment for the administrator against the quarry company.—*Hoosier Stone Co. v. Louisville, N. A. & C. Ry. Co.*, 131 Ind. 575, 31 N. E. 365.

[f] (APP. 1903)

Plaintiff, as surety for the defendant corporation, executed a supersedeas bond to stay execution on a judgment rendered against the corporation, and from which it had taken an appeal; it and the other defendant executing to plaintiff an indemnity bond. Afterwards the judgment against the corporation was affirmed. Plaintiff thereafter repeatedly urged it to settle the judgment and was told that suit would be brought on the supersedeas bond, and reminded that, as defendant corporation was a nonresident, the judgment would be against plaintiff alone. The corporation, in one letter, answered: "In case they should start suit there, kindly keep us posted, and we will take such steps as seem wise." Later plaintiff wrote that suit had been filed the day before. The defendant answered, noting what was said, and replying that "it will be a long time before we will pay on the basis of his demands. \* \* \* If they want to sue, we have no way to prevent it, but we will defend to the 'long limit,'" etc. Judgment went against plaintiff by default some three months thereafter. *Held* to show sufficient notice to the defendant corporation of the suit on the supersedeas bond, and the judgment therein was conclusive against it and its surety on the bond of indemnity.—*South Bend Pulley Co. v. Fidelity & Deposit Co.*, 67 N. E. 269, 68 N. E. 688, 32 Ind. App. 255.

Defendant could not claim to have been prejudiced by the failure of plaintiff to defend the action on the supersedeas bond; defendant having had opportunity to itself defend the action, and there being no showing that the judgment rendered therein was in any way one not proper to be rendered in the absence of any defense.—*Id.*

[g] (APP. 1907)

Where a city is compelled to pay damages because of the negligence of a contractor, it may recover over against him, and if he is given notice of the action against it he is bound by the judgment rendered therein.—*Fleming v. City of Anderson*, 39 Ind. App. 343.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Indem. § 41; 22 CENT. DIG. Ex. & Ad. § 1902; 30 CENT. DIG. Judgm. §§ 1223-1224; 43 CENT. DIG. Sales, §§ 1279, 1280; 43 CENT. DIG. Sheriffs, § 322.

See, also, 22 Cyc. p. 106; note, 22 Am. St. Rep. 204.

§ 15. Actions on contracts.

Conclusiveness as against indemnitor of judgment against indemnity, see post, § 14.

Against indemnitors of sheriffs and constables, see *SHERIFFS AND CONSTABLES*, §§ 128-139.

Pleading matters of fact or conclusions, see *PLEADING*, § 8.

[a] (Sup. 1845)

In an action on a contract of indemnity, the proper plea is non damnificatus.—*Loyd v. Marvin*, 7 Blackf. 464.

[b] (Sup. 1878)

Under 1 Rev. St. p. 635, § 1, making assignable instruments in writing to convey property or to perform any stipulation therein mentioned, a mortgage given to indemnify the mortgagee against a contingent liability is assignable; and, on the accruing of such liability, the assignee may maintain an action thereon in his own name.—*Carper v. Munger*, 62 Ind. 481.

[c] (Sup. 1879)

Where an assignee in bankruptcy, under order of court, sold real estate of the bankrupt, taking from the purchaser a bond of indemnity conditioned for the payment by the purchaser of outstanding liens and incumbrances on the property, and to save the vendor harmless therefrom, one who holds a lien against the property has no right of action on the bond.—*Young v. Schlosser*, 65 Ind. 225.

[d] (Sup. 1882)

The fact that a property owner made an excavation in a street in front of his property and constructed a stairway for the purpose of gaining access to the basement of a building on such property, and to admit air and light thereto, said stairway being such as other property owners on the street were accustomed to have and enjoy with the consent of the town, does not, when alleged in an answer to a complaint by the city averring that the excavation was unlawfully made and resulted in injury to a passerby, for which injury the city was held liable, show permission from the town or amount to an averment that defendant had such permission.—*McNaughton v. City of Elkhart*, 85 Ind. 384.

[e] (APP. 1893)

An attorney paid to his client money collected as the client's share of a certain estate, and received from the client a bond reciting that suit had been begun against the attorney and his client and others by a third person, demanding that the attorney pay said money into court, and agreeing to repay the attorney said money, "in case he is ordered to refund or repay said sum, or any part thereof, to the plaintiff, to the clerk of said court, or to the administrator of said estate." The plaintiff in said action recovered judgment against the attorney's client, but not against the attorney himself. The bond was never assigned by the attorney. *Held*, that the administrator of said estate had no right of action on said bond, it

being given solely for the indemnification of the attorney. The fact that the attorney was made a party defendant to the action on the bond does not give the administrator any right to sue thereon, in the absence of any allegation in the complaint that the bond had been assigned or transferred to the administrator.—*Derry v. Morrison*, 8 Ind. App. 50, 34 N. E. 107.

[1] (App. 1908)

In an action against a mortgagee, on an indemnity bond to the mortgagor's wife that in consideration of her joining in the mortgage given by the husband to secure the mortgagee as the husband's surety, in case it should be foreclosed, the mortgagee would pay her a certain sum, a paragraph of the answer alleging that when the mortgage was executed there was an equity in the land sufficient to justify the payment specified, but that afterwards defendant was induced to take a second mortgage on the land without indemnity or limitation to secure other indebtedness of the husband, that defendant had to pay all the debts and that he foreclosed the mortgages, selling the land for less than his judgment against the husband, and that he had paid more than the amount of plaintiff's claim in excess of his first mortgage at plaintiff's request, but not alleging that the indemnity bond represented plaintiff's inchoate interest, nor that the amount secured by the mortgages and the amount of the bond exceeded the value of the land, did not state a defense.—*Druckamiller v. Coy*, 42 Ind. App. 500, 85 N. E. 1028.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Indem. §§ 36-47; 2 CENT. DIG. Anim. §§ 321, 324; 11 CENT. DIG. Contracts, § 1740; 25 CENT. DIG. High. § 319; 39 CENT. DIG. Plead. § 1294. See, also, 22 Cyc. pp. 100-106; note, 49 Am. Dec. 362.

## INDEMNITY INSURANCE.

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## INDENTURES.

See APPRENTICES, §§ 8-15, 19.

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Regulating sale of intoxicating liquors on, see INTOXICATING LIQUORS, § 120.

## INDEPENDENT CONTRACTORS.

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MASTER AND SERVANT, §§ 315-324.

MUNICIPAL CORPORATIONS, § 751.

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Transfer as notice to subsequent purchasers. MORTGAGES, § 171.

## INDIANA UNIVERSITY.

University land, see PUBLIC LANDS, § 54.

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

# INDIANS.

## Scope-Note.

[INCLUDES persons wholly or partly of Indian blood; their rights and disabilities in general; protection and regulation of such persons; and government of the Indian country and of the Indian reservations.

[EXCLUDES marriage between Indians or between Indians and persons of other races (see *Marriage*), and titles to lands derived from Indians (see *Public Lands*). For complete list of matters excluded, see cross-references, post.]

## Analysis.

- § 1. Who are Indians.
- § 2. Status of Indian nations or tribes.
- § 3. Treaties and engagements with Indian nations or tribes.
- § 9. Lands.
- § 11. — Cession by treaties.
- § 12. — Reservations or grants to Indian nations or tribes.
- § 14. — Grants and patents to individual Indians.
- § 15. — Alienation in general.
- § 17. — Cutting timber.
- § 18. — Descent.
- § 20. — Judicial sale.
- § 24. Contracts.
- § 38. Criminal prosecutions.

## Cross-References.

See—

Construction of statutes in *pari materia*. STATUTES, § 225.

Marriage by Indian custom. MARRIAGE, § 15.

Testamentary capacity. WILLS, §§ 23, 25.

### § 1. Who are Indians.

[a] (Sup. 1856)

In the act of February 3, 1841, entitled "An act for the relief of the Miami and other Indians," it is provided that "in all cases the provisions of this act shall extend to all persons of Indian descent, who are recognized as members of any tribe residing in this state, down to those having one-eighth Indian blood." *Held*, that this must be regarded as the legislative definition of the word "Indian" used in all other acts, unless a different meaning should appear to be clearly intended.—*Doe ex dem. Lafontaine v. Avaline*, 8 Ind. 6.

A married woman recognized as an Indian by the community, by the Indians, and by the state and federal authorities; her birth, education, and language stamping the same character upon her; the law under consideration, intended for the relief of the Indians and to prevent fraud, requiring a liberal construction; and she having three-eighths Indian blood,—must be deemed to be an Indian.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Indians, § 1.

See, also, 22 Cyc. p. 112.

### § 2. Status of Indian nations or tribes.

[a] (Sup. 1862)

A tribe of North American Indians is neither a state nor a nation, in the political or international sense of the terms.—*Roche v. Washington*, 19 Ind. 53, 81 Am. Dec. 376.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Indians, §§ 2, 3.

See, also, 22 Cyc. pp. 117-121.

### § 3. Treaties and engagements with Indian nations or tribes.

Session of land, see post, § 11.

Reservation of lands to individual Indians by treaties, see post, § 14.

Reservation of land to Indian nations or tribes by treaties, see post, § 12.

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

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[a] (Sup. 1837)

The construction of an Indian treaty belongs to the court as a matter of law.—*Harris v. Doe ex dem. Barnett*, 4 Blackf. 369.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Indians, §§ 5-7, 11.

See, also, 22 Cyc. pp. 121-123.

### § 9. Lands.

Taxation of Indian lands, see TAXATION, §§ 181, 249, 535.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Indians, §§ 17, 25-56.

See, also, 22 Cyc. pp. 123-139.

### § 11. — Cession by treaties.

Reservation of lands to individual Indians, by treaties, see post, § 14.

Reservation to Indian nations or tribes by treaties, see post, § 12.

[a] (App. 1905)

Where the United States received from the Pottawatomie Indians a cession of land extending from Logansport to Lake Michigan, for the purpose of establishing a public highway from such lake to the Ohio river, such tribe and their grantees were bound to yield up the necessary land from Logansport to the lake, and the United States and her grantees were compelled to furnish such land from Logansport to such river.—*Western Union Telegraph Co. v. Krueger*, 36 Ind. App. 348, 74 N. E. 25.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Indians, § 26.

See, also, 22 Cyc. pp. 130-132.

### § 12. — Reservations or grants to Indian nations or tribes.

Reservations to individual Indians, see post, § 14.

[a] (Sup. 1868)

A reservation of land in an Indian treaty of cession simply secures to those in whose favor the reservation is made a continuation of the right of occupancy in the land reserved, while the ultimate title remains in the United States as before the treaty.—*Wheeler v. Mesching-go-me-sia*, 30 Ind. 402.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Indians, §§ 27, 28.

See, also, 22 Cyc. p. 124.

### § 14. — Grants and patents to individual Indians.

[a] A reservation in a treaty to certain members of an Indian tribe is equivalent to an absolute grant, and the title is conferred by the treaty, and is perfected when the location is made, which is necessary to give the grant identity without a patent.—(Sup. 1837) *Harris v. Doe ex dem. Barnett*, 4 Blackf. 369; (1869) *Dequindre v. Williams*, 31 Ind. 444.

[b] (Sup. 1837)

A treaty with the Indians so far as respects the grants of land to individuals contained in it is evidence of the grantees' title, and, as such, proper to be laid before a jury.—*Harris v. Doe ex dem. Barnett*, 4 Blackf. 369.

[c] (Sup. 1849)

A reservation in a treaty to certain members of an Indian tribe is not equivalent to an absolute grant, and the title is not conferred by the treaty nor perfected when the location is made.—*Longlois v. Coffin*, 1 Ind. 446, Smith, 378.

Where a treaty with Indians says that the title to a certain tract of land is thereby vested in a certain individual, his heirs and assigns, the treaty operates as a grant; but when it says that a half section of land, at a specified point, shall be granted to a certain person, etc., by patent from the president of the United States, it amounts only to a contract for land to be afterwards located and conveyed.—*Id.*

So the third article of the treaty of 1837 between the United States and the Miami Indians, providing that the lands mentioned in a schedule thereto annexed shall be granted to the persons therein named, by patent from the president, is not of itself a grant, but is only a contract that the land shall be afterwards properly located, and granted by such patent to the persons named.—*Id.*

[d] (Sup. 1869)

A section of land, to be located under the direction of the president, was granted to a certain person by an Indian treaty. After the death of the grantee, the proper court, upon petition of the guardian of the grantee's heirs at law, ordered the sale of the unlocated section; and, the land having been located by the assignee of the purchaser at such guardian's sale, the proper court ordered a conveyance of the specific land to such assignee, which was made, but never approved by the president. *Held*, that by the doctrine of relation, the treaty operated instantly in law as a grant: the subsequent location of the land merely ascertaining the specific thing which was granted.—*Dequindre v. Williams*, 31 Ind. 444.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Indians, §§ 2, 31-36, 46.

See, also, 22 Cyc. pp. 132-139.

### § 15. — Alienation in general.

Compelling conveyance, see post, § 20.

[a] (Sup. 1852)

The sixth article of the treaty by the United States with the Miami Nation of Indians, made on the 6th of October, 1818, provided that the several tracts of land which the United States therein engaged to grant should never be transferred by the grantees or their heirs without the approbation of the president of the United States. Pursuant to the treaty certain

premises were granted to B., an Indian woman, and subsequently the president, upon her petition, granted her authority to sell a portion of the land and to divide the remainder among her children. She accordingly sold a portion of the land, but shortly after died without having made any partition of the remainder to her children. *Held*, that the children took the land by descent, and could not, therefore, convey it, and a deed executed by them was void.—*Harris v. Doe ex dem. Spencer*, 3 Ind. 494.

[b] (*Sup.* 1864)

Suit for the recovery of land. The land was granted to A. by a treaty between the United States and the Pottawattamie tribe of Indians, made October 16, 1826. 7 Stat. 295, 299. The grant (article 6) was in these words: "The United States agree to grant to each of the persons named in the schedule hereunto annexed the quantity of land therein stipulated to be granted; but the land so granted shall never be conveyed, by either of the said persons or their heirs, without the consent of the president of the United States." A., on the 13th day of June, 1836, without the consent or approval of the president, executed and delivered to B. a deed conveying to him the land in dispute; but the deed thus made was afterwards, on the 14th day of December, 1846, approved by James K. Polk, the then president of the United States. When the land was thus conveyed by A. to B., there was no adverse possession, but in 1843 C. went into possession of the land, and, at the time of the approval of the deed by the president, held it adversely. *Held*, that the deed from A. to B. could not, without the consent of the president, operate as a conveyance, but that his consent to its execution might be given before or after its execution.—*Ashley v. Eberts*, 22 Ind. 55.

[c] (*Sup.* 1878)

The doctrine of the decisions holding that the approval of the president of the United States when made to the conveyance of lands included in the treaty with Pottawattamie Indians (7 U. S. Stat. p. 218), providing that lands granted to the Indians thereby should not be conveyed by the grantees thereof without the consent of the president, relates back to the time of the execution of the deed to the lands, has become a rule of property in Indiana.—*Steeple v. Downing*, 60 Ind. 478.

A conveyance by a beneficiary, under the treaty of August 29, 1821, of a specified tract of land afterwards conveyed to him pursuant to such treaty, vested title in the grantee, though the latter died prior to the issuing of the patent and the approval of the conveyance.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. INDIANS, §§ 17, 29, 34, 37-44.

See, also, 22 Cyc. pp. 127-129, 135-137.

§ 17. — Cutting timber.

[a] (*Sup.* 1868)

The common-law doctrine that the cutting of standing trees is waste does not apply to the members of a band of Indians in the use of a large tract of wild land within a state, granted to them by the United States.—*Wheeler v. Meshin-go-me-sia*, 30 Ind. 402.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. INDIANS, § 48.

See, also, 22 Cyc. p. 126.

§ 18. — Descent.

[a] (*Sup.* 1890)

Act Cong. 1872 (17 Stat. 213), authorized partition among the survivors of the Meshin-go-me-sia band of Indians of the tract of land ceded to Meshin-go-me-sia by treaty of 1840, and provided that patent issue to each person in fee simple, and that the title so conveyed should descend as other lands in Indiana; but provided that the land should not be subject to any debt contracted prior to the partition, nor subject to levy, sale, forfeiture, or mortgage, prior to January, 1, 1881, nor be sold by the owner prior to that date. *Held*, that the land of one of the tribe who died in 1880, leaving debts not within the prohibited class, descended, subject to be applied in payment of such debts, as provided by Rev. St. § 2332, in case of other lands.—*Taylor v. Vandegrift*, 126 Ind. 325, 25 N. E. 548.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. INDIANS, § 49.

See, also, 22 Cyc. p. 137.

§ 20. — Judicial sale.

[a] (*Sup.* 1840)

A section of land was reserved by an Indian treaty for certain minors; they having no right to sell it, however, without the consent of the President of the United States. The land was afterwards located, and a part of it sold and conveyed, under an order of the probate court, for the support of minors; but, being imperfectly described in the deed, the President refused his assent to the sale. *Held*, that the purchaser might, by a bill filed in the probate court, obtain a correct survey and conveyance of the land.—*Johns v. De Rome*, 5 Blackf. 421.

[b] (*Sup.* 1890)

That lands granted to an Indian in severalty are not subject to execution on a judgment recovered on a note is no defense to an action on the note, and no cause for granting an injunction against a levy; it not appearing that plaintiff is threatening to make one.—*Ke-tuc-e-mun-guah v. McClure*, 122 Ind. 541, 23 N. E. 1080, 7 L. R. A. 782.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. INDIANS, § 53.

See, also, 22 Cyc. pp. 129, 138.

**§ 24. Contracts.**

[a] (Sup. 1880)

Where a party to whom an annuity, to which a Miami Indian was entitled from the United States, was, by her verbal order, paid in satisfaction of a debt, was garnished in an attachment suit, against said Indian, the order would not be presumed to be void, under Rev. St. U. S. 1873-75, p. 370, §§ 2103, 2106.—*Godfroy v. Scott*, 70 Ind. 259.

[b] (Sup. 1890)

A promissory note made by an Indian, a member of a tribe residing on a reservation, and maintaining its tribal relations, in favor of another member of the tribe, is valid, when it was not given under a contract prohibited by Rev. St. U. S. 1878, p. 367, in relation to their lands or annuities.—*Ke-tuc-e-mun-guah v.*

*McClure*, 122 Ind. 541, 23 N. E. 1080, 7 L. R. A. 782.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Indians, § 16.

See, also, 22 Cyc. pp. 115, 121.

**§ 38. Criminal prosecutions.**

[a] (Sup. 1835)

An indictment against a person for selling spirituous liquors to an Indian cannot be objected to merely because the name of the Indian is not inserted, if the indictment state that the name is unknown to the jurors.—*State v. Jackson*, 4 Blackf. 49.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Indians, §§ 22, 64, 66.

See, also, 22 Cyc. pp. 148, 149; note, 21

L. R. A. 169.

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

# INDICTMENT AND INFORMATION.

## *Scope-Note.*

[INCLUDES formal written accusations of public offenses, presented by grand juries or preferred by prosecuting officers, whether in form of indictment, presentment, information, or complaint; necessity for presentment or indictment by grand jury; finding, indorsing, filing, and requisites of such accusations, objections thereto, and motions to quash, etc., demurrers thereto, and amendment thereof; variance between averments and proof; and conviction of offense included in that charged.]

[EXCLUDES preliminary complaints in criminal cases, and proceedings thereon before indictment (see *Criminal Law*); organization of and inquisitions by grand juries (see *Grand Jury*); accusations of particular offenses, and proceedings thereon (see specific heads); arraignment and pleas to indictments and trial thereof (see *Criminal Law*); and review of proceedings thereon (see *Criminal Law*). For complete list of matters excluded, see cross-references, post.]

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**I. NECESSITY OF INDICTMENT OR PRESENTMENT.**

**§ 1. Necessity of formal accusation in general.**

[a] (App. 1896)

The purpose of an indictment or information is, first, to inform the court of the facts alleged, so that it may decide whether or not they are sufficient in law to support a conviction; and, second, to furnish the accused with

such a description of the charge against him as will enable him to make his defense and avail of his conviction or acquittal for protection against further prosecution for the same offense.—State v. Allen, 40 N. E. 705, 12 Ind. App. 528.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Ind. & Inf. §§ 1-3.  
 See, also, 22 Cyc. p. 171.

## § 2. Constitutional and statutory provisions.

Local and special laws, see **STATUTES**, § 87.

Subjects and titles of acts, see **STATUTES**, § 118.

### [a] (Sup. 1874)

Act 1873, entitled "An act relating to prosecutions by affidavit and information," was intended to authorize prosecutions for misdemeanors in the circuit courts of the state in the same manner as they had been prosecuted in the court of common pleas. The circuit courts had long possessed concurrent jurisdiction with the common pleas in such cases; and when the latter court was abolished it was thought advisable to permit the practice of that court to be adopted in the circuit court, and prosecute by affidavit and information, instead of requiring all prosecutions to be by indictments, as theretofore.—*Byrne v. State*, 47 Ind. 120.

### [b] (Sup. 1881)

Act March 29, 1879 (Acts 1879, p. 143), in relation to prosecutions of felonies by affidavit and information, is not in conflict with any of the provisions of the Constitution of this state.—*Heanley v. State*, 74 Ind. 90; *Jones v. Same*, Id. 249; *Sturm v. Same*, Id. 278; *Fox v. Same*, 76 Ind. 243.

[c] Under Const. art. 7, § 17, providing that the General Assembly may modify or abolish the grand jury system, a person charged with a felony cannot demand, as a constitutional right, that he be tried only upon an indictment returned by the grand jury of the county in which the offense was committed.—(Sup. 1904) *Welty v. Ward*, 72 N. E. 596, judgment affirmed on rehearing (1905) 73 N. E. 889, 164 Ind. 457.

### [d] (Sup. 1906)

A liberal construction is placed on statutes authorizing prosecutions by information; the tendency of the Constitution and laws being to reduce the work of, and necessity for, the grand jury.—*State v. Roberts*, 166 Ind. 585, 77 N. E. 1093.

### [e] (Sup. 1906)

Const. U. S. art. 3, § 2, providing for trial of crime by jury, and amendments 5 and 6, providing that no person shall be held to answer for crime, unless on an indictment, and that in all criminal prosecutions the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor, do not apply to prosecutions in the courts of the states or to laws enacted by the Legislatures of the states, but only to prosecutions in the courts of the United States and laws enacted by Congress.—*Spurgeon v. Rhodes*, 78 N. E. 228, 167 Ind. 1.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 4-8.

See, also, 22 Cyc. pp. 171-173.

## § 3. Offenses which must be prosecuted by indictment.

### [a] (Sup. 1871)

All prosecutions for violations of the criminal law, whether felonies or misdemeanors, originating in the several criminal courts of the state, must be by indictment, not by information.—*State v. Benson*, 38 Ind. 60.

### [b] (Sup. 1874)

The circuit court cannot try a charge of felony upon an affidavit and information filed in that court.—*Bell v. State*, 46 Ind. 453.

### [c] (Sup. 1886)

Prosecutions for felony must be by indictment, except in cases where the statute expressly provides that they may be by information.—*State v. Boswell*, 4 N. E. 675, 104 Ind. 541.

### [d] (Sup. 1896)

Under Rev. St. 1894, § 1748, subd. 1, authorizing a prosecution by affidavit and information for all public offenses, except treason and murder, where the court is in session and the grand jury is not in session, or has been discharged, a person may be prosecuted for rape by affidavit and information, though a grand jury had been in session since his arrest, and had been discharged without indicting him.—*Lankford v. State*, 43 N. E. 444, 144 Ind. 428.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 9-23;

19 CENT. DIG. Escape, § 10.

See, also, 22 Cyc. p. 184; notes, 17 L. R. A. 764, 1 L. R. A. (N. S.) 1153.

## § 4. Proper form of accusation.

### [a] (Sup. 1829)

A common assault cannot be prosecuted by indictment.—*State v. Hailstock*, 2 Blackf. 257.

### [b] (Sup. 1853)

After the act establishing courts of common pleas took effect, but before Rev. St. 1852 went into force, a charge of felony not punishable with death, containing the requisites prescribed by the statute, was filed in the court of common pleas, but the charge was termed an "information." Held, that the name given to the complaint did not change its legal effect.—*Lindville v. State*, 3 Ind. 580.

### [c] (Sup. 1853)

In January, 1853, Rev. St. 1852, not being in force, information for misdemeanors was not authorized by law, but only a sworn charge or complaint.—*Gardner v. State*, 4 Ind. 632.

### [d] (Sup. 1855)

Until the act of 1852, requiring informations to be filed in criminal prosecutions, came into effect, the filing with the clerk of the court of common pleas of a written charge, verified by affidavit, was sufficient to put the party accused upon trial.—*Levy v. State*, 6 Ind. 281.

[e] The mode of initiating and conducting prosecutions for criminal offenses must be uniform in the same court, but it may be different in different courts. Thus in the circuit court prosecutions for felonies are initiated by indictment, but under the act of 1859 they may be commenced in the common pleas court by affidavit and information.—(Sup. 1859) *Reed v. State*, 12 Ind. 641; (1860) *Daffey v. Same*, 15 Ind. 441.

[f] (Sup. 1870)

Misdemeanors may in the criminal and circuit courts be prosecuted upon indictment.—*Eitel v. State*, 33 Ind. 201.

[g] (Sup. 1874)

A prosecution for a misdemeanor cannot properly be commenced in the circuit court by affidavit, without an information.—*Byrne v. State*, 47 Ind. 120; *Jackson v. State*, 48 Ind. 251.

[h] (Sup. 1874)

Under the acts of March 6 and 8, 1873, prosecutions for misdemeanor should be upon affidavit and information.—*Moniger v. State*, 48 Ind. 383.

[i] (Sup. 1874)

In the absence of an indictment no prosecution can be commenced in the circuit court upon an affidavit without an information.—*Allstodt v. State*, 49 Ind. 233.

[j] (Sup. 1880)

Misdemeanors may be prosecuted in the circuit court, either by indictment or by affidavit and information, and, so far as practicable, the practice in either mode must be governed by the law applicable to prosecutions on affidavit.—*Douglass v. State*, 72 Ind. 385.

[k] (Sup. 1882)

A prosecution cannot be maintained on an affidavit alone. If no information is filed, the proceedings should be quashed.—*State v. First*, 82 Ind. 81.

[l] (Sup. 1886)

Where an accused has been recognized to appear at the term of court following the commission of the offense, and where the grand jury sitting at that term has failed to find an indictment against him, he cannot be prosecuted by information.—*State v. Boswell*, 4 N. E. 675, 104 Ind. 541.

[m] (Sup. 1887)

A defendant entering into a recognizance to appear at the circuit court, under Rev. St. § 1636, which provides that in a criminal proceeding before a justice, "if he find that the punishment he is authorized to assess is not adequate to the offense, he shall hold such person to bail for his appearance before the proper court," is simply required to appear before the court named, to answer such charge as may be

preferred against him; and such defendant must be tried by indictment or information as in an original proceeding in the circuit court, and cannot be tried on the complaint filed with the justice.—*Butler v. State*, 113 Ind. 5, 14 N. E. 247.

[n] (Sup. 1894)

Rev. St. 1894, § 8728 (Rev. St. 1881, § 6549), provides that any warehouseman violating section 8726, Rev. St. 1894 (section 6547, Rev. St. 1881), forbidding disposition of stored goods without the written consent of the holder of the warehouse receipt, shall be "subject to indictment"; and Rev. St. 1894, § 1748 (Rev. St. 1881, § 1679), provides that all public offenses except treason and murder may, in certain cases, be prosecuted by affidavit and information. *Held*, that there is no conflict between the two acts, and that a prosecution of a warehouseman for violating the act may be had on affidavit and information.—*Miller v. State*, 144 Ind. 401, 43 N. E. 440.

[o] (Sup. 1906)

Burns' Ann. St. 1901, § 1748, provides that an offense may be prosecuted by information when the party charged is not under indictment therefor, and the court is in session, and the grand jury discharged for the term. Const. 1861 forbade a prosecution save by presentment, indictment, or impeachment; but Const. 1851, art. 7, § 17, authorized the modification or abolition of the grand jury system. The members of the grand jury were reduced by Rev. St. 1852, p. 387, pt. 3, c. 4, and Acts 1875 (Sp. Sess.) p. 54, c. 12. By Rev. St. 1852, p. 363, pt. 3, c. 1, provision was made for prosecution by information of offenses not within the jurisdiction of the grand jury. The authority to prosecute by information was further enlarged by Acts 1879, p. 143, c. 52, and again in 1881 (Acts 1881, p. 134, c. 36); and Burns' Ann. St. §§ 241, 1312, provide for a liberal construction of statutes. *Held*, that an accused, held to answer a charge of assault and battery with felonious intent, can be prosecuted for that offense by information filed, after an investigation by a grand jury and the return of an indictment for a simple assault and battery, where such information is filed after the discharge of the grand jury and during the term to which the accused was recognized.—*State v. Roberts*, 77 N. E. 1093, 166 Ind. 585.

[p] (Sup. 1907)

Acts 1905, p. 611, c. 169, § 118, provides that certain offenses may be presented by affidavit filed in term time, except when the grand jury is in session or a prosecution by indictment or affidavit for the same offense is pending. Defendant was bound over on a preliminary affidavit. Thereafter the prosecutor filed an affidavit against him during an adjournment of the grand jury which subsequently reconvened. *Held*, that there existed the right to prosecute by affidavit.—*Williams v. State*, 169 Ind. 384, 82 N. E. 790.

## [q] (Sup. 1907)

Acts 1905, p. 611, c. 169, § 118, providing that public offenses may be prosecuted by affidavit, substitutes affidavit for the information authorized by the old Code, and the affidavit will alone perform all the functions of an affidavit and information under the old Code.—*Cole v. State*, 169 Ind. 393, 82 N. E. 796.

## FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 3, 24-27.

See, also, 22 Cyc. pp. 173-190.

## II. FINDING AND FILING OF INDICTMENT OR PRESENTMENT.

Filing of information or complaint, see post, §§ 41-43.

Powers and duties of grand jury, see GRAND JURY, §§ 24, 26.

Proceedings of grand jury, see GRAND JURY, §§ 33, 34, 36, 38, 39.

### § 6. Jurisdiction of court.

## [a] (Sup. 1844)

In this state an indictment for a capital offense cannot be found in the circuit court, in the absence of the president.—*Cook v. State*, 7 Blackf. 165.

## FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 29-33.

See, also, 22 Cyc. pp. 190-195.

### § 7. Term of court or time of finding.

Mode of objecting, see post, § 133.

## [a] (Sup. 1860)

An indictment may be found at an adjourned term of the circuit court.—*Ulmer v. State*, 14 Ind. 52.

## FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 36-42;

18 CENT. DIG. Embez. § 38.

See, also, 22 Cyc. pp. 196, 197.

### § 10. Finding of grand jury.

## [a] (Sup. 1825)

The statement in the indictment of its having been found on the "oaths" of the grand jurors, instead of on their "oath," is no ground of error.—*Jerry v. State*, 1 Blackf. 395.

## [b] (Sup. 1865)

When the grand jury has returned a bill into court duly indorsed by the foreman, a plea in abatement that it was found without evidence, or that no vote was taken, will be set aside.—*Creek v. State*, 24 Ind. 151.

## [c] (Sup. 1902)

An indictment duly returned by the grand jury is conclusive evidence of the regularity of the finding, and it is not competent to inquire into the amount or kind of evidence on which they acted.—*State v. Comer*, 62 N. E. 452, 157 Ind. 611.

## [d] (App. 1906)

The return by the grand jury into open court of an indictment, duly indorsed by the foreman "A true bill," is sufficient evidence that the charge was made on evidence given before the grand jury and that a sufficient number of the jurors concurred in the finding, under the statute requiring that at least five of the grand jurors must concur in the finding.—*Guy v. State*, 77 N. E. 855, 37 Ind. App. 691.

## FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 50-61;

14 CENT. DIG. Crim. Law, § 868; 23

CENT. DIG. Forg. § 56; 24 CENT. DIG.

Gr. Jury, §§ 6, 79.

See, also, 22 Cyc. pp. 204-210; note, 28

L. R. A. 324.

### § 11. Return and filing or record.

## [a] (Sup. 1828)

A conviction will not be reversed because the record does not show that the indictment was indorsed "A true bill" by the foreman of the grand jury.—*Townsend v. State*, 2 Blackf. 151.

## [b] (Sup. 1835)

The record of an indictment need not show that the indictment was signed by the prosecuting attorney, nor that there was a foreman of the grand jury.—*McGregg v. State*, 4 Blackf. 101.

## [c] (Sup. 1848)

If the record states only that it was presented that the defendant, etc., but does not state that the indictment was found by the grand jury of the proper county, the indictment is bad, and may be quashed on motion, or judgment arrested.—*Clark v. State*, 1 Ind. 253, Smith, 161.

## [d] (Sup. 1850)

When an indictment is delivered to the clerk of the court, and is received by him to be kept with the papers in the case, it is to be considered as filed.—*Engleman v. State*, 2 Ind. 91, 52 Am. Dec. 494.

The caption (being the prefatory statement of the clerk upon the record preceding the copy of the indictment) stated that the indictment was found at the October term, 1846, by certain men, "duly impanelled, sworn and charged as grand jurors in and for the county of Allen, at said term." *Held*, that this was sufficiently explicit.—*Id.*

## [e] (Sup. 1856)

2 Rev. St. p. 369, § 68, requiring that every indictment must be recorded by the clerk during the term at which it was found, is designed to prevent a failure of justice in case the indictment should be lost or purloined, and the recording of it is not necessary to give validity to the original; but, were it necessary, this indictment must be presumed to have been recorded in the Boone circuit court.—*Reed v. State*, 8 Ind. 200.

[f] (Sup. 1858)

Where the record does not affirmatively show the return of an indictment by the grand jury into open court, a motion in arrest of judgment should be sustained.—*Adams v. State*, 11 Ind. 304.

[g] (Sup. 1860)

The failure to enter the return of the indictment by the grand jury may be cured by a nunc pro tunc order at the next term.—*State v. Pearce*, 14 Ind. 426.

[h] (Sup. 1861)

Where the trial is had upon the original indictment, it is not necessary that the record should show that the indictment has been recorded, compared with the original, and certified, etc., by the judge.—*Porter v. State*, 17 Ind. 415.

[i] (Sup. 1862)

Where one accused, in a criminal suit, has been tried and convicted, but the record does not show the impaneling of a grand jury, nor the return by such body of an indictment, nor the indorsement thereon of "A true bill," nor the signature thereto of any person purporting to be foreman of such jury, the judgment must be reversed and the cause remanded.—*Conner v. State*, 18 Ind. 428; *Id.*, 19 Ind. 98; *Springer v. Same*, *Id.* 180.

[j] (Sup. 1863)

Where the record, in a criminal prosecution on indictment, fails to show that a grand jury properly impaneled has returned the indictment into court, the court has authority, at any time during the term of the trial, to make a sufficient entry of record to rectify this defect.—*Bodkin v. State*, 20 Ind. 281.

[k] (Sup. 1863)

If the record does not show that the indictment was duly "returned by the grand jury into open court," a conviction cannot be sustained.—*Jackson v. State*, 21 Ind. 79.

[l] (Sup. 1864)

Where a transcript shows that a grand jury was sworn and impaneled, of which B. was appointed foreman, and that afterwards the same grand jury returned into court sundry bills signed by their foreman as true bills, and contains a statement by the clerk that the indictment which follows is one of these, and then the indictment is set out, indorsed: "A true bill. B., Foreman,"—the record sufficiently shows the return of the indictment into court by the grand jury.—*Wall v. State*, 23 Ind. 150.

[m] (Sup. 1872)

An indictment recited the style of the court, the name of the county and state, the time and place of the session of the court, the names of the parties, and that the grand jurors were of the proper county, good and lawful men, duly and legally impaneled, charged, and sworn to inquire, etc. The accompanying record, upon a change of venue, recited that such

indictment was returned into open court. *Held* sufficient.—*Bailey v. State*, 39 Ind. 438.

[n] (Sup. 1873)

Where the record fails to show that the indictment was returned by the grand jury, it will be quashed on motion.—*Heacock v. State*, 42 Ind. 393.

[o] (Sup. 1874)

The county in and for which the grand jury which found an indictment was impaneled is sufficiently shown where the caption of such indictment shows the impaneling of the grand jury in the county of Sullivan, state of Indiana, and the indictment is entitled, "State of Indiana, Sullivan County," etc., and commences, "The grand jurors of the state of Indiana, being duly impaneled, sworn, and charged to inquire of crimes and offenses committed within the body of the county of Sullivan in the state of Indiana, in the name and by the authority and in behalf of said state of Indiana upon their oaths present," etc.—*Lovell v. State*, 45 Ind. 550.

[p] (Sup. 1874)

The statute does not require the clerk to file an indictment in open court, or that the act of marking it "filed" shall be done in open court.—*Willey v. State*, 46 Ind. 363.

Where the record recites that the grand jury came into "open court and returned the following indictment," giving its number and setting it out, it sufficiently shows that it was returned into open court, and sufficiently identifies the indictment.—*Id.*

[q] (Sup. 1877)

To a plea by the defendant in abatement of an indictment, alleging the failure of the clerk of the court to indorse upon such indictment the time of its filing, and to enter of record the return of the same into court by the grand jury, a reply that such omissions have been cured by a nunc pro tunc entry, made by the order of such court, is sufficient.—*Long v. State*, 56 Ind. 133, 600.

Where an indictment duly returned into court by a proper grand jury has there remained without being filed, and without any record of such return, it is the duty of such court, upon being informed of such facts, to direct the making of a proper nunc pro tunc entry, showing the returning and filing of such indictment.—*Id.*

[r] (Sup. 1877)

Failure of the record in a criminal case, which has been taken on a change of venue to another county, to show that the indictment had been indorsed "A true bill" by a foreman of the grand jury in the county where it was found, is not ground for a motion to quash.—*Beard v. State*, 57 Ind. 8.

[s] (Sup. 1877)

The record of a criminal prosecution showing that "the regular grand jury for said term

of said court," having been duly impaneled and sworn, "returned into open court, and upon their oaths presented" the indictment in question, shows that the indictment was properly presented by a legal grand jury.—*Beavers v. State*, 58 Ind. 530.

[t] (Sup. 1879)

The record in a criminal trial showed that on a certain juridical day of a certain term of the court, and before a judge of said court, the grand jury presented and filed, as true bills, certain indictments, by their numbers, followed by copies of the same, and that the clerk had indorsed upon said indictments the words "Filed in open court," with the date. *Held*, that the record showed that the indictments were "duly returned into open court and filed by the clerk."—*Clare v. State*, 68 Ind. 17.

[u] (Sup. 1882)

A record that "come now the grand jury and 'present'" the indictment, *held* to be a sufficient statement that the indictment was "returned."—*Reeves v. State*, 84 Ind. 116.

[v] (Sup. 1884)

An indictment shown by the record to have been returned by the grand jury into open court, and itself alleging that the grand jury were duly impaneled, charged, and sworn, is good against a motion to quash on the ground that it fails to show the impanelment of the grand jury.—*Stout v. State*, 93 Ind. 150.

[w] (Sup. 1885)

The failure of the clerk to enter the indictment in the order book cannot be made the ground of a motion to quash.—*Heath v. State*, 101 Ind. 512.

A recital in the record that the grand jury come into open court and present an indictment, followed by an indictment, is sufficient to show its due return.—*Id.*

[ww] (Sup. 1885)

The record on appeal showed that on a certain day the following entry was made in the order book of the trial court: "Come now the grand jury and return in open court seven indictments, which are each signed by the prosecuting attorney and indorsed a true bill by a foreman and numbered respectively on the backs thereof. \* \* \* And said indictments are examined by the court and filed by the clerk." The indictment in question was set out in the record with all its indorsements as the indictment against the appellant. *Held*, that the record showed with sufficient certainty that the indictment against the defendant was duly returned by the grand jury in open court.—*Padgett v. State*, 3 N. E. 377, 103 Ind. 550.

[x] (Sup. 1886)

Where the record shows that an indictment was returned by the grand jury, and the proceedings appear to be founded on such indictment, it is immaterial that the number of the case as stated on the indictment is different from that stated elsewhere in the record.—

*Mergentheim v. State*, 107 Ind. 567, 8 N. E. 568.

[xx] (Sup. 1888)

On plea in abatement that the record does not show that an indictment was returned into court, the court may cause the clerk to make such an entry *nunc pro tunc*.—*Waterman v. State*, 116 Ind. 51, 18 N. E. 63.

[y] (App. 1892)

An indictment for selling intoxicating liquor without a license was as follows: "State of Indiana, Morgan county—ss.: In the Morgan circuit court, February term, 1891. The State of Indiana vs. Thomas Howell. The grand jury of the county of Morgan upon their oaths do present that at the county of Morgan, in the state of Indiana," etc. The record showed that the indictment was returned "by the grand jury of Morgan county, Indiana, into open court." *Held*, that it sufficiently appeared that the indictment was presented by the grand jury of the county of Morgan, in the state of Indiana.—*Howell v. State*, 4 Ind. App. 148, 30 N. E. 714.

[yy] (App. 1892)

The provisions of Rev. St. 1881, § 1672, that, as soon as an indictment is presented and examined by the court, the clerk shall indorse thereon the date of presentation, and then record the same with its indorsements in a book kept for that purpose, are so far directory only that, where an indictment was duly presented on the last day of a term, the recording of the same on a later day is not a cause for quashing it.—*Courtney v. State*, 5 Ind. App. 356, 32 N. E. 335.

[z] (Sup. 1896)

A defendant, who was tried on the indictment actually returned by the grand jury, was not prejudiced by failure to show that such indictment was recorded, as required by Rev. St. 1894, § 1741 (Rev. St. 1881, § 1672), providing that the clerk shall record indictments as soon as presented and examined.—*Ransbottom v. State*, 144 Ind. 250, 43 N. E. 218.

[zz] (Sup. 1907)

The record in a murder trial reciting the presentment, return into open court, filing and recording of the indictment, aided by the presumptions that operate in favor of the regularity of the proceedings, was sufficient against an objection that the indictment was not filed and had not been recorded, especially when the defendant did not attempt to show that his substantial rights were in any way prejudiced.—*Williams v. State*, 168 Ind. 87, 79 N. E. 1079.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 62-75.  
See, also, 22 Cyc. pp. 210-220.

#### § 14. Loss or destruction.

[a] (Sup. 1877)

The defendant in a criminal prosecution cannot be put upon trial on an indictment

against him which has been destroyed, and of which there is no record.—*Buckner v. State*, 56 Ind. 208, 209.

The defendant in a criminal prosecution cannot be put upon trial on a *nunc pro tunc* entry, made by the order of the court, showing the return into court, by the grand jury, of an indictment against the defendant, and that it has been destroyed.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 77–82.  
See, also, 22 Cyc. pp. 220–223.

### § 15. Successive indictments for same offense.

Successive informations, see post, § 45.

[a] Another indictment pending for the same offense constitutes no ground of abatement in criminal prosecutions.—(Sup. 1854) *Dutton v. State*, 5 Ind. 533; (1864) *Hardin v. State*, 22 Ind. 347.

[b] (Sup. 1876)

A grand jury, after finding an indictment and returning it into court, was discharged. At a subsequent day of the same term it was recalled, vacancies filled with talesmen, and the same indictment was again returned into court. *Held*, that it could not be presumed, in the absence of proof thereof, that no amendment of the indictment was made, nor that it was not signed by the prosecutor and indorsed by the foreman.—*Hughes v. State*, 54 Ind. 95.

[c] (App. 1898)

That another prosecution is pending against him for the same offense cannot constitute valid matter in abatement until the defendant has been placed in jeopardy in the other action.—*Haase v. State*, 36 N. E. 54, 8 Ind. App. 488.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 83–88.  
See, also, 22 Cyc. pp. 223–227.

## III. FORMAL REQUISITES OF INDICTMENT.

Formal requisites of information, see post, §§ 46–53.

### § 19. Statutory forms.

[a] (Sup. 1889)

Under Rev. St. 1881, § 1734, which provides that an indictment for being an accessory before the fact shall state, “and the said \* \* \* was accessory before the fact to the said felony,” an indictment which charges the defendant with being an accessory to the crime of murder, without containing the above statement, is insufficient even after verdict.—*Sage v. State*, 120 Ind. 201, 22 N. E. 338.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. § 91.

### § 20. Caption.

Aider of averments as to venue by averment in caption, see post, § 86.

Amendment, see post, § 159.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 92–116.  
See, also, 22 Cyc. pp. 228–239, 30 Cyc. p. 1384.

### § 21. — In general.

[a] (Sup. 1879)

Although the name of the offense intended to be charged need not be contained in the title of an indictment, yet if it is contained therein, and there is a conflict as to such name with the language of the indictment itself, such language will control.—*Howard v. State*, 67 Ind. 401.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 92–97.  
See, also, 22 Cyc. p. 228.

### § 25. — Description of grand jury.

[a] The caption of an indictment represented the grand jurors that found the bill to be “good and lawful men.” *Held*, that this was a sufficient description of the qualifications of the jurors.—(Sup. 1825) *Jerry v. State*, 1 Blackf. 395; (1842) *Beauchamp v. State*, 6 Blackf. 299.

[b] (Sup. 1842)

The caption of an indictment from the circuit court showed that at, etc., on, etc., the jurors (naming them) appeared in court, and, being duly sworn and charged, etc. *Held*, that the omission of the words “then and there,” before the words “sworn and charged,” was not material.—*Beauchamp v. State*, 6 Blackf. 299.

[c] (Sup. 1844)

A caption of an indictment which shows the indictment to have been found by a grand jury at a circuit court held at, etc., on, etc., is sufficient. It need not specify the qualifications of the jurors, nor allege them to be good and lawful men.—*Weinzorpfen v. State*, 7 Blackf. 186.

[d] (Sup. 1868)

That an indictment does not show that the grand jury presenting it was composed of persons possessing the statutory qualifications is immaterial; the caption showing the indictment to have been found by the grand jury of a county named in the circuit court of such county, and the record reciting that the grand jurors were sworn as required by law.—*Stone v. State*, 30 Ind. 115.

[e] (Sup. 1874)

Where the record states that the grand jurors returning an indictment were “good and lawful men, householders” of the proper county, it will be presumed that they possessed all the statutory qualifications.—*Willey v. State*, 46 Ind. 363.

## [f] (Sup. 1884)

An indictment beginning as follows: "The grand jurors of W. county, in the state of Indiana, good and lawful men, duly and legally impaneled," is not open to a motion to quash on the ground that it shows that the grand jurors were not freeholders.—*Mathis v. State*, 94 Ind. 562.

## [g] (Sup. 1885)

When the record discloses enough to authorize the inference that an indictment was duly returned by a lawfully organized grand jury, the fact that the names of the grand jurors were not stated therein is no objection.—*Epps v. State*, 102 Ind. 539, 1 N. E. 491.

## [h] (App. 1893)

An indictment need not state when the grand jury was impaneled, and where such date is imperfectly given it will be considered surplusage, and disregarded.—*State v. Miller*, 6 Ind. App. 653, 34 N. E. 27.

## FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 92, 108-114.

See, also, 22 Cyc. p. 234.

## § 26. — Title of cause or names of parties.

## [a] (Sup. 1853)

A formal statement that an indictment was found by the authority of the state is not necessary if it appear from the record that the prosecution was in the name of the state.—*Crutz v. State*, 4 Ind. 385.

## [b] (Sup. 1858)

An indictment charging that "A. B. did," etc., sufficiently sets forth the names of the parties, without a formal title setting forth the names of the parties and the crime charged.—*Cronkhite v. State*, 11 Ind. 307.

## [c] (Sup. 1859)

The omission of the mere formality of naming the defendant in the title, he being named in the body of the indictment, does not tend to prejudice his rights upon the merits, and is not fatal.—*Dukes v. State*, 11 Ind. 557, 71 Am. Dec. 370.

## FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 115, 116.

See, also, 22 Cyc. p. 237.

## § 27. Commencement.

## FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 117-120.

See, also, 22 Cyc. pp. 239-242.

## § 29. — Venue.

## [a] (Sup. 1853)

An indictment worded: "State of Indiana, Delaware County—ss.: In the Delaware District Court, September Term, 1851. The grand jurors for the state of Indiana upon their oaths present,"—sufficiently shows that the grand jury

sworn and impaneled at such September term in Delaware county was meant.—*State v. Kiger*, 4 Ind. 621.

## [b] (App. 1892)

An indictment reciting that it was found by the grand jury of a certain county is sufficient, though it contains no recital that such county was situated in the state.—*Howell v. State*, 31 N. E. 88, 4 Ind. App. 483.

## [c] (Sup. 1905)

Where the first count of an indictment recited that it was presented by the "grand jury of L. county in the state of Indiana, good and lawful men, duly and legally impaneled, charged, and sworn for the adjourned November term of the Lake circuit court for the year A. D. 1904," a second count, containing an introductory clause, "And for a second and further count said grand jury do further find and present," was not objectionable for failure to allege that such second count was returned by the grand jury of L. county.—*Donahue v. State*, 74 N. E. 996, 165 Ind. 148.

## FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. § 119.

See, also, 22 Cyc. p. 240.

## § 32. Conclusion.

Amendment, see post, § 159.

## [a] (Sup. 1820)

Where a statute creates an offense which did not exist at common law, the indictment should conclude, "contra formam statuti," aliter, where the statute is merely declaratory of the common law.—*Fuller v. State*, 1 Blackf. 63.

## [b] (Sup. 1822)

A person guilty of perjury, where the punishment was whipping not exceeding 100 stripes, was prosecuted and convicted after the taking effect of a statute by which the punishment for subsequent convictions of the crime was changed to confinement in the penitentiary not exceeding seven years. *Held*, that the conclusion of the indictment in the singular, "contra formam statuti," was sufficient.—*Strong v. State*, 1 Blackf. 193.

## [c] (Sup. 1824)

The conclusion, "contrary to law," of an indictment for murder, is sufficient.—*Hudson v. State*, 1 Blackf. 317.

[d] Where one statute creates an offense and another directs the penalty, the indictment must conclude "against the form of the statutes."—(Sup. 1844) *State v. Moses*, 7 Blackf. 24; (1851) *King v. State*, 2 Ind. 523.

[e] Where an act cannot be made out to be criminal without reading two or more statutes, the indictment must conclude, "against the form of the statutes," in the plural.—(Sup. 1840) *State v. Hunter*, 8 Blackf. 212; (1846) *Tevis v. State*, 8 Blackf. 303; (1848) *Francisco v. Same*, 1 Ind. 179.

[f] (Sup. 1850)

Where the offense and penalty are declared by the same statute, though in different sections, and the indictment is founded on the same statute, there is no necessity that it should refer to another, or conclude against the form of the statutes.—*Crawford v. State*, 2 Ind. 132.

[g] (Sup. 1851)

Where one statute continues a former one in part, or explains what was doubtful, or regulates its operation, the conclusion of the indictment should be in the singular.—*King v. State*, 2 Ind. 523.

[h] (Sup. 1851)

If the offense is punishable by a single statute only, and the conclusion of the indictment is against the statutes, the conclusion will be considered good.—*Carter v. State*, 2 Ind. 617.

[i] (Sup. 1851)

Under Rev. St. 1843, p. 960, murder in the first degree was punished by death; but by Acts 1846, p. 40, the punishment was made death or imprisonment for life in the discretion of the jury. *Held*, that an indictment found in 1851 properly concluded "contra formam statuti."—*Bennett v. State*, 3 Ind. 167.

[j] (Sup. 1857)

Under 2 Rev. St. p. 368, an indictment need not conclude "against the peace," etc.—*Hall v. State*, 8 Ind. 439.

[k] (Sup. 1859)

An information need not contain a specific allegation that the prosecution is carried on in the name of the state, nor conclude with the words "contrary to the form of the statute."—*Snodgrass v. State*, 13 Ind. 292.

#### FOR CASES FROM OTHER STATES.

SEE 27 CENT. DIG. Ind. & Inf. §§ 122-131; 4 CENT. DIG. Assault, § 106.

See, also, 21 Cyc. p. 858, 22 Cyc. pp. 243-251.

#### § 33. Signature.

[a] (Sup. 1859)

The signature of the prosecuting attorney is not essential to the validity of an indictment.—*Dukes v. State*, 11 Ind. 557, 71 Am. Dec. 370.

[b] (Sup. 1859)

An information signed "A. B., Prosecuting Attorney," instead of "A. B., District Attorney," is good.—*Baldwin v. State*, 12 Ind. 383.

[c] (Sup. 1873)

Where an indictment appears not to have been signed by the district attorney, it will be quashed on motion.—*Heacock v. State*, 42 Ind. 303.

[d] (Sup. 1875)

An indictment signed by the prosecuting attorney by his surname in full and his Christian name by its initials is in this respect sufficient.—*Vanderkarr v. State*, 51 Ind. 91.

[e] (Sup. 1882)

An indictment may properly be signed by special prosecuting attorney appointed under the statute, as well as by the prosecuting attorney.—*Choen v. State*, 85 Ind. 209.

[f] (Sup. 1884)

Rev. St. 1881, § 5569, providing that a deputy prosecuting attorney may perform all the duties of his principal, authorizes such deputy to sign an indictment.—*Stout v. State*, 93 Ind. 150.

[g] (Sup. 1885)

Where the name of the prosecuting attorney appears in print on the indictment, this is a sufficient compliance with section 1669, Rev. St., requiring it to be "signed by the prosecuting attorney."—*Hamilton v. State*, 103 Ind. 96, 2 N. E. 299, 53 Am. Rep. 491.

[h] (Sup. 1888)

Though under Rev. St. 1881, § 1669, the better practice is for the name of the prosecuting attorney to be signed to an indictment, yet, where his deputy signs his own name as deputy prosecuting attorney, this is not such an imperfection as will require a reversal of a judgment of conviction under such indictment.—*Taylor v. State*, 113 Ind. 471, 16 N. E. 183.

[i] (Sup. 1900)

It is immaterial on what part of an indictment the signature of the foreman of the grand jury is written.—*Blume v. State*, 56 N. E. 771, 154 Ind. 343.

#### FOR CASES FROM OTHER STATES.

SEE 27 CENT. DIG. Ind. & Inf. §§ 132-137.  
See, also, 22 Cyc. pp. 251-254.

#### § 34. Indorsements.

Of names of witnesses, see CRIMINAL LAW, § 628.

[a] An indictment which is neither indorsed "A true bill," nor signed by the foreman of the grand jury, should be quashed.—(Sup. 1864) *Johnson v. State*, 23 Ind. 32; (1881) *Cooper v. Same*, 79 Ind. 206.

[b] The signature of the foreman of the grand jury by his surname and the initials of his Christian name to the indorsement on an indictment is sufficient.—(Sup. 1866) *Wassels v. State*, 26 Ind. 30; (1866) *Anderson v. Same*, Id. 80; (1892) *Zimmerman v. Same*, 4 Ind. App. 583, 31 N. E. 550.

[c] (Sup. 1885)

Where an indictment was returned into open court by the grand jury, indorsed "A true bill" by their foreman, such indorsement sufficiently showed a proper return.—*Epps v. State*, 1 N. E. 491, 102 Ind. 539.

[d] (Sup. 1885)

Mere misplacement of a signature on an indictment so that it does not immediately precede the word "Foreman" from the signature on the

back of an indictment is not fatal.—*State v. Bowman*, 103 Ind. 69, 2 N. E. 289.

[e] (Sup. 1887)

An indictment not indorsed by the foreman of the grand jury, as required by Rev. St. 1881, § 1669, is bad upon motion to quash.—*Strange v. State*, 110 Ind. 354, 11 N. E. 357.

[f] (Sup. 1890)

The fact that an indictment is indorsed "Thomas B., Foreman," while the record shows that the foreman of the grand jury was "George B.," is not ground for reversing a judgment of conviction, as it will be presumed that Thomas B. was the duly-appointed foreman, and that the recital in the transcript that George B. was appointed foreman was a mistake of the clerk.—*Deitz v. State*, 123 Ind. 85, 23 N. E. 1086.

[g] (Sup. 1890)

Under Rev. St. 1881, § 1609, which requires that each indictment be indorsed "A true bill," and the foreman's name subscribed thereon, an indictment merely indorsed with the foreman's name may be quashed on motion.—*State v. Buntin*, 123 Ind. 124, 23 N. E. 1140.

[h] (Sup. 1900)

It is immaterial on what part of the indictment the words "A true bill" are written.—*Blume v. State*, 56 N. E. 771, 154 Ind. 343.

[i] (Sup. 1900)

An indictment which was not indorsed, "A true bill," over the signature of the foreman of the grand jury, as required by Rev. St. 1881, § 1669, was insufficient.—*Denton v. State*, 58 N. E. 74, 155 Ind. 307.

[j] (Sup. 1907)

Acts 1905, p. 609, c. 169, § 110, providing that, when an indictment is found, it must be indorsed by the foreman of a grand jury as a true bill, re-enacts the provisions of the former Criminal Codes and the common-law rule, and imperatively requires, as at common law, that an indictment contain the indorsement by the foreman of the grand jury, or the same will be invalid.—*Cole v. State*, 169 Ind. 393, 82 N. E. 796.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 138-143.  
See, also, 22 Cyc. pp. 254-259.

#### IV. FILING AND FORMAL REQUISITES OF INFORMATION OR COMPLAINT.

Authentication of preliminary affidavit, in general, see AFFIDAVITS, § 12.

Finding and filing of indictment or presentment, see ante, §§ 6-15.

Formal requisites of indictment, see ante, §§ 19-34.

#### § 35. Nature and purpose in general.

[a] An information, under Rev. St. 1852, must contain all the substantial requirements of

an indictment at common law.—(Sup. 1853) *State v. Miles*, 4 Ind. 577; (1856) *Mount v. State*, 7 Ind. 654.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. § 144.

See, also, 22 Cyc. pp. 259, 283.

#### § 36. Constitutional and statutory provisions.

Local and special laws, see STATUTES, § 87.

[a] (Sup. 1881)

Act March 29, 1879, p. 143, authorizing the prosecution of felonies by affidavit and information where accused is in custody and no grand jury is in session, or where an indictment has been found and quashed, or where a conviction has been reversed by the supreme court for defects in the indictment, and providing that any person accused of felony shall have the right to demand that he be prosecuted without delay by affidavit and information, does not make accused's consent a prerequisite to a prosecution by affidavit and information, but merely gives him the right to have the prosecution conducted in such manner if he elects to do so.—*Heanley v. State*, 74 Ind. 99; *Jones v. Same*, Id. 249; *Sturm v. Same*, Id. 278.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. § 145; 14 CENT. DIG. Crim. Law, § 460.

#### § 38. Jurisdiction of court.

Necessity of averments of jurisdiction, see post, § 47.

[a] Under Acts 1859, pp. 94, 95, § 2, providing that the common pleas court shall have no right to determine a case of felony unless the accused party is in custody or, being on bail, has consented to the jurisdiction, that court has no jurisdiction unless the information shows one or the other of these facts.—(Sup. 1861) *McCarty v. State*, 16 Ind. 310; (1861) *Justice v. Same*, 17 Ind. 56; (1861) *Harrison v. Same*, Id. 422; (1862) *Gorden v. Same*, 18 Ind. 152; (1862) *Jones v. Same*, Id. 179; (1862) *Alford v. Same*, Id. 407; (1862) *Parker v. Same*, Id. 424; (1862) *Wilson v. Same*, 19 Ind. 179; (1862) *Smith v. Same*, Id. 197, 227; (1862) *Welch v. Same*, Id. 450; (1863) *Bailow v. Same*, 20 Ind. 220; *Brown v. Same*, Id. 221; (1866) *Cobb v. Same*, 27 Ind. 133.

[b] (Sup. 1862)

An information for larceny which avers that the defendant is now confined in the jail of F. county, charged with the felony herein set forth, and that he has not been indicted by any grand jury of said county, sufficiently shows jurisdiction in the common pleas.—*Mitchell v. State*, 19 Ind. 381.

[c] (Sup. 1863)

An information for arson, concluding, "And the said [defendants] are in the V. county jail on the charge of said felony, and not in

dicted by the grand jury," sufficiently avers that an indictment had not been presented by the grand jury against the defendants upon that charge.—*Wilson v. State*, 20 Ind. 384.

[c] (Sup. 1863)

An information charged that the defendant did steal three horseshoes, of the value of 75 cents, and, in default of bail to appear at the next term of the circuit court, was committed to the county jail, where he now is confined; that no indictment is now pending against him on this charge, and, further, that at the February term, 1855, he was indicted in the circuit court for petit larceny; that he pleaded to the charge and was convicted, and judgment was rendered accordingly. *Held*, that the averments gave the common pleas jurisdiction both of the crime and person, and that whether a prior conviction had taken place, and, if so, whether it was for the same larceny charged in the information, were questions to be settled by the evidence at the trial.—*Dougherty v. State*, 20 Ind. 442.

[e] (Sup. 1866)

An information in the common pleas court for a felony alleged that the defendant was confined in the jail of the county on a charge of grand larceny, the identical felony thereafter set forth; that he had not been indicted by any grand jury of the county for the said crime; that said defendant on, etc., at, etc., did feloniously steal, etc., one bay mare, of the value of \$150, the personal property of A. *Held*, that the information sufficiently charged the larceny and showed jurisdiction in the court of common pleas.—*Newcome v. State*, 27 Ind. 10.

[f] (Sup. 1867)

An information in the court of common pleas of R. county for a felony, averring that the defendant is in the R. county jail on a charge of said felony, is sufficient to give that court jurisdiction, without alleging that he had been indicted by the grand jury of R. county.—*Hunter v. State*, 29 Ind. 80.

[g] (Sup. 1881)

In a prosecution for felony under Act March 29, 1879, § 1, averments in the information "that an indictment was found by the grand jury and quashed, and that said grand jury is not now in session," are insufficient under either the first or second clause of that section.—*Iter v. State*, 74 Ind. 188; *Fox v. State*, 76 Ind. 243.

[h] (Sup. 1881)

Where an information contained a prayer "that a warrant be issued for the said defendant in this behalf, that he may answer in the premises," such prayer could not be allowed to control or modify the direct charge in the body of the information that he was "now in custody" and that the grand jury was not in session.—*Sturm v. State*, 74 Ind. 278.

[i] (Sup. 1884)

Where the circuit court has acquired jurisdiction of a criminal by affidavit and information when the grand jury was not in session, the subsequent meeting of the grand jury without finding an indictment of the accused does not deprive the court of jurisdiction.—*Elder v. State*, 96 Ind. 162.

[j] (Sup. 1886)

Where one arrested for a crime has given bail to appear at a certain term of court, and the grand jury sitting for that term adjourns without finding a true bill against him, he cannot be prosecuted by information filed by the prosecuting attorney.—*State v. Boswell*, 104 Ind. 541, 4 N. E. 675.

[k] (Sup. 1887)

Under Rev. St. 1881, § 1679, no jurisdiction is conferred on the circuit court over a prosecution for felony, begun by affidavit and information filed during its vacation. After-acquired jurisdiction cannot be made to relate back and cure the defect; and the record showing that, at the time the information was filed, the court had no jurisdiction, a motion in arrest will lie.—*Hoover v. State*, 110 Ind. 340, 11 N. E. 434.

[l] (Sup. 1889)

Rev. St. § 1387, provides that the court in term time, or the judge in vacation, can summon the grand jury for such day in the term as he may select. Section 1679 provides that all public offenses, except murder and treason, may be prosecuted on information, when any person is in jail or on bail on a charge of felony or misdemeanor, and the court is in session, and the grand jury is not, or has been discharged. Act March 10, 1873, leaves the calling of a grand jury to the discretion of the court, provided it is called twice a year. *Held* that, when a prosecution for felony has been begun in vacation, and defendant has recognized to the next term, he can be tried on information at such term before the impaneling of the grand jury.—*Kennegar v. State*, 120 Ind. 176, 21 N. E. 917.

[m] (Sup. 1891)

When the accused is in actual custody, he may be prosecuted by information, when the grand jury is not in session, though the information or process upon which he was originally arrested may have been defective or irregular.—*Rowland v. State*, 126 Ind. 517, 20 N. E. 485.

[n] (Sup. 1891)

After a nolle prosequi is entered and a prosecution ended, the accused may be prosecuted by information, if the grand jury has been discharged and the court is in session.—*Dye v. State*, 130 Ind. 87, 29 N. E. 771.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. § 147.

See, also, 22 Cyc. p. 262.

### § 41. Preliminary proceedings.

[a] An information based on an insufficient affidavit should be quashed, together with the affidavit.—(Sup. 1855) *State v. Downs*, 7 Ind. 237; (1866) *Luther v. State*, 27 Ind. 47; (1875) *State v. Cuppy*, 50 Ind. 291; (1882) *Same v. Beebe*, 83 Ind. 171; (1883) *Strader v. State*, 92 Ind. 376; (1884) *Brunson v. Same*, 97 Ind. 95; (1884) *Engle v. Same*, Id. 122.

[aa] (Sup. 1881)

Since courts take judicial notice of the names and signatures of their officers, where the word "clerk" is added to the signature attached to the jurat of an affidavit in a criminal prosecution in the circuit court, it will be presumed to be the signature of the clerk of that court.—*Mountjoy v. State*, 78 Ind. 172.

[b] (Sup. 1882)

Under the statutes of this state, it is not imperative that the names of the witnesses be stated in the body of the affidavit on which the information is based, and it is error to quash the affidavit for that defect.—*State v. Bunnell*, 81 Ind. 315.

[c] (Sup. 1882)

Act 1852, § 39, defining felonies and prescribing the punishment therefor (2 Rev. St. 1876, p. 443), provides that if any officer intrusted with the administration of justice or any person holding an office of trust or profit under the laws of the state or any member of any board of common council of any incorporated city or trustee of any incorporated town in the state shall take any money, gift, property, or undue reward to influence his behavior, vote, or action in office or discharge of official duty, or any person who shall offer any money, gift, property or undue reward to influence the behavior of such officer or members, shall on conviction be fined, etc. *Held*, that an affidavit on which an information was based charging that a member of a city council was induced to expect a present of \$100 in money for his vote for school trustee in favor of defendant was insufficient in view of Rev. St. 1881, § 1755, providing that the offense charged shall be stated with such degree of certainty that the court may pronounce judgment on a conviction according to the right of the case.—*State v. Stephenson*, 83 Ind. 246.

[d] (Sup. 1882)

Under Acts 1879, p. 132, providing for the prosecution of felonies by affidavit and information "when any person is in custody on a charge of felony and no grand jury is in session," an affidavit charging defendant with larceny of certain property and further charging that he was then "in the custody of the sheriff of Allen \* \* \* in the state of Indiana and confined in the jail of said county, on the charge of grand larceny," etc., sufficiently showed that defendant was in custody on the particular charge of felony preferred against him at the time it was filed.—*Sovine v. State*, 85 Ind. 576.

[e] (Sup. 1882)

Under Rev. St. 1881, § 1855, providing that whoever maliciously or mischievously injures, etc., any property of another, etc., is guilty of a malicious trespass, an affidavit in a prosecution by affidavit and information, stating that defendant "did then and there feloniously and maliciously injure, tear down, and destroy" a certain fence "to the damage of said property," sufficiently showed that the injury charged was unlawfully inflicted.—*State v. Maddox*, 85 Ind. 585.

[f] An affidavit filed at the same time with the information based thereon is filed soon enough; the language of Rev. St. 1881, § 1679, implying that the affidavit be filed before the information, being directory merely.—(Sup. 1882) *State v. De Long*, 88 Ind. 312; (1883) *Same v. Lauderman*, 89 Ind. 600.

[g] (Sup. 1883)

In a prosecution by affidavit and information, the omission of the name of the affiant in the body or commencement of the affidavit is not a sufficient reason for quashing the information, when it appears that the affiant's name is signed at the close of the affidavit, and that he was sworn to the matters stated therein.—*Beller v. State*, 90 Ind. 448.

[h] (Sup. 1901)

Under Burns' Rev. St. 1901, § 1813 (Horner's Rev. St. 1901, § 1744), providing that a felony or misdemeanor may be charged in separate counts in the indictment or information to have been committed by different means, the affidavit on which the information is based in a prosecution under Burns' Rev. St. 1894, § 1996 (Horner's Rev. St. 1897, § 1923), for producing an abortion causing the woman's death, commenced by affidavit and information, may contain counts alleging that the abortion was committed by different methods.—*Diehl v. State*, 62 N. E. 51, 157 Ind. 549.

[i] (App. 1906)

The fact that a notary who took an affidavit on which an information was based was employed for compensation to procure evidence on which to base the prosecution and to act as an attorney in the prosecution was of no avail to defendant.—*McNulty v. State*, 76 N. E. 547, 37 Ind. App. 612, 117 Am. St. Rep. 344.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 152, 163-169; 14 CENT. DIG. Crim. Law, §§ 415-434, 461-477.

See, also, 22 Cyc. pp. 263-272.

### § 42. Time of filing.

[a] (Sup. 1896)

Under Rev. St. 1881, § 1679 (Rev. St. 1894, § 1748), providing that where a public offense has been committed, and the party charged is not under indictment, and the court is in session, and the grand jury has been discharged for the term, the offense may be presented by

information, an information may be filed with the clerk in term time, though the court be not actually open for business.—*Masterson v. State*, 144 Ind. 240, 43 N. E. 138.

[b] (Sup. 1896)

An affidavit and information may be filed in the clerk's office in term time, and need not be filed in open court.—*State v. Duggins*, 146 Ind. 427, 45 N. E. 603.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Ind. & Inf. § 153.

See, also, 22 Cyc. p. 273.

**§ 43. Filing and record.**

[a] (Sup. 1890)

Under Rev. St. 1881, § 1072, which provides that, "as soon as an indictment is presented and examined by the court, or information filed, the clerk shall indorse \* \* \* and shall record such indictment or information," it is not necessary that an information should be filed in open court.—*Stefani v. State*, 124 Ind. 3, 24 N. E. 254.

[b] (Sup. 1891)

The statement of the clerk that an information was duly filed, as shown by the file mark on the back thereof, is sufficient, prima facie, to give the court jurisdiction without an entry of such filing in the order book.—*State v. Matthews*, 129 Ind. 281, 28 N. E. 703.

[c] (Sup. 1896)

A showing, by the file marks on an affidavit and information, that the same were filed with the clerk in term time, is prima facie sufficient to give the court jurisdiction, without entry of such filing in the order book.—*State v. Duggins*, 45 N. E. 603, 146 Ind. 427.

[d] (Sup. 1907)

The word "filed" in Acts 1905, p. 611, c. 169, § 118, providing that public offenses may be prosecuted "by affidavit filed in term time," when considered in connection with section 119, providing that such affidavit shall be approved by the prosecuting attorney, etc., is intended for "made," and the clause should read "by affidavit made in term time."—*Cole v. State*, 169 Ind. 393, 82 N. E. 796.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Ind. & Inf. § 154

See, also, 22 Cyc. p. 272.

**§ 44. Loss or destruction.**

[a] (Sup. 1904)

Under Burns' Rev. St. 1901, § 1746, providing that, in case of the loss of an information, the prosecuting attorney may file another, and the prosecution shall proceed, and trial be had without any delay from that cause, it is not necessary that an information filed in place of one lost shall be a copy of the first information.—*Goodman v. State*, 69 N. E. 442, 161 Ind. 629.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Ind. & Inf. § 155.

See, also, 22 Cyc. p. 274; note, 86 Am. Dec. 728.

**§ 45. Successive informations or complaints for same offense.**

[a] (Sup. 1869)

After having secured defendant's conviction of larceny before a mayor on a defective affidavit, and while he was lying in jail on such charge in default of bail, the prosecuting attorney was properly permitted, over defendant's objection, to file a new affidavit and information in the common pleas.—*Taylor v. State*, 32 Ind. 153.

[b] (App. 1894)

On the trial of one indicted for a crime, where the prosecuting attorney, believing that there has been a variance, interrupts the trial, and draws an information, on which defendant is arraigned, a plea of another action pending, based on the preparation of the information, and defendant's arraignment thereon, was properly overruled, since he was not placed in jeopardy under the information.—*Hasse v. State*, 8 Ind. App. 488, 36 N. E. 54.

[c] (App. 1906)

Where a prosecution was commenced before the Criminal Code of 1905 went into effect, the right to file a new affidavit thereafter, and after the motion to quash the original affidavit had been sustained, but before accused was discharged from custody, was governed by Burns' Ann. St. 1901, §§ 1804, 1829, relating to amendments, and providing that in case an information is quashed the court may direct the filing of an information on proper affidavit, and not by the Code of 1905, requiring the filing of an affidavit only, and an information must be filed with the affidavit.—*State v. Clark*, 76 N. E. 649, 37 Ind. App. 105.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Ind. & Inf. § 156.

See, also, 22 Cyc. p. 275.

**§ 46. Formal requisites of information.**

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Ind. & Inf. §§ 148, 149,

157-168; 4 CENT. DIG. Assault, §§ 107, 109.

See, also, 22 Cyc. pp. 276-283.

**§ 47. — In general.**

[a] The court of common pleas has jurisdiction in felonies only in certain specified cases, and the information must show on its face such a state of facts as entitles the court to entertain such jurisdiction.—(Sup. 1861) *Justice v. State*, 17 Ind. 56; (1862) *Hartman v. Same*, 18 Ind. 153; (1862) *Wilson v. Same*, 19 Ind. 179; (1862) *Welch v. Same*, 19 Ind. 450; (1863) *Bail-*

low v. Same, 20 Ind. 220; Brown v. Same, 20 Ind. 221.

[b] Where the jurisdiction to try for a felony rests upon the custody of the defendant, it must appear from the information that he is in custody for the same crime for which he is prosecuted.—(Sup. 1861) Kreigh v. State, 17 Ind. 495; (1862) Roberts v. Same, 19 Ind. 180; (1863) Broadhurst v. Same, 21 Ind. 333; (1864) Walker v. Same, 23 Ind. 61; (1866) Cobb v. Same, 27 Ind. 133.

[c] (Sup. 1879)

Act March 29, 1879, § 1, cl. 1, provides that felonies may be prosecuted by affidavit and information "when any person is in custody on a charge of felony and no grand jury is in session." Held that, in order to justify a prosecution in that mode, the affidavit and information must show that the party accused is in custody on a charge of the particular felony alleged therein.—Davis v. State, 69 Ind. 130.

[d] The word "indictment," as used in 2 Rev. St. 1876, p. 409, § 141, cl. 1, includes the affidavit and information, which may in certain cases form the basis of a criminal prosecution; and, when such a prosecution is founded thereon, the judgment may be arrested for the want of any material jurisdictional averments either in the affidavit or information.—(Sup. 1880) Lindsey v. State, 72 Ind. 39; (1880) Burroughs v. Same, Id. 334; (1881) State v. Henderson, 74 Ind. 23.

[e] (Sup. 1881)

In a prosecution by affidavit and information, the affidavit must state that the defendant is in custody on the charge preferred against him and that the grand jury is not in session.—State v. Henderson, 74 Ind. 23.

[f] (Sup. 1881)

Under Acts 1879, p. 143, authorizing a prosecution by indictment and information, where any person is in custody on a charge of felony and no grand jury is in session, the information must allege that no grand jury was in session at the time of filing the affidavit and information. An allegation that an indictment was found by the grand jury and quashed, and "said grand jury is not now in session," is insufficient.—Iter v. State, 74 Ind. 188.

Under Acts 1879, p. 143, authorizing a prosecution by affidavit and information where an indictment has been found by the grand jury and has been quashed, the information must allege that the indictment was found by the grand jury for the same offense as that for which accused is prosecuted, and which is charged in the information.—Id.

[g] Since the adoption of Rev. St. 1881, § 1733, where a prosecution is by information instead of by indictment, the jurisdictional facts giving the right so to prosecute need not be stated in the information or affidavit; the

absence of jurisdictional facts being matters in abatement only.—(Sup. 1882) State v. Frain, 82 Ind. 532; (1882) Hodge v. State, 85 Ind. 561; (1882) Powers v. Same, 87 Ind. 97; (1890) Nichols v. Same, 127 Ind. 406, 26 N. E. 839.

[h] (Sup. 1896)

Under Rev. St. 1894, § 1802 (Rev. St. 1881, § 1733), declaring that an information need not state why the proceeding is by information instead of indictment, it is unnecessary to allege that the court is in session, and that the grand jury has been discharged for the term.—State v. Duggins, 45 N. E. 603, 146 Ind. 427.

[i] (App. 1897)

An information based on the affidavit of a competent and reputable person, as required by Rev. St. 1894, § 1747 (Horner's Rev. St. 1897, § 1678), need not state that fact; Rev. St. 1894, §§ 1798—1802 (Horner's Rev. St. 1897, §§ 1729—1733), specifying the contents and form of an information, not requiring such statement.—Blake v. State, 47 N. E. 942, 18 Ind. App. 280.

[j] (Sup. 1904)

Under Burns' Ann. St. 1901, § 1747, requiring informations to be based upon the affidavit of some competent and reputable person, an information is not bad for failing to show upon its face that it was based upon the affidavit of a competent and reputable person.—Stifel v. State, 72 N. E. 600, 163 Ind. 628.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 148, 149, 157; 4 CENT. DIG. Assault, § 109.  
See, also, 22 Cyc. p. 276.

#### § 48. — Caption or title.

[a] (Sup. 1859)

An information need not contain a specific allegation that the prosecution is carried on in the name of the state.—Snodgrass v. State, 13 Ind. 292.

[b] (Sup. 1860)

Defect in the title of an information is not ground for quashing it.—Malone v. State, 14 Ind. 219.

[c] (Sup. 1863)

In an information, the statement in the caption of the title of the court to which the information is presented is sufficient, without naming the county.—State v. Mathis, 21 Ind. 277.

[d] (Sup. 1896)

An affidavit and information which do not contain the title of the cause and the name of the court as required by Rev. St. 1894, § 1800 (Rev. St. 1881, § 1731), are cured by Rev. St. 1894, § 1825 (Rev. St. 1881, § 1756), which provides that no information shall be deemed invalid for "any defect or imperfection which does not tend to the prejudice of the substantial rights of the defend-

ant upon the merits.”—*Rivers v. State*, 144 Ind. 16, 42 N. E. 1021.

FOR CASES FROM OTHER STATES,  
SEE 27 CENT. DIG. Ind. & Inf. § 158.  
See, also, 22 Cyc. p. 277.

§ 50. — Conclusion.

[a] (Sup. 1859)  
Under 2 Rev. St. p. 368, § 61, an information need not conclude, “contrary to the form of the statute.”—*Snodgrass v. State*, 13 Ind. 292.

FOR CASES FROM OTHER STATES.  
SEE 27 CENT. DIG. Ind. & Inf. §§ 159, 160.  
See, also, 21 Cyc. p. 858, 22 Cyc. p. 278.

§ 51. — Signature.

[a] (Sup. 1860)  
It is immaterial that the officer signs himself “district attorney prosecutor,” instead of “district attorney.”—*Malone v. State*, 14 Ind. 219.

FOR CASES FROM OTHER STATES,  
SEE 27 CENT. DIG. Ind. & Inf. § 161.  
See, also, 22 Cyc. p. 279.

§ 52. — Verification or accompanying affidavit.

[a] (Sup. 1853)  
Under Rev. St. 1852, where an information for larceny is filed without any affidavit or other sworn charge, a motion in arrest of judgment will be sustained.—*Baramore v. State*, 4 Ind. 524.

[b] (Sup. 1860)  
An information must be based upon an affidavit first filed. A verification of the information is not sufficient.—*Carpenter v. State*, 14 Ind. 109.

[c] (Sup. 1860)  
An information may be quashed if the supporting affidavit does not show the commission of the offense charged.—*State v. Gartrell*, 14 Ind. 280.

[d] An affidavit stating the necessary facts on information and belief is sufficient to warrant an information.—(Sup. 1860) *State v. Ellison*, 14 Ind. 380; (1869) *Same v. Buxton*, 31 Ind. 67; (1874) *Deveny v. State*, 47 Ind. 208; (1882) *Franklin v. Same*, 85 Ind. 99; (1883) *Toops v. Same*, 92 Ind. 13.

[e] (Sup. 1890)  
Rev. St. 1881, § 5963, providing that “no notary shall be authorized to act until he shall have procured a seal,” and that “all notarial acts not attested by such seal shall be void,” an information for assault and battery based on an affidavit to which the seal of the notary, before whom it was verified, was not attached, should be quashed, and the error in overruling the motion to quash is not cured by permitting the notary thereafter to attach the seal.—*Milnor v. State*, 122 Ind. 355, 24 N. E. 156.

[f] (Sup. 1890)

An information which is verified in different parts by different persons cannot be attacked for insufficiency of verification, without specifically assigning the cause of insufficiency.—*Hawkins v. State*, 126 Ind. 294, 26 N. E. 43.

FOR CASES FROM OTHER STATES,  
SEE 27 CENT. DIG. Ind. & Inf. §§ 163-168;  
4 CENT. DIG. Assault, § 107.  
See, also, 22 Cyc. p. 281.

§ 53. — Indorsements.

[a] (Sup. 1907)  
Under Acts 1905, p. 611, c. 169, §§ 118, 119, providing that public offenses may be prosecuted by affidavit, and requiring the prosecuting attorney to approve the affidavit by indorsement, using designated words and signed by him, an affidavit which does not contain the indorsement of the prosecuting attorney is bad, and a motion to quash it must be granted, though the court on discovering the failure of the prosecuting attorney to approve the affidavit may, before the beginning of the trial, permit him to approve it.—*Cole v. State*, 169 Ind. 393, 82 N. E. 796.

FOR CASES FROM OTHER STATES,  
SEE 27 CENT. DIG. Ind. & Inf. § 162.  
See, also, 22 Cyc. p. 280.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

As affecting right to sue for malicious prosecution, see MALICIOUS PROSECUTION, § 7.

§ 55. Applicability of rules of pleading in general.

[a] (Sup. 1864)  
The old rules of criminal pleading not inconsistent with the Code, and, so far as they may operate in aid thereof, are continued in force.—*Walker v. State*, 23 Ind. 61.

[b] (Sup. 1882)  
The sufficiency of an information must be determined by the rules governing indictments.—*Sovine v. State*, 85 Ind. 576.

FOR CASES FROM OTHER STATES,  
SEE 27 CENT. DIG. Ind. & Inf. § 174.  
See, also, 22 Cyc. pp. 293-300.

§ 56. Constitutional requirements as to accusation.

[a] (Sup. 1873)  
Act Feb. 27, 1873, § 18, providing that, in prosecutions for the illegal sale of intoxicating liquors, “by indictment or otherwise, it shall not be necessary to state the kind of liquor sold, or to describe the place where sold, and it shall not be necessary to state the names of the persons to whom sold,” is invalid, under Const. art. 1, § 13, which provides that “in all criminal prosecutions the accused shall have the right to \* \* \* demand the nature and

cause of the accusation against him."—*McLaughlin v. State*, 45 Ind. 338.

The Legislature has not the power to dispense with such allegations in indictments as are essential to reasonable particularity and certainty in the description of offenses.—*Id.*

[b] (Sup. 1881)

2 Rev. St. 1876, p. 451, providing that, in indictments for conspiracy, the particular felony designed to be committed need not be alleged, is unconstitutional, in that it denies the right of the accused to be informed of the offense with which he is charged.—*Miller v. State*, 79 Ind. 198.

[c] (Sup. 1892)

An information which, under Rev. St. 1881, § 1750, providing that it shall be sufficient in indictments and informations to describe money, bank bills, notes, United States treasury notes, etc., "simply as money, without specifying any particular coin, note, bill, or currency," charges the larceny of "six dollars in money," is sufficient, under Const. art. 1, guarantying every one accused of crime the right "to demand the nature and cause of the accusation against him."—*Randall v. State*, 32 N. E. 305, 132 Ind. 539.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 175, 176.

See, also, 22 Cyc. pp. 285-288.

#### § 57. Statutory provisions as to statement of offense.

[a] (Sup. 1857)

The statute of 1852 requires in an indictment all the substantial allegations of a good indictment at common law; but the common-law precedents are not law in this state.—*Dillon v. State*, 9 Ind. 408.

The legislature has laid down certain general rules in relation to the material facts of an indictment, and left the courts to apply those rules and mould the forms by judicial decision.—*Id.*

[b] (Sup. 1877)

To render an indictment valid under the Code, it must contain averments which would render it sufficient as a common-law indictment.—*State v. Record*, 56 Ind. 107.

[c] (Sup. 1885)

While a statute cannot dispense with a statement in the indictment of the essential ingredients of the crime charged, it may provide that the description of the property stolen may be general, as, for example, that money, bills, notes, or currency, shall be described simply as money.—*Riggs v. State*, 104 Ind. 261, 3 N. E. 886.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 177-179.

See, also, 22 Cyc. pp. 285-288, 32 Cyc. p. 582.

#### § 58. Subject-matter of allegations.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 180-191, 266, 267.

See, also, 22 Cyc. pp. 301-307.

#### § 59. — Designation of offense or grade or degree thereof.

[a] (Sup. 1858)

An indictment charged "that A. B., on," etc., "did in a rude," etc., "manner, unlawfully beat C. D. with intent then," etc., "purposely, and with premeditated malice, to kill and murder the said," etc. *Held*, that the crime charged, an assault with intent to murder in the first degree, was sufficiently set out, and need not be contained in a formal title.—*Cronkrite v. State*, 11 Ind. 307.

[b] (App. 1902)

All that is required in a criminal charge is that it should be prepared with that degree of certainty that the court and jury may know what they are to try and to acquit the defendant of, or punish him for, that the defendant may know what he is to answer to, and that the record may show, so far as may be, for what he was once put in jeopardy.—*Nichols v. State*, 63 N. E. 783, 28 Ind. App. 674.

FOR CASES FROM OTHER STATES.

SEE 27 CENT. DIG. Ind. & Inf. §§ 180, 181.

See, also, 22 Cyc. p. 302.

#### § 60. — Elements and incidents of offense in general.

[a] (Sup. 1896)

Where an information does not contain all the essential elements of a public offense, a motion in arrest of judgment should be sustained.—*Chandler v. State*, 141 Ind. 106, 39 N. E. 444.

[b] (App. 1895)

The minor circumstances which are merely incidental to or descriptive of the main fact need only be stated with that degree of particularity that carries knowledge of the offense and bars a future prosecution. If these circumstances are not the vital elements of the offense, it is unnecessary for the pleader to descend into details, and describe them minutely.—*State v. Allen*, 40 N. E. 705, 12 Ind. App. 528.

[c] (Sup. 1905)

Minor circumstances, which are not vital elements of the offense, need not be set out in an indictment.—(App.) *State v. New*, 76 N. E. 181, 36 Ind. App. 521, transferred to Supreme Court, 76 N. E. 400, 165 Ind. 571.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 182, 266, 267.

See, also, 22 Cyc. p. 326.

**§ 61. — Matter judicially noticed.**

[a] (Sup. 1910)

In a prosecution under Burns' Ann. St. 1908, § 2586, imposing a penalty for knowingly making or presenting a false claim to the treasurer or other accounting officer of a city for the purpose of procuring its allowance, whether the board of public works of a city, to which the claim was presented, was an "accounting officer" within the statute, was a question of law, so that the indictment need not allege that it was an accounting officer; section 2047 providing that neither presumptions of law nor matters of which judicial notice is taken need be alleged in the indictment.—Brunaugh v. State, 90 N. E. 1019.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. § 183.

See, also, 22 Cyc. p. 303.

**§ 62. — Matters of presumption or implication.**

See, also, ante, § 61.

[a] (Sup. 1910)

An indictment alleged that a certain company procured a contract for repairing the streets of a city, and that accused superintended such repairs for it, and unlawfully and knowingly, with intent to defraud the city, made out and presented to the board of public works, for the purpose of procuring its allowance, a false claim wherein the amount of the repairs made during April were stated at so many yards, and a certain amount was given as justly due on account thereof, when the number of yards of repairs made and the amount due therefor was much less than the number and sum stated in said claim, and that accused, when he made out such false claim, knew that the number of yards claimed was greatly in excess of the amount of work done, and that the amount due was much less than that claimed. *Held*, that the indictment was not objectionable as requiring the court to indulge in presumptions against accused.—Brunaugh v. State, 90 N. E. 1019.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. § 184; 36

CENT. DIG. Mun. Corp. § 1406.

See, also, 22 Cyc. p. 303.

**§ 63. — Matters of fact or conclusions.**

[a] (Sup. 1861)

An information against the "trustees of the W. and E. Canal" for a nuisance, in failing to keep a bridge in repair, not showing that the road named or the bridge crossed the canal, was *held bad*; the averment of duty being a mere conclusion of law.—Butler v. State, 17 Ind. 450.

[b] (Sup. 1886)

An indictment charged that defendant unlawfully, feloniously, and corruptly offered and promised a township trustee that if he, as such trustee, would purchase of defendant 12 sets of

reading charts for the township, and pay him therefor the sum of \$175, he would sign and deliver to the trustee a voucher and receipt in his favor as such trustee on said township for \$194, thereby unlawfully, corruptly, and feloniously offering the sum of \$19 for the purpose of bribing the trustee to act in buying the charts of defendant. *Held*, that the statement that defendant thereby offered \$19, etc., is simply a conclusion of the pleader, and not the statement of a fact, and is therefore mere surplusage that may be disregarded.—State v. McDonald, 6 N. E. 607, 106 Ind. 233.

[c] (Sup. 1898)

An indictment that accused killed and murdered another states a matter of fact, and not a conclusion.—Lane v. State, 51 N. E. 1056, 151 Ind. 511.

[d] (App. 1900)

The allegation in an indictment that an allowance was made to the county auditor, "such allowance being illegal and unwarranted," states merely a conclusion of law, and does not describe the offense sought to be charged, and is therefore insufficient.—State v. Trueblood, 57 N. E. 975, 25 Ind. App. 437.

[e] (Sup. 1908)

An indictment or affidavit must state a specific description of the offense, and mere conclusions of law are insufficient.—State v. Metsker, 169 Ind. 701, 83 N. E. 1135; Same v. Bridgewater, 171 Ind. 1, 85 N. E. 715; Same v. Henson, 171 Ind. 725, 85 N. E. 718; Same v. Larter, 171 Ind. 725, 85 N. E. 719; Same v. Brooks, 171 Ind. 725, 85 N. E. 975; Same v. Charles, Id.; Same v. Ritter, Id.; Same v. Turner, 171 Ind. 725, 85 N. E. 1027; Same v. Ballard, Id.; Same v. Romaine, 171 Ind. 725, 86 N. E. 73.

[f] (Sup. 1910)

An indictment alleged that a certain company procured a contract for repairing the streets of a city, and that accused superintended such repairs for it, and unlawfully and knowingly, with intent to defraud the city, made out and presented to the board of public works, for the purpose of procuring its allowance, a false claim wherein the amount of the repairs made during April were stated at so many yards and a certain amount was given as justly due on account thereof, when the number of yards of repairs made and the amount due therefor were much less than the number and sum stated in said claim, and that accused, when he made out such false claim, knew that the number of yards claimed was greatly in excess of the amount of work done, and that the amount due was much less than that claimed. *Held*, that the indictment was not objectionable for alleging conclusions instead of facts.—Brunaugh v. State, 90 N. E. 1019.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. § 185.

See, also, 22 Cyc. p. 303.

### § 64. — Conclusions of law from facts alleged.

[a] (Sup. 1886)

It is a general rule that, if the facts well pleaded supply grounds for the necessary legal conclusion, it will be made by the court, and the failure of the pleader to state it will not under the Indiana Criminal Code, however, it may have been at common law, vitiate the indictment.—*Henning v. State*, 6 N. E. 803, 7 N. E. 4, 106 Ind. 386, 55 Am. Rep. 756.

[b] (App. 1904)

Where the facts well pleaded in an indictment supply grounds for a necessary legal conclusion, it will be made by the court, and a failure to state it will not vitiate the indictment.—*Christ v. State*, 69 N. E. 269, 33 Ind. App. 488.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. § 186.

See, also, 22 Cyc. p. 303.

### § 65. — Matters of evidence.

[a] (Sup. 1910)

An indictment need not plead the evidence upon which the state relies for conviction.—*Brunaugh v. State*, 90 N. E. 1019.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. § 187.

See, also, 22 Cyc. p. 304.

### § 66. — Matters of defense in general.

[a] (Sup. 1853)

It is not necessary that the indictment should negative every conceivable fact which might change the character of the offense.—*State v. Shoemaker*, 4 Ind. 100.

[b] (Sup. 1878)

An indictment for murder, alleging death to have resulted from a mortal wound made upon the person of the deceased "by cutting," with intent to kill, and with malice premeditated, need not allege that the wound was not inflicted in a surgical operation.—*Merrick v. State*, 63 Ind. 327.

[c] (Sup. 1881)

Excuses and justifications for selling liquor to a minor are matters of defense, and it is not necessary for an indictment to allege that they do not exist.—*Payne v. State*, 74 Ind. 203.

[d] (Sup. 1881)

In a prosecution under a statute, matters showing that the act complained of was not unlawful, though within the letter of the statute, are matters of defense, and need not be noticed in the indictment.—*Dorrell v. State*, 80 Ind. 566.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. § 188.

See, also, 22 Cyc. p. 304.

### § 67. — Matter in avoidance of bar of statute of limitations.

Time of offense, see post, § 87.

[a] (Sup. 1860)

If the offense was committed beyond the period of limitation, the facts which bring it within the exceptions of the statute must be stated in the indictment, because the prisoner can avail himself of the statute without pleading it.—*Ulmer v. State*, 14 Ind. 52.

[b] (Sup. 1860)

Where acts of the defendant in concealing the fact of the crime are relied on as taking a case out of the statute of limitations, the indictment must specifically charge those acts.—*Jones v. State*, 14 Ind. 120; *Randolph v. State*, Id. 232.

[c] (Sup. 1862)

In a prosecution of a negro for coming into and settling in the state, it should be averred in the information, and proved, that the act, if done more than six years prior to the prosecution, was taken out of the statute of limitations by concealment, etc.—*Hatwood v. State*, 18 Ind. 492.

[d] (Sup. 1891)

An averment in an indictment for embezzlement, for the purpose of taking the offense out of the bar of the statute of limitations, that defendant, on a date named, fled from the county, and so concealed himself that process could not be served upon him, is not sufficient to take a case out of the bar of Rev. St. 1881, § 1597, providing that if a person who has committed an offense "thereafter is absent from the state, or so conceals himself that process cannot be served upon him, the time of absence or concealment is not to be included in computing the limitation"; there being no averment as to how long he remained absent or concealed.—*Colvin v. State*, 127 Ind. 403, 26 N. E. 888.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. § 189.

See, also, 22 Cyc. pp. 305, 306.

### § 69. — Matters not known to grand jury.

[a] (Sup. 1882)

An indictment for robbery, describing a bill as "a note circulating as money, of the denomination and value of ten dollars, a more particular description being unknown, and therefore not given," is not defective.—*McQueen v. State*, 82 Ind. 72.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. § 191; 39 CENT. DIG. Perj. § 69.

See, also, 22 Cyc. p. 307.

### § 70. Directness and positiveness.

[a] (Sup. 1858)

Under statutory provisions which allow a constable to pay to plaintiff or to the justice all money collected by him by virtue of any writ, an indictment for a failure to pay over money collected, which alleges only that he has not paid it to plaintiff, without alleging that

he has not paid it to the justice, is not cured of the defect by the further averment that on the day of the expiration of the constable's term of office he had the money in his possession.—*State v. Longley*, 10 Ind. 482.

[b] (*Sup.* 1869)

An information in which the district attorney charges the offense "as he verily believes" is bad on motion to quash. The charge must be that the defendant committed the crime, not that he is guilty as the district attorney verily believes.—*Vannatta v. State*, 31 Ind. 210.

[c] (*Sup.* 1897)

The indictment must state by direct averments facts constituting the offense as defined by the statute, and such a degree of certainty must be shown by its averments as to fully inform the accused of the charge preferred, and the court and jury of the crime of which, upon the trial, he is either to be convicted or acquitted.—*State v. Feagans*, 48 N. E. 225, 148 Ind. 621.

[d] (*App.* 1900)

Under Burns' Rev. St. 1894, § 7853, making it a misdemeanor for the board of county commissioners to allow any claims of county auditors not specifically required by statute, except in cases of indispensable public necessity, an indictment alleging that an allowance was made, "there being no indispensable public necessity therefor," alleges the facts only by way of recital, and not by direct averment, and is therefore fatally defective.—*State v. Trueblood*, 57 N. E. 975, 25 Ind. App. 437.

[e] (*Sup.* 1906)

It is insufficient for an indictment to charge facts only by inferences.—*Vinnedge v. State*, 167 Ind. 415, 79 N. E. 353.

[f] (*Sup.* 1907)

Allegations in an indictment must be positive, as assumptions or recitals of fact will not be indulged.—*Riley v. State*, 168 Ind. 657, 81 N. E. 726.

[g] The facts constituting an offense must be affirmatively averred, and not introduced by way of recital only.—(*Sup.* 1907) *Terre Haute Brewing Co. v. State*, 82 N. E. 81, 169 Ind. 242; (1910) *Axtell v. State*, 91 N. E. 354.

[h] (*Sup.* 1908)

No material averment in a criminal pleading can be supplied by inference or intendment.—*Hewitt v. State*, 171 Ind. 283, 86 N. E. 63.

In indictments and informations every fact essential to constitute the crime must be alleged directly and positively, and no material matter should be introduced by way of argument, conclusion, or recital.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. § 192.

See, also, 22 Cyc. p. 293, 28 Cyc. p. 49.

§ 71. Certainty and particularity.

Aider by verdict, see post, § 202.

Certainty as to accused, see post, § 81.

[a] Under the Code of Criminal Procedure, the indictment need not be more certain than the complaint in a civil action; it only being necessary that the allegations be certain to common intent.—(*Sup.* 1850) *State v. McCormack*, 2 Ind. 305; (1864) *McCool v. State*, 23 Ind. 127; (1898) *Lane v. Same*, 51 N. E. 1056, 151 Ind. 511; (1910) *Brunaugh v. Same*, 90 N. E. 1019.

[b] (*Sup.* 1852)

It is a general rule that whatever is essential to the gravamen of the indictment must be set out particularly.—*Markle v. State*, 3 Ind. 535.

[c] (*Sup.* 1858)

Criminal charges must be preferred with certainty, to the common intent that the court and jury may know what they are to try, of what they are to acquit the defendant, or for what they are to punish him, that the defendant may know what he is to answer, and that the record may show, as far as may be, for what he has been put in jeopardy.—*Whitney v. State*, 10 Ind. 404.

[d] (*Sup.* 1869)

An information which is so uncertain that, upon a plea of guilty, the court cannot know what punishment it may affix, is bad on motion in arrest of judgment.—*Vogel v. State*, 31 Ind. 64.

[e] (*Sup.* 1871)

An indictment alleging that defendant made certain false pretenses to induce A. to become his surety on a note, whereupon A. made his note payable to defendant, which defendant negotiated, is void for uncertainty and ambiguity.—*State v. Locke*, 35 Ind. 419, 422.

[f] (*Sup.* 1875)

A criminal charge must be preferred with such reasonable certainty as will enable the court and jury to know what they are to try.—*Keller v. State*, 51 Ind. 111.

The averments of an indictment should be so clear and distinct that there can be no difficulty in determining what evidence is admissible under them.—*Id.*

[g] (*Sup.* 1882)

In charging offenses, the same certainty is required in the affidavit and information that is necessary in an indictment.—*State v. Beebe*, 83 Ind. 171.

[h] (*Sup.* 1892)

An indictment which charges a public offense with reasonable certainty is good, though the offense may not be charged with strict formality, and there may be surplusage in the indictment, since defects that do not affect the substantial rights of the defendant are not sufficient to require the indictment or informa-

tion to be quashed.—*Musgrave v. State*, 32 N. E. 885, 133 Ind. 297.

[l] (App. 1895)

Certainty to a common intent is all that is required in criminal pleadings.—*Lay v. State*, 39 N. E. 768, 12 Ind. App. 362.

[l] (Sup. 1898)

The particular crime with which the accused is charged must be referred to with such reasonable certainty by the essential averments in the pleading as will enable the court and jury to distinctly understand what is to be tried and determined and fully inform defendant of the particular charge he is required to meet.—*Funk v. State*, 49 N. E. 266, 149 Ind. 338.

An affidavit and information for obtaining money by means of false representations, in violation of Rev. St. 1894, § 2352 (Horner's Rev. St. 1897, § 2204), charging that defendant falsely represented that he was the owner of certain horses of a certain value, describing them, which representations were relied on, and further alleging that defendant falsely represented that he was the owner of the horses described in a certain mortgage given as security for certain notes in exchange for which the money was obtained, but which leaves the description of such mortgaged horses, and whether they were the horses described in the first part of the affidavit and information, to conjecture, is insufficient for uncertainty.—*Id.*

[k] (Sup. 1907)

Ambiguity and uncertainty in charging an offense, when made the ground of a motion to quash, must be taken most strongly against the state.—*Terre Haute Brewing Co. v. State*, 169 Ind. 242, 82 N. E. 81.

[l] (Sup. 1908)

A particular crime with which defendant is charged must be set forth with reasonable certainty by express averments.—*State v. Metsker*, 169 Ind. 555, 83 N. E. 241; *Id.*, 169 Ind. 701, 83 N. E. 1135.

[m] (Sup. 1908)

An affidavit charging an offense should state the facts with such certainty as to inform accused of what offense he is to be put on trial.—*Barnhardt v. State*, 171 Ind. 428, 86 N. E. 481.

[n] (Sup. 1909)

The facts constituting an offense must be alleged with such certainty as to inform accused of, and enable the court and jury to understand, the nature of the offense charged and to make the record show for what crime accused was put in jeopardy.—*Skelton v. State*, 89 N. E. 860.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 144, 174, 193, 194; 18 CENT. DIG. Embez. § 38.  
See, also, 20 Cyc. p. 899, 22 Cyc. p. 295, 28 Cyc. p. 49.

§ 72. Disjunctive or alternative allegations.

[a] (Sup. 1890)

An indictment for forgery charged defendant with uttering counterfeit coin, with knowledge and intent to defraud, and then, after sufficient allegations, went on to aver that said counterfeit coin resembled, or was intended to resemble, genuine coin. To this averment objection was made that the allegation was in the alternative. *Held*, that this averment was surplusage, and that its informality would not vitiate the indictment.—*McGregor v. State*, 16 Ind. 9.

[b] Where a statute makes it a crime to do any one of several things mentioned disjunctively, all of which are punishable alike, the whole may be charged conjunctively in single count.—(Sup. 1890) *Marshall v. State*, 23 N. E. 1141, 123 Ind. 128; (App. 1897) *Douglass v. State*, 48 N. E. 9, 18 Ind. App. 289.

[c] (Sup. 1890)

Rev. St. 1881, § 1756, provides that no indictment shall be deemed invalid, for any of the following reasons: "Sixth. For any surplusage or repugnant allegation, where there is sufficient matter alleged to indicate the crime and person charged. \* \* \* Tenth. For any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." *Held*, in an indictment for forging a note, the fact that two reasons, connected by a disjunctive, are given why the note is not set out verbatim in the indictment, is not a material defect.—*State v. Callahan*, 124 Ind. 364, 24 N. E. 732.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 195-199;  
24 CENT. DIG. Gaming, § 224.  
See, also, 20 Cyc. p. 900, 22 Cyc. p. 296.

§ 73. Repugnancy.

[a] (Sup. 1843)

If an allegation in a count be sensible, and consistent in the place where it occurs, and be not repugnant to antecedent matter, it cannot be rejected as surplusage, although it be repugnant to a subsequent allegation.—*Dias v. State*, 7 Blackf. 20, 39 Am. Dec. 448.

An objection to a count for repugnancy in the description of the offense cannot be removed by striking out the allegation which is inconsistent with a previous one, unless, after striking out the subsequent allegation, a legal description of the offense will still remain.—*Id.*

A count, in an indictment for murder, charging that the prisoner did strike the deceased on the "left" temple, giving him a mortal wound on the "right" temple, etc., is inconsistent and void.—*Id.*

[b] (Sup. 1875)

If two material averments in an indictment are directly repugnant, the indictment is bad.—*Keller v. State*, 51 Ind. 111.

## [c] (Sup. 1881)

An indictment *held* not bad, under 2 Rev. St. 1876, p. 386, for repugnancy, where the defendant was truly named in the body of the indictment, but the title was in the name of another party.—*State v. Boss*, 74 Ind. 80.

## [d] (Sup. 1884)

Where an indictment charges the forgery of a certain order "purporting to have been made and executed by Vincent D. West," and the order is set out in *hæc verba*, and is signed "Dr. West," the purport clause will be rejected as surplusage, and hence the repugnancy is immaterial.—*Myers v. State*, 101 Ind. 379.

## [e] (Sup. 1887)

Where an offense is charged in an information with sufficient certainty, contradictory or repugnant allegations not containing any matter which, if true, would constitute a legal justification of the offense, or other legal bar to the prosecution, will afford no ground for quashing the information.—*Trout v. State*, 111 Ind. 499, 12 N. E. 1005; *Watson v. Same*, 111 Ind. 599, 12 N. E. 1008.

## [f] (Sup. 1897)

An indictment charging that defendant, with a revolver and some other instrument, both shot and cut deceased, and thereby inflicted two mortal wounds, is not bad for repugnancy, as it charges but one offense.—*Sutherland v. State*, 48 N. E. 246, 148 Ind. 695.

## [g] (Sup. 1899)

An affidavit and information that accused "altered, forged, and counterfeited a receipt for money" is bad for repugnancy, as an altered receipt implies the existence of a genuine one, while a counterfeited receipt implies one that is wholly false.—*State v. Bracken*, 53 N. E. 838, 152 Ind. 565.

## [h] (Sup. 1900)

Under Burns' Rev. St. 1894, § 1992 (Rev. St. 1881, § 1919; Horner's Rev. St. § 1919), making it a crime to administer or to procure to be administered any poison, etc., to a human being, with intent to kill, an indictment which charged that the defendant did administer and procure to be administered a certain poison is not self-contradictory, since the word "procure," in the statute, is used in the sense of "cause," and it is not impossible for a person in the same transaction to both administer a poison, and cause the same to be done.—*Rosenbarger v. State*, 56 N. E. 914, 154 Ind. 425.

## [i] (Sup. 1904)

An information under Burns' Rev. St. § 2354, making forgery and knowingly uttering a forged instrument with intent to defraud offenses of the same class, punishable in the same way, which avers that defendant did feloniously and knowingly make, forge, counterfeit, utter, publish, and pass to M. as true and genuine a certain false, forged and counterfeit note, with intent to defraud, in effect charges defendant with both the forging and uttering of

the note to M. as one single and continuous transaction, and as such is sufficient; and its language is not repugnant or inconsistent.—*Selby v. State*, 69 N. E. 463, 161 Ind. 667.

Repugnancy does not make a criminal charge alleged in an information bad where there is sufficient matter alleged to indicate the crime and person charged as provided by Burns' Rev. St. 1901, § 1825.—*Id.*

## [j] (Sup. 1906)

The use of the terms "B." and "B, Sr." interchangeably in a preliminary affidavit and information, did not constitute such repugnance as to render them fatally defective; the addition of "Sr." being mere matter of description.—*State v. Simpson*, 76 N. E. 544, 1005, 163 Ind. 211.

## FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 200, 201;

26 CENT. DIG. Homic. § 258.

See, also, 22 Cyc. p. 298.

## § 74. Language and form of allegations.

## FOR CASES FROM OTHER STATES.

SEE 27 CENT. DIG. Ind. & Inf. §§ 202-215.

See, also, 22 Cyc. pp. 288-293.

## § 75. — In general.

## [a] (Sup. 1846)

An indictment for murder alleged that the defendant, with a certain gun which he in both hands then and there held, etc., feloniously did shoot, etc. *Held*, that the omission of the word "his" before the word "hands" was no objection to the indictment.—*Ward v. State*, 8 Blackf. 101.

## [b] (Sup. 1850)

An indictment for keeping a tippling house, "to the common nuisance A. B.," is not bad for the omission of the preposition "of" before the name "A. B."—*State v. Rhodes*, 2 Ind. 321.

## [c] (Sup. 1877)

Defects or informalities in an indictment which do not tend to prejudice the rights of the accused will not render the indictment insufficient.—*Greenley v. State*, 60 Ind. 141.

## [d] (Sup. 1877)

The fact that an indictment for attempting to levy blackmail is inartistically drawn does not render it insufficient.—*McMillen v. State*, 60 Ind. 216.

## [e] (Sup. 1882)

Under Rev. St. 1881, § 2003, providing a punishment for "any female who frequents or lives in houses of ill fame," etc., an indictment charging the defendant with living in a "house" of ill fame is good, since the plural, as used in the statute, includes the singular.—*State v. Nichols*, 83 Ind. 228, 43 Am. Rep. 66.

## [f] (Sup. 1883)

An affidavit for an information for rape, charging that defendant at, etc., "upon on

A., a female child, \* \* \* did then and there unlawfully, feloniously, and forcibly make a violent assault upon her, the said A., then and there unlawfully and feloniously did ravish and carnally know," is fatally defective in having no connectives between the clauses.—*Strader v. State*, 92 Ind. 376.

[g] (Sup. 1885)

An indictment for larceny, inartistically drawn in repeating "did" in the charging part, and placing the object after the auxiliary verb, *held*, nevertheless, sufficient.—*Heath v. State*, 101 Ind. 512.

[h] (Sup. 1886)

It is not error to overrule a motion in arrest because of the insufficiency of an indictment, if the indictment charges the offense substantially in the terms of the statute, and contains a statement of all the elements necessary to constitute the offense, although lacking somewhat in precision and certainty.—*Graeter v. State*, 105 Ind. 271, 4 N. E. 461.

[i] (Sup. 1886)

The omission in an indictment of the word "liquor," after "intoxicating," *held* not fatal.—*Walter v. State*, 105 Ind. 589, 5 N. E. 735.

[j] (Sup. 1886)

The use of the word "affiant," instead of the words "prosecuting attorney," in the body of the information, where the context shows that the error was a clerical one, is not such an error as will render an information fatally defective on a motion in arrest of judgment.—*Rillings v. State*, 107 Ind. 54, 6 N. E. 914, 7 N. E. 763, 57 Am. Rep. 77.

[k] (App. 1891)

Under Rev. St. 1881, § 1756, providing that no information shall be quashed for any imperfection that does not tend to prejudice the substantial rights of the defendant, an information containing two counts filed by the prosecuting attorney, and based on the affidavit of a citizen, should not be quashed because the second count begins with the statement that the person who made the affidavit "further swears," instead of stating that the prosecuting attorney "further shows to the court," etc.—*Fisher v. State*, 2 Ind. App. 365, 28 N. E. 565.

[l] (Sup. 1908)

Allegations in an indictment or information by the use of the participle "being," instead of the affirmative form of the verb, are allowable in setting out matter of inducement in charging the offense.—*Hewitt v. State*, 171 Ind. 283, 86 N. E. 63.

FOR CASES FROM OTHER STATES.

SEE 27 CENT. DIG. Ind. & Inf. §§ 202-204.  
See, also, 22 Cyc. p. 288.

§ 77. — **Videlicet or scilicet.**

Certainty as to person injured, see post, § 101.

[a] (Sup. 1908)

The property of a *videlicet* in criminal pleading is to explain precedent general or doubtful language and cannot be used to enlarge or contradict the prior language; its allegations in such connection being rejected as surplusage. Such rule, however, has been modified by Burns' Ann. St. 1901, § 2063, prohibiting the quashing of an indictment or affidavit because of surplusage or repugnance, where matter is alleged to indicate the person or crime charged.—*Tullis v. Shaw*, 169 Ind. 662, 83 N. E. 376.

FOR CASES FROM OTHER STATES.

SEE 27 CENT. DIG. Ind. & Inf. § 206.  
See, also, 22 Cyc. p. 299.

§ 78. — **Abbreviations, numerals, and symbols.**

[a] The day and year when an offense is charged in an indictment to have been committed should be expressed in the indictment in words at length, and not in figures.—(Sup. 1843) *Finch v. State*, 6 Blackf. 533; (1853) *State v. Voshall*, 4 Ind. 589.

[b] But under 2 Rev. St. 1852, p. 368, § 61, an indictment is good in which the day when the offense was committed is stated in figures, and not words.—(Sup. 1856) *Hampton v. State*, 8 Ind. 336; (1859) *Ilizer v. Same*, 12 Ind. 334.

[c] (Sup. 1878)

An indictment found in Floyd county, charging the accused with having committed a larceny in Clarke county May 15, "1878," and with having brought the stolen goods into Floyd county May 16, "1876," is insufficient on motion in arrest.—*Hutchinson v. State*, 62 Ind. 556.

FOR CASES FROM OTHER STATES.

SEE 27 CENT. DIG. Ind. & Inf. §§ 207, 208;  
32 CENT. DIG. Larc. § 100.  
See, also, 22 Cyc. p. 289.

§ 79. — **Mistakes in writing, grammar, or spelling.**

[a] (Sup. 1837)

An objection that the word "steal" was spelled "stal" in an indictment for larceny is not good on motion in arrest.—*Wills v. State*, 4 Blackf. 457.

[b] (Sup. 1832)

An indictment for unlawfully selling by retail spirituous liquors is not bad for using the word "spiritual," instead of "spirituous."—*State v. Clark*, 3 Ind. 451.

[c] (Sup. 1855)

Bad grammar, and for the same reason bad spelling, does not vitiate an indictment. Therefore, where an indictment alleged that an offense was committed "on the first day of August, in the year one thousand eight hundred and fifty too," it was *held* that "too" must be

construed to mean "two."—*State v. Hedge*, 6 Ind. 330.

[d] (Sup. 1879)

An indictment for injuring a toll gate is not necessarily bad because it alleges that the toll gate was erected on a division of a certain gravel-road "company," and not on a division of a gravel road.—*Jay v. State*, 69 Ind. 158.

[e] (Sup. 1881)

Where the objection to an indictment for assault with intent to kill was that the letters and characters used to form the word probably intended to be "malice" did not spell and constitute such word, *held*, on examination of the original indictment, that, as the word evidently stood for "malice," it ought to be so read and construed.—*Pierce v. State*, 75 Ind. 199.

[f] (Sup. 1889)

Mere incorrect orthography of a material word will not vitiate an indictment.—*Lefler v. State*, 122 Ind. 206, 23 N. E. 154.

[g] (Sup. 1910)

An indictment reciting that accused did "unlawfully and felon desert his wife," etc., sufficiently charged that the desertion was felonious; the defect being a mere clerical error, which could not have harmed accused.—*Peacock v. State*, 91 N. E. 597.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 209-214;

24 CENT. DIG. Gaming, § 220.

See, also, 22 Cyc. p. 291.

§ 80. — Erasures and interlineations.

[a] (Sup. 1859)

If an indictment be conveniently legible, it will not be bad simply because it contains interlineations; and in the absence of anything appearing upon the face of a written instrument, or being shown, intrinsically tending to prove that interlineations were made subsequently to its execution, it will be presumed that they were made before or at its execution.—*French v. State*, 12 Ind. 670, 74 Am. Dec. 229.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. § 215.

See, also, 22 Cyc. p. 290.

§ 81. Designation and description of accused.

Designation of person injured or others, see post, § 101.

Idem sonans, see NAMES, § 16.

Issues, proof and variance, see post, § 166.

Motion to quash or set aside, see post, § 137.

Waiver of defects and objections, see post, § 196.

[a] (Sup. 1841)

A description of a defendant, in an indictment, by the addition of his degree or mystery,

and place of residence, is not necessary in this state.—*State v. McDowell*, 6 Blackf. 49.

[b] (Sup. 1853)

Since every person is presumed to have a Christian name, until the contrary is shown, a charge verified by affidavit is insufficient which merely gives the initials of the Christian name.—*Gardner v. State*, 4 Ind. 632.

[c] (Sup. 1855)

An affidavit of accusation, charging one by his surname, alleging his Christian name to be unknown, and otherwise identifying the accused, is sufficient.—*Levy v. State*, 6 Ind. 281.

[d] (Sup. 1858)

An indictment, leaving out the name of the defendant, is bad.—*Campbell v. State*, 10 Ind. 420.

[e] (Sup. 1858)

An indictment against "L. J. Jones, whose given name is to the jurors unknown," is good.—*Jones v. State*, 11 Ind. 357.

[f] (Sup. 1874)

Where the defendant, indicted for murder, was named in the caption as "James A. Smith," and in the body of the indictment first as "James Smith," and afterwards as "the said James A. Smith," the difference in the name created no uncertainty.—*West v. State*, 48 Ind. 483.

[g] (Sup. 1876)

The law recognizes only one Christian name, and the insertion of the initial letter of a middle name in an indictment will be regarded as mere surplusage.—*Choen v. State*, 52 Ind. 347, 21 Am. Rep. 179.

[h] (Sup. 1877)

An indictment which neither names nor refers to the defendant is insufficient.—*Enwright v. State*, 58 Ind. 567.

[i] (Sup. 1877)

An affidavit in a criminal prosecution is defective which omits the Christian name of defendant.—*State v. Kutter*, 59 Ind. 572.

[j] (Sup. 1878)

A misnomer of the defendant will be treated as surplusage, if the crime is elsewhere sufficiently charged in the indictment.—*Kennedy v. State*, 62 Ind. 136.

[k] (Sup. 1881)

An indictment will not be quashed, nor the judgment arrested, because the Christian name of the defendant was described therein as "Ben," as it will be presumed, in the absence of any contrary showing in the record, that it was his full Christian name.—*Burton v. State*, 75 Ind. 477.

[l] (Sup. 1884)

An indictment is not bad because the caption contained the middle initial of defendant's name, and the body omitted it.—*O'Connor v. State*, 97 Ind. 104.

[m] (Sup. 1888)

It is sufficient in an indictment to allege the name by which a person is commonly or usually known, though differing from his true or baptismal name; and, where a person has or is known by two or more names, he may be described by either or any one or all his names.—*Henry v. State*, 15 N. E. 593, 113 Ind. 304.

[n] (Sup. 1886)

An indictment charged "that Ranph" D. killed deceased, shooting at and mortally wounding her with a revolver, "which said revolver he, the said Ralph Drake, then and there had and held in his hands," of which mortal wound deceased instantly died. *Held*, that the indictment was not bad for uncertainty of defendant's name, as the words "the said Ralph Drake" might be eliminated, and yet leave the indictment sufficient.—*Drake v. State*, 145 Ind. 210, 41 N. E. 799, 44 N. E. 188.

[o] (Sup. 1898)

The name by which a person is commonly known may be employed in an indictment, and it will be good if it appears that he is commonly known by that name.—*State v. McEwen*, 51 N. E. 1053, 151 Ind. 485.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 216-224;

36 CENT. DIG. Names, § 1.

See, also, 22 Cyc. pp. 322-325.

#### § 84. Accessories before the fact.

Variance, see post, § 174.

[a] (Sup. 1860)

An indictment which charged C. and J. with a larceny of horses, and then charged that U. before the committing of the felony unlawfully and feloniously incited, encouraged, hired, and commanded C. and J. to commit the larceny, sufficiently charged U. with being an accessory before the fact.—*Ulmer v. State*, 14 Ind. 52.

Though the accessory may be convicted before the principal, yet the offense of the principal must be alleged.—*Id.*

[b] (Sup. 1907)

An affidavit charging accused with being an accessory before the fact to the act of a notary public in feloniously appending her signature and affixing her official seal as notary to a false certificate of acknowledgment of a deed, which alleged that the notary unlawfully appended her signature and fixed her seal to an acknowledgment of a deed which purported to be executed by a female to accused, followed by an instrument purporting to be a deed by the female and another, followed by separate acknowledgments of the deed over the signature and seal of the notary, etc., failed to show that the notary falsely took the acknowledgment of the female or of the other party to the deed, and did not charge an offense against accused, notwithstanding section 188, Cr. Code (Acts 1905, p. 624, c. 169; *Burns' Ann. St. Supp.*

1905, § 1829), providing that, where it is necessary to make an averment in an indictment as to any instrument, it shall be sufficient to designate the same by any name by which it is usually known, which merely renders it unnecessary to go further than to name the character of the instrument.—*Riley v. State*, 168 Ind. 637, 81 N. E. 726.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 227, 228.

See, also, 22 Cyc. pp. 360-363.

#### § 86. Place of offense.

Allegation as to place where usurious note was made, see *USURY*, § 149.

Variance, see post, §§ 166, 175.

[a] (Sup. 1823)

The words "Knox county and circuit," in the margin of an information there filed, though they be not expressly referred to, may imperfectly serve for a venue through the whole case. And where it appeared from the law and the record that the information against the bank at Vincennes was filed in the Knox circuit court at that place, and charged the bank with misconduct which might have there occurred, it was held that this with the imperfect venue in the margin showed that the defect, if any, as to the venue, was of the lowest grade of informality.—*President, etc., of Bank of Vincennes v. State*, 1 Blackf. 267, 12 Am. Dec. 234.

[b] (Sup. 1847)

An indictment having a venue in the margin, and alleging that the defendant, on, etc., did unlawfully, etc., destroy, etc., a certain mare, etc., by then and there fastening, etc., sufficiently shows the place where the offense was committed.—*State v. Slocum*, 8 Blackf. 315.

[c] (Sup. 1853)

It is sufficient in the counts of an indictment to distinctly refer to the venue already laid in the introduction to it.—*State v. Alsop*, 4 Ind. 141.

[d] (Sup. 1858)

The venue need not be repeated to every material allegation, in an affidavit to support a prosecution.—*Thayer v. State*, 11 Ind. 287.

[e] (Sup. 1860)

An information was filed in the name of the state in the common pleas court of P. county, Indiana, by E., whom the court officially knew to be the district attorney for the counties of P. and G. in Indiana. It charged the offense in the conclusion of the information to have been committed against the statutes and peace of Indiana and in the body of the information to have been committed in the said county of P. for which said E. was district attorney. *Held*, that there was a sufficient venue.—*Malone v. State*, 14 Ind. 219.

[f] (Sup. 1866)

An information filed in the Wells common pleas charged a larceny to have been committed

by the defendant in the county of Allen, and that he brought the stolen property into Wells county. *Held*, that the information, though informal, was sufficient under the Code.—*Hurt v. State*, 26 Ind. 106.

[g] (Sup. 1874)

An information for an unlawful sale of intoxicating liquor was entitled: "State of Indiana, Randolph County. In the Randolph Circuit Court." In the body of the information, the offense was charged to have been committed "at said county of Randolph," without again mentioning the name of the state. *Held*, that the venue was sufficiently stated.—*Evarts v. State*, 48 Ind. 422.

[h] (Sup. 1876)

An indictment charging that at the county of M. defendant did feloniously steal, take, and drive away from the county of M., and did then and there feloniously bring into, and dispose of in, the county of D., certain personal property, sufficiently describes the transfer of the stolen property from M. county to D. county to give jurisdiction to the court of the latter county, under 2 Gav. & H. St. p. 392, § 7, providing that, when property taken in one county by burglary, robbery, larceny, or embezzlement has been brought into another county, the jurisdiction is in either county.—*Jones v. State*, 53 Ind. 235.

[i] (Sup. 1876)

An indictment for perjury alleged that the oath, upon which the indictment was based, was administered in the "B. circuit court in the county of B. and state of Indiana." *Held*, that the venue was sufficiently laid.—*State v. Walls*, 54 Ind. 407.

[j] (Sup. 1877)

Where the venue of an indictment is laid in a certain county in this state, and the offense charged is alleged to have been committed in "said county," naming it, such offense is sufficiently shown to have been committed in this state.—*Long v. State*, 56 Ind. 133, 600.

[k] (Sup. 1877)

Where the place has been once properly stated in an indictment, the words "then and there" in the charging part sufficiently show the place at which the crime is alleged to have been committed.—*State v. Schultz*, 57 Ind. 19.

[l] (Sup. 1881)

Under Cr. Code, § 181, where time and place have been once alleged in an indictment, the words "then and there" need not be in every subsequent material allegation.—*Turpin v. State*, 80 Ind. 148.

[m] (Sup. 1882)

Where the affidavit on which the information is based does not indicate that the offense charged was committed in the state, the information and affidavit will be quashed.—*State v. Beebe*, 83 Ind. 171.

[n] (Sup. 1884)

An indictment charging an offense to have been committed in B. county, Indiana, is sufficient, without the use of the word "state."—*State v. Schreiber*, 98 Ind. 184.

[o] (Sup. 1886)

For many purposes the caption is considered a part of the indictment, and it may aid in showing the venue.—*Anderson v. State*, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711.

[p] (App. 1893)

An affidavit for assault and battery must allege the venue.—*Ford v. State*, 7 Ind. App. 567, 35 N. E. 34.

[q] (App. 1894)

An indictment which mentions the state in the introductory portion, and then alleges that the offense was committed in "the state aforesaid," sufficiently names the state.—*Hasse v. State*, 8 Ind. App. 488, 36 N. E. 54.

[r] (Sup. 1896)

Where a county and state are named in its caption, an affidavit, which in its body refers to the "county and state aforesaid," and then charges that defendant "did then and there, at and in said county, unlawfully," etc., charges the crime to have been committed in the county named in the caption.—*Rivers v. State*, 144 Ind. 16, 42 N. E. 1021.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 230-243;  
4 CENT. DIG. Assault, §§ 103, 112; 24  
CENT. DIG. Gaming, § 221; 32 CENT.  
DIG. Larc. § 100.

See, also, 22 Cyc. pp. 307-313.

#### § 87. Time of offense.

Matters in avoidance of bar of statute of limitations, see ante, § 67.

Use of figures, see ante, § 78.

Variance, see post, §§ 166, 176.

[a] (Sup. 1837)

An indictment for perjury must state a day certain on which the offense was committed.—*State v. Offutt*, 4 Blackf. 355.

[b] (Sup. 1845)

An indictment, not containing the year, but referring to the caption, which does contain the year, in this manner, "in the year of our Lord aforesaid," was *held* to be bad, as the caption was no part of the indictment.—*State v. Hopkins*, 7 Blackf. 494.

[c] (Sup. 1846)

Where the time for the prosecution of an offense is limited by statute, the time, as averred in the indictment, should appear to be within the limit.—*State v. Rust*, 8 Blackf. 195.

[d] (Sup. 1848)

The words "Hendrick's Circuit Court, October term, 1846," at the head of an indictment, constitute a part of it; and in such case, where the offense charged is alleged to have been com-

mitted on the "third day of October, in the year aforesaid," these words will be taken to refer to the year stated in the heading.—*State v. Paine*, 1 Ind. 163, Smith, 73.

[e] (Sup. 1850)

Where an indictment charged the offense to have been committed on a certain day of a certain month "in the year 1846," it was held that the omission of the words, "of our Lord," did not constitute a valid objection.—*Engleman v. State*, 2 Ind. 91, 52 Am. Dec. 494.

[f] (Sup. 1853)

Where any positive fact is averred in an indictment, it should be stated to have been done "then and there," after the county has been clearly expressed in the body of the indictment; and the allegation of time and place "then and there" should be repeated to every material fact which is issuable and triable.—*State v. Williams*, 4 Ind. 234, 58 Am. Dec. 627.

[g] When the indictment stated that the offense was committed "on or about the 30th day of December," it was held that the words "or about" were mere surplusage.—(Sup. 1856) *Hampton v. State*, 8 Ind. 336; (1858) *Hardebeck v. State*, 10 Ind. 459.

[h] (Sup. 1856)

2 Rev. St. 1852, p. 367, § 56, providing that the precise time of the commission of an offense need not be stated in the indictment or information, does not change the common-law rule that it was necessary to state in an indictment a time when the offense was committed, as it does not dispense with the statement of the time, but the time stated need not be the precise time proved.—*Hampton v. State*, 8 Ind. 336.

[i] (Sup. 1867)

An indictment for gaming, charging the offense to have been committed at a date subsequent to the finding of the indictment, is invalid.—*State v. Noland*, 29 Ind. 212.

An indictment for suffering a building to be used for gaming is bad on motion to arrest judgment if it does not state that the offense was committed within the statute of limitations.—*Id.*

[j] (Sup. 1868)

An indictment for perjury, stating the time when the offense was committed thus: "At the April term of the II. circuit court, in the year 1867," is sufficiently certain, under 2 Gav. & H. St. p. 402, § 56, providing that the exact time need not be stated, but it is sufficient if it appear to be within the statute of limitations.—*State v. Thrift*, 30 Ind. 211.

[k] (Sup. 1870)

Under the Code, as at common law, an indictment must charge the offense to have been committed on a particular day stated.—*Clark v. State*, 34 Ind. 436, 439.

[l] (Sup. 1873)

An indictment for hunting on Sunday, which alleges that "on or about the 1st day of October, A. D. 1871," the defendant, etc., "said 1st day of October, 1871, being then and there the first day of the week, commonly called Sunday," is bad for uncertainty as to the time of the offense.—*State v. Land*, 42 Ind. 311

[m] (Sup. 1874)

An indictment charging a sale of liquor "on or about the 2d day of November, 1873, said day being Sunday," is not sufficiently certain as to time.—*Effinger v. State*, 47 Ind. 235.

[n] (Sup. 1877)

In an indictment against the clerk of a circuit court for failure to pay over either fines, jury fees, unclaimed witness fees, or docket fees collected by him, an allegation that such funds are "due and owing to the state of Indiana" cannot supply the necessary allegations as to the time when such funds were collected, but is only averring a conclusion of law.—*State v. Record*, 56 Ind. 107.

[o] (Sup. 1877)

Where a date has been properly stated in an indictment, the words "then and there," in the charging part, sufficiently show the time of the commission of the offense.—*State v. Schultz*, 57 Ind. 19.

[p] (Sup. 1877)

An indictment which charges that "on the first day of June, A. D. 1875," and thence up till the finding of the indictment, the defendant kept the place where he sold intoxicating liquor in a disorderly manner, etc., does not sufficiently charge an offense on any day except the 1st day of June; and if, on that day, the statute relied on by the prosecution had not taken effect, the indictment cannot be sustained by proof of sales on subsequent days, but must be quashed.—*Collins v. State*, 58 Ind. 5.

[q] (Sup. 1878)

An indictment for selling liquor on a legal holiday, July 4th, alleging that the sale was made "on or about" the 4th day of July, etc., is not sufficiently certain as to time.—*Ruge v. State*, 62 Ind. 388.

[r] (Sup. 1878)

The precise time of the commission of an offense need not be stated in the indictment, but it must be shown to have been committed within the statute of limitations.—*Hutchinson v. State*, 62 Ind. 556.

[s] (Sup. 1884)

Under Rev. St. 1881, § 1756, providing that no indictment shall be invalid "for omitting to state the time at which the offense was committed in any case in which time is not the essence of the offense, nor for stating the time imperfectly unless time is of the essence of the offense," an indictment charging the sale of

liquor on "the 15th day of March, A. D. 188—," said valid.—*State v. Sammons*, 95 Ind. 22.

[t] (*Sup.* 1886)

An indictment which states an impossible date is bad on motion to quash.—*Murphy v. State*, 106 Ind. 96, 5 N. E. 767, 55 Am. Rep. 722; *Id.*, 107 Ind. 598, 8 N. E. 158; *Id.*, 107 Ind. 600, 8 N. E. 176; *Id.*, 8 N. E. 583.

[u] (*Sup.* 1886)

Where time is not of the essence of the offense charged in a count of an indictment, said count is not bad because the time is not stated.—*State v. McDonald*, 6 N. E. 607, 106 Ind. 233.

[v] (*Sup.* 1888)

An indictment for illegal voting, returned on November 3, 1886, charged that the offense was committed on November 4, 1886, being the day upon which the general election was then and there being held in said state, for the election of governor, as was then and there required and authorized by law. *Held*, that this portion of the indictment had relation to a past offense, and showed that the offense had been committed before the return of the indictment; and that, time not being of the essence of the offense, the indictment must be upheld under Rev. St. 1881, § 1756, which provides that an indictment shall not be quashed "for stating the time imperfectly unless time is of the essence of the offense."—*State v. Patterson*, 116 Ind. 45, 10 N. E. 289, 18 N. E. 270.

[w] (*Sup.* 1888)

Where the examination of a debtor on supplementary proceedings was mainly as to property which had previously belonged to him at different times, an indictment for perjury, alleging that he was then and there owner of a certain amount of property, is too indefinite as to time.—*State v. Cunningham*, 116 Ind. 209, 18 N. E. 613.

[x] (*Sup.* 1889)

Under Rev. St. 1881, § 1756, providing that no information shall be quashed for omitting to state the time when the offense was committed, when the time is not of the essence of the offense, an information for assault and battery is not insufficient because it fails to state the time when the assault was committed.—*Myers v. State*, 121 Ind. 15, 22 N. E. 781.

[y] (*Sup.* 1894)

A motion to quash an indictment for larceny on the ground that it charged the offense to have been committed "on the — day of —, 189—," is properly overruled, since Rev. St. 1881, § 1756, subd. 8, provides that failure to charge the time, when time is not of the essence of the offense, or that stating it imperfectly, will not vitiate the indictment.—*Fleming v. State*, 136 Ind. 149, 36 N. E. 154.

[yy] (*App.* 1895)

Under the Criminal Code (Rev. St. 1881, § 1756, subd. 8; Rev. St. 1894, § 1825, subd. 8), providing that no indictment shall be deemed

invalid for, *inter alia*, "omitting to state the time at which the offense was committed in any case in which time is not of the essence of the offense; nor for stating the time imperfectly unless time is of the essence of the offense,"—an information which charges defendant with keeping a house to be used for gaming "on the — day of" a certain month and year is good.—*Emperly v. State*, 13 Ind. App. 393, 41 N. E. 840.

[z] (*Sup.* 1896)

An indictment against a deputy county treasurer for embezzlement, returned in November, 1893, alleged that defendant was deputy treasurer from August 18, 1891, to August 18, 1893. *Held* that, under Rev. St. 1894, § 1825 (Rev. St. 1881, § 1756), providing that no indictment shall be deemed invalid for omitting to state the time when the offense was committed, when time is not the essence of the offense, the indictment should not be set aside upon the presumption that the offense charged was committed in the first part of defendant's term of office, and consequently barred by the statute.—*Armstrong v. State*, 145 Ind. 609, 43 N. E. 866.

[zz] (*Sup.* 1897)

Under Rev. St. 1894, § 1825 (Rev. St. 1881, § 1756), providing that an information shall not be quashed for omitting to state the time at which the offense was committed, where time is not the essence of the offense, and section 1807 (section 1738), declaring that the precise time need not be stated, but that it is sufficient if it be shown to have been within the statute of limitations, an information for perjury is not fatally defective for failure to state the time it was committed, or for imperfectly stating said time.—*Shell v. State*, 47 N. E. 144, 148 Ind. 50.

[zzz] (*Sup.* 1905)

The time of the commission of an offense, as stated in the indictment or information, must not be shown on the face of such pleading to be subsequent to the return of the indictment of the filing of an information, but must appear to be anterior or prior thereto.—*Terrell v. State*, 165 Ind. 443, 75 N. E. 884, 2 L. R. A. (N. S.) 251, 112 Am. St. Rep. 244.

Where an indictment found September 12, 1903, charged that defendant on "July 12, 18903," at, etc., then and there unlawfully and feloniously did kill and murder W. by shooting, etc., the indictment was fatally defective, as alleging the date of the offense subsequent to the finding of the indictment.—*Id.*

Burns' Ann. St. 1901, § 1825, provides that no indictment or information shall be deemed invalid because it omits to state the time at which the offense was committed in any case in which time is not the essence of the offense, nor for stating the time imperfectly unless time is of the essence of the offense. *Held* that, where an indictment stated that the offense was committed on a date long after the finding and

return of such indictment, it could not be sustained under such section.—Id.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 244-255;  
4 CENT. DIG. Assault, § 112; 24 CENT.  
DIG. Gaming, § 220; 30 CENT. DIG.  
Perj. § 69.

See, also, 22 Cyc. pp. 313-322; note, 2 L.  
R. A. (N. S.) 251.

#### § 88. Intent.

Indictment for burglary, see BURGLARY, § 19.

Indictment for forgery, see FORGERY, § 27.

Indictment for gambling, see GAMING, § 86.

Indictment for larceny, see LARCENY, § 29.

Indictment for obtaining money or property by  
false pretenses, see FALSE PRETENSES, § 27.

Indictment for rape, see RAPE, § 21.

Indictment for taking or exacting usury, see  
USURY, § 149.

Variance, see post, § 177.

##### [a] (Sup. 1842)

Where an evil intent accompanying an act  
is necessary to constitute such act a crime, the  
intent must be alleged in the indictment and  
proved.—State v. Freeman, 6 Blackf. 248.

##### [b] (Sup. 1886)

It is sufficient to state in general and ap-  
propriate words the intent essential to the ex-  
istence of the particular crime charged.—Gar-  
mire v. State, 104 Ind. 444, 4 N. E. 54.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 256-258.  
See, also, 22 Cyc. pp. 329-331.

#### § 91. Felonious or otherwise unlawful nature of act.

##### [a] (Sup. 1875)

An indictment for an assault with intent,  
etc., must use, in describing the crime intended,  
the word "unlawfully," or some other equiva-  
lent word, such as "feloniously."—Greer v. State,  
50 Ind. 267, 19 Am. Rep. 709.

##### [b] (Sup. 1878)

An indictment charging a conspiracy to  
burglarize with intent to steal is not sufficient  
where the word "feloniously" is not used to  
qualify the word "steal."—Scudder v. State, 62  
Ind. 13.

##### [c] (Sup. 1881)

In an indictment for a misdemeanor only,  
the use of the word "feloniously" is not fatal.  
—State v. Sparks, 78 Ind. 166.

##### [d] (Sup. 1882)

An information for grand larceny, which  
fails to aver that the acts charged were done  
feloniously, is bad on motion to quash.—Sovine  
v. State, 85 Ind. 576.

##### [e] (Sup. 1882)

In charging malicious trespass, the word  
"unlawfully" need not be used.—State v. Mad-  
dox, 85 Ind. 585.

##### [f] (Sup. 1885)

The indictment need not be in the exact  
words of the statute, but other words convey-  
ing the same meaning may be used; and an  
indictment in the words of the statute, except  
that the word "feloniously" is used in place of  
the word "falsely," is good; especially where  
it is also averred that the statements sworn to  
were false, and known to be so by the party  
making them.—State v. Anderson, 103 Ind. 170,  
2 N. E. 332.

##### [g] (Sup. 1886)

An indictment is good which uses words  
of an equivalent meaning with those used by  
the statute in defining the offense; and, where  
the word "feloniously" is employed instead of  
the word "unlawful," the indictment is suffi-  
cient to withstand a motion to quash.—Frank-  
lin v. State, 108 Ind. 47, 8 N. E. 695.

##### [h] (Sup. 1889)

Act March 5, 1883, makes it the duty of  
a county officer to pay over to his successor all  
moneys remaining in his hands as such officer,  
and for failure so to do he is declared to be  
guilty of embezzlement. *Held*, that the stat-  
ute is not to be construed in its broad sense  
but an indictment, in addition to the words of  
the statute, must allege that the act charged  
was done feloniously.—Stropes v. State, 120  
Ind. 502, 22 N. E. 773.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 261-265;  
8 CENT. DIG. Burg. § 35; 18 CENT.  
DIG. Embez. §§ 40, 140; 23 CENT. DIG.  
Forg. § 61; 32 CENT. DIG. Larc. § 60;  
39 CENT. DIG. Perj. § 68; 46 CENT.  
DIG. Tresp. § 176.

See, also, 22 Cyc. pp. 331-333.

#### § 92. Act or omission constituting of- fense.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 266-  
268.

See, also, 22 Cyc. pp. 326, 327.

#### § 93. — In general.

##### [a] (Sup. 1889)

Where it is sought to charge an accused  
with a crime, the acts done by him must be  
stated in the indictment.—Kinningham v. State,  
21 N. E. 911, 119 Ind. 332.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. § 263.

See, also, 22 Cyc. p. 326; 32 Cyc. p. 331.

#### § 95. — Specific facts.

##### [a] (Sup. 1870)

An indictment for assault with intent to  
commit a felony must charge the assault by  
setting forth the facts constituting it accord-

ing to the statutory definition.—*Adell v. State*, 34 Ind. 543.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Ind. & Inf. § 267.

See, also, 22 Cyc. p. 326.

**§ 96. — Circumstances making act or omission criminal.**

[a] (Sup. 1881)

An indictment under Rev. St. 1881, § 2070, charging the sale of meat of diseased animals, without alleging that the same was sold for food, is insufficient, since the construction put on the statute by the supreme court forbids the sale of such animals only for the purpose of food.—*Schmidt v. State*, 78 Ind. 41.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Ind. & Inf. § 268.

See, also, 22 Cyc. p. 327.

**§ 97. Separate counts.**

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Ind. & Inf. §§ 269–271.

See, also, 22 Cyc. pp. 364–367.

**§ 98. — In general.**

[a] (Sup. 1858)

Each count in an indictment must be sufficient in itself. Averments in one count cannot aid defects in another.—*State v. Longley*, 10 Ind. 482.

[b] (Sup. 1875)

Where different counts charging felonies are joined in the same indictment each separate count should charge the defendant as if he had committed a distinct offense.—*Mershon v. State*, 51 Ind. 14.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Ind. & Inf. § 269.

See, also, 22 Cyc. p. 364.

**§ 99. — Reference from one count to another.**

[a] (Sup. 1826)

An indictment contained two counts,—one against B. for stealing, the other against A. for receiving the goods knowing them to be stolen. *Held*, that the second count was not objectionable for not stating the time, place, value of the goods, etc.; these requisites being laid in the first count, and referred to in the second.—*Redman v. State*, 1 Blackf. 429.

[b] (Sup. 1878)

The fact that the prosecuting attorney elects to abandon the first count does not render the other counts bad for want of the formal introductory allegations which were in the first count only; the other counts beginning "the grand jurors aforesaid, upon their oaths aforesaid, do further present," etc.—*State v. Dufour*, 63 Ind. 567.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Ind. & Inf. §§ 270, 270½.

See, also, 22 Cyc. pp. 366, 367.

**§ 100. — Defects and omissions.**

*Idem sonans*, see NAMES, § 16.

[a] (Sup. 1858)

One defective count in an indictment cannot aid another that is also defective in a different respect.—*State v. Longley*, 10 Ind. 482.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Ind. & Inf. § 271.

See, also, 22 Cyc. p. 365.

**§ 101. Designation of person injured or others.**

Description of person assaulted, see ASSAULT AND BATTERY, § 76.

Description of person killed, see HOMICIDE, § 131.

Description of purchaser or others in indictment for illegal sale of intoxicating liquors, see INTOXICATING LIQUORS, § 219.

Designation and description of accused, see ante, § 81.

Variance, see post, § 180.

[a] (Sup. 1840)

Where third persons are referred to in an indictment, they must be named, or it must be alleged that they are unknown.—*State v. Irvin*, 5 Blackf. 343.

[b] (Sup. 1884)

In a criminal case, if the name by which a person is generally known is stated in the indictment and established by the proof, it is sufficient.—*Ehlert v. State*, 93 Ind. 76.

[c] (Sup. 1904)

An information is not bad because in one count, charging that defendant passed the forged note to M., with intent to defraud "one" M., and in another count charging that the forged note purported to be signed by V. and was passed to M. with intent to defraud "one" V.—*Selby v. State*, 69 N. E. 463, 161 Ind. 667.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Ind. & Inf. §§ 272–277.

See, also, 22 Cyc. pp. 348–352.

**§ 102. Description of real property.**

Description of gambling house in indictment for gambling, see GAMING, § 89.

Indictment for arson, see ARSON, § 20.

Indictment for burglary, see BURGLARY, § 22.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Ind. & Inf. § 278.

See, also, 22 Cyc. p. 352.

**§ 103. Description of personal property.**

Description of obscene matter in indictment for obscenity, see **OBSCENITY**, § 12.

Indictment for arson, see **ARSON**, § 20.

Indictment for burglary, see **BURGLARY**, § 23.

Indictment for gambling, see **GAMING**, § 87.

Issues, proof and variance, see post, § 166.

Property embezzled, see **EMBEZZLEMENT**, § 28.

Property obtained by false pretenses, see **FALSE PRETENSES**, § 32.

Property stolen, see **LARCENY**, § 30.

[a] (**Sup.** 1858)

"United States gold coin" is equivalent to "gold coin of the United States." Such coin is current by law, and both court and jury know, without allegations, that a gold coin of the denomination and value of \$10 is an eagle.—*Daily v. State*, 10 Ind. 536.

[b] (**Sup.** 1858)

"Sixty dollars of the current gold coin of the United States, of the value," etc., "the property," etc., is a sufficient description.—*McKane v. State*, 11 Ind. 195.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. § 279.

See, also, 22 Cyc. pp. 352, 353.

**§ 104. Quantity or value of personal property.**

Indictment for larceny, see **LARCENY**, § 31.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. § 280.

See, also, 22 Cyc. p. 353.

**§ 105. Ownership, possession, or custody of property.**

Indictment for arson, see **ARSON**, § 22.

Indictment for burglary, see **BURGLARY**, §§ 22, 23.

Indictment for embezzlement, see **EMBEZZLEMENT**, § 30.

Indictment for larceny, see **LARCENY**, § 32.

Variance, see post, § 182.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 281, 282.

See, also, 22 Cyc. p. 353.

**§ 106. Description of or setting forth written or printed matter.**

Description of or setting forth forged instrument, see **FORGERY**, § 28.

Description of written instrument obtained by false pretenses, see **FALSE PRETENSES**, § 33.

Variance, see post, § 183.

[a] (**Sup.** 1858)

An information must correctly describe the instruments, the transfer of which is the ground of the information.—*Whitney v. State*, 10 Ind. 404.

[b] (**Sup.** 1885)

It is questionable whether or not, in an indictment under the statute making it an of-

fense to deposit an obscene paper in the post office, the obscene matter must be set out in *hæc verba*; but where it is alleged that the letter "is of the following substance, purport, tenor, and effect," and a true copy is then set out, except that several words are omitted, which omission is explained by the statement that such words in the original letter had become illegible and were not known, it is sufficient even if the matter is required to be set out.—*Thomas v. State*, 103 Ind. 419, 2 N. E. 808.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. § 283.

See, also, 22 Cyc. pp. 354, 355.

**§ 107. Statutory offenses.**

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 284-299; 2 CENT. DIG. Anim. § 95; 6 CENT. DIG. Big. § 22; 8 CENT. DIG. Breach of P. § 5; 8 CENT. DIG. Bribe § 5; 8 CENT. DIG. Burg. § 31; 10 CENT. DIG. Consp. §§ 95, 97; 17 CENT. DIG. Disorderly C. § 13; 17 CENT. DIG. Disturb. of Pub. A. §§ 8-10; 23 CENT. DIG. Forg. §§ 61, 64; 23 CENT. DIG. Forn. § 3; 24 CENT. DIG. Gaming, §§ 226, 250; 32 CENT. DIG. Larc. § 58; 33 CENT. DIG. Lotteries, § 30; 35 CENT. DIG. Monop. § 20; 37 CENT. DIG. Neut. Laws, § 15; 42 CENT. DIG. Rec. S. Goods, § 10; 46 CENT. DIG. Tresp. § 176.

See, also, 22 Cyc. pp. 333-347.

**§ 108. — Reference to or recital of statute.**

Conclusion of indictment, see ante, § 32.

[a] (**Sup.** 1908)

It is not necessary that an indictment should name a particular law under which it is drawn; such fact being determined from the facts alleged.—*Donovan v. State*, 170 Ind. 123, 83 N. E. 744.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 284, 285.

See, also, 22 Cyc. pp. 334, 335.

**§ 109. — Elements and incidents of offense in general.**

[a] (**Sup.** 1820)

Where a statute declaring an offense is merely declaratory of the common law, an indictment in the common-law form is sufficient.—*Fuller v. State*, 1 Blackf. 63.

[b] (**Sup.** 1876)

An indictment under a statute must embrace a charge of all the particulars that enter into the statutory description of the offense, either in the language of the statute or other equivalent words.—*State v. Wright*, 52 Ind. 307.

[c] (Sup. 1889)

Where the terms of a statute are broader than the intent of the Legislature, an indictment thereunder must be so drawn as to effectuate the intention of the Legislature by which it was framed.—*Stropes v. State*, 22 N. E. 773, 120 Ind. 562.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 280-288.

See, also, 22 Cyc. p. 335.

#### § 110. — Language of statute.

See RIOT, § 5; ROBBERY, §§ 17, 19.

[a] An indictment charging a statutory offense in the language of the statute, or in terms substantially equivalent thereto, is sufficient.—(Sup. 1833) *State v. Bougher*, 3 Blackf. 307; (1841) *Same v. Noel*, 5 Blackf. 548; (1879) *Shinn v. State*, 68 Ind. 423; (1881) *Payne v. Same*, 74 Ind. 203; (1882) *Smith v. Same*, 85 Ind. 553; (1888) *Benham v. Same*, 116 Ind. 112, 18 N. E. 454; (1889) *State v. Sutton*, 19 N. E. 602, 116 Ind. 527; (1895) *Chandler v. State*, 39 N. E. 444, 141 Ind. 106; (App. 1895) *Lay v. Same*, 39 N. E. 768, 12 Ind. App. 362; (1895) *State v. Allen*, 40 N. E. 705, 12 Ind. App. 528; (Sup. 1901) *Latshaw v. State ex rel. Latshaw*, 59 N. E. 471, 156 Ind. 194; (1902) *Semon v. State*, 62 N. E. 625, 158 Ind. 55; (App. 1904) *Atkinson v. Same*, 70 N. E. 560, 33 Ind. App. 8; (App. 1905) *State v. New*, 76 N. E. 181, 36 Ind. App. 521, transferred to Supreme Court (1905) 76 N. E. 400, 165 Ind. 571.

[b] (Sup. 1836)

An indictment for kidnapping is sufficient if it follow the language of the statute.—*State v. McRoberts*, 4 Blackf. 178.

[c] (Sup. 1841)

An indictment against a justice of the peace, found at the March term, 1840, charged that the defendant had in his hands, on the 1st of January, 1840, a certain sum received by him as a fine, and that he had failed to pay the money over within 60 days after receipt thereof, as required by Rev. St. 1838, p. 559. *Held*, that the indictment is not open to the objection that it does not aver with sufficient certainty the offense created by the statute, inasmuch as it does not set forth the time at which the justice received the money which he failed to pay over, since it follows substantially the language of the statute.—*State v. Noel*, 5 Blackf. 548.

[d] (Sup. 1854)

An indictment for keeping a tippling house, where spirituous liquors were sold, without license, was sufficient in following the language of the statute, without setting forth the particular acts relied on as violations of the statute.—*Shilling v. State*, 5 Ind. 443.

[e] (Sup. 1859)

An information charging that defendant "encouraged" a negro woman to remain in the state is too vague to charge an offense, though

it follows the language of the statute. The acts constituting the encouragement should be stated.—*Bowles v. State*, 13 Ind. 427.

[f] (Sup. 1860)

It seems that, where the statute names particular acts as constituting the offense, the charge may follow the statute; but, where the statute is general, the particular acts may properly be set out to show that they constitute in fact and in law the offense generally described.—*Malone v. State*, 14 Ind. 219.

[g] (Sup. 1866)

In an information for trespass to lands, it was alleged that the act of trespass was done "without the consent of A.," the owner of the land, "or his agent." *Held*, that the information sufficiently alleged that the act was done "without a license from competent authority," under the statute.—*State v. Marlett*, 26 Ind. 198.

[h] (Sup. 1869)

When the language of a statute creating an offense is not to be taken in the broad meaning of the words used, but is to be limited by construction to a special subject or matter, an indictment thereunder should not follow the language of the statute simply, in charging the crime, but should limit the case and allege facts which bring it within the construction placed upon the statute.—*Bates v. State*, 31 Ind. 72.

[i] (Sup. 1873)

An indictment charged that the defendant "feloniously, purposely, and with premeditated malice," did "beat, strike, kick, stamp, trample upon, and wound, with intent, then," etc. *Held*, that the indictment was sufficient, under a statute declaring every person "who in a rude, insolent, or angry manner, shall unlawfully touch another," guilty of assault and battery. But such departures from the statute defining the offense are not to be approved.—*Sloan v. State*, 42 Ind. 570.

[j] An assault is sufficiently described in the language of the statute.—(Sup. 1874) *State v. Trulock*, 46 Ind. 289; (1887) *Same v. Kinder*, 109 Ind. 226, 9 N. E. 917.

[k] (Sup. 1879)

Where the statute in a criminal case is not to be taken on the broad meaning of the words used, but limited by construction, it is proper that the indictment should charge the crime, not in the language of the statute simply, but should limit the case, and bring it within the construction placed on the act.—*Manheim v. State*, 66 Ind. 65; *Faber v. Same*, *Id.* 600.

[l] (Sup. 1879)

An indictment under 2 Rev. St. 1876, p. 481, § 76, making it an offense to unlawfully go upon the land of another and pull off or pull off and carry away any corn growing on the stock, or any fruit on the tree, bush, or plant,

is sufficient if it follows the language of the statute.—*State v. Allisbach*, 69 Ind. 50.

[m] (*Sup.* 1882)

The indictment charged that the act was committed "feloniously, purposely, and with premeditated malice," with the intent, etc. *Held*, that the failure to charge that it was committed, in the words of the statute, "in a rude, insolent, or angry manner," was immaterial.—*Knight v. State*, 84 Ind. 73.

[n] (*Sup.* 1883)

An indictment under Rev. St. 1881, § 1904, for keeping "a house of ill fame, resorted to for the purpose of prostitution and lewdness," is sufficient if it follows the language of the statute.—*Betts v. State*, 93 Ind. 375.

[o] (*Sup.* 1884)

An indictment, under Rev. St. 1881, § 2156, for being a party to a conveyance made to defraud creditors or purchasers, which substantially follows the language of the statute, using terms of equivalent meaning, and showing that the conveyance was corruptly made for the fraudulent purpose, is sufficient.—*State v. Miller*, 98 Ind. 70.

[p] (*Sup.* 1887)

The offense of practicing medicine and surgery without a license, prescribed by the act regulating the practice of medicine and surgery, charged in the language of the statute, is sufficient.—*Eastman v. State*, 10 N. E. 97, 109 Ind. 278, 58 Am. Rep. 400.

[q] (*Sup.* 1887)

An information charging, among other things, that the accused at a time and place specified, "unlawfully sold to P. for the sum of ten cents, then and there paid by said P. to him, one share, chance, and opportunity to draw in a certain lottery scheme and gift enterprise for the division of certain sums of lawful money to be determined by chance, lot," etc., charges the offense of unlawfully selling a share in a lottery or gift enterprise, as defined in Rev. St. 1881, § 2077, substantially in the words of the statute, and is good on motion to quash.—*Trout v. State*, 111 Ind. 499, 12 N. E. 1005; *Watson v. Same*, 111 Ind. 599, 12 N. E. 1008.

[r] Under Rev. St. 1881, § 2097, providing that "whoever keeps a place where intoxicating liquors are sold, bartered, given away, or suffered to be drunk in a disorderly manner, to the annoyance or injury of any part of the citizens of this state, shall be fined," an indictment which describes the offense in the words of the statute is sufficient.—(*Sup.* 1889) *Skinner v. State*, 120 Ind. 127, 22 N. E. 115; (1890) *State v. Hoard*, 123 Ind. 34, 23 N. E. 972.

[s] (*Sup.* 1890)

Where a statute simply provides punishment for an unlawful entry on the lands of another without making any provision for the

restoration of the land to the rightful owner and where locality or place is not an essential ingredient of the offense, no particular description is necessary, and a charge in the language of the statute is sufficient.—*Winlock v. State*, 23 N. E. 514, 121 Ind. 531.

[t] (*Sup.* 1890)

The offense created by Rev. St. § 2093, consists in selling, bartering, or giving intoxicating liquor to a person in the habit of being intoxicated, after notice shall have been given to the person selling or giving the liquor that the person to whom it is sold or given is in the habit of being intoxicated. This conclusion does not require that a separate notice be served on the proprietor of the saloon, and also on each clerk or other person authorized to sell. It only requires, in order to make an indictment sufficient, that the charge should be made substantially in the language of the statute, leaving the question of the sufficiency of the proof to the court or jury trying the cause.—*State v. Smith*, 23 N. E. 714, 122 Ind. 178.

[u] (*App.* 1891)

Where an information charges defendant with renting a house to be used and occupied for gaming in the language of the statute, it is sufficient.—*Fisher v. State*, 28 N. E. 565, 2 Ind. App. 365.

[uu] (*App.* 1895)

Under Rev. St. 1894, § 2173, making it an offense to keep a building to be used or occupied for gaming, an indictment in the language of the statute is sufficient.—*Emperly v. State*, 41 N. E. 840, 13 Ind. App. 393.

[v] (*Sup.* 1896)

Where an information charges an offense in the language of the statute, it is sufficient as against a motion in arrest of judgment.—*Woodworth v. State*, 145 Ind. 276, 43 N. E. 933.

[vv] (*Sup.* 1897)

Under a statute making it an offense to do an act "fraudulently," an indictment charging the offense in the language of the statute is sufficient, without setting out the facts constituting the fraud.—*State v. Beach*, 43 N. E. 949, 46 N. E. 145, 147 Ind. 74, 36 L. R. A. 179.

[w] (*App.* 1897)

An indictment under *Horner's Rev. St.* 1897, § 4323, charging a retail liquor dealer, in the language of the statute, with permitting a minor to loiter in his saloon, need not allege that the offense was "unlawfully" committed.—*Walbert v. State*, 46 N. E. 827, 17 Ind. App. 350.

[ww] (*Sup.* 1901)

An indictment based on *Burns' Rev. St.* 1894, § 2097 (*Rev. St.* 1881, § 2010; *Horner's Rev. St.* 1897, § 2010), providing that whoever, either before or after he is elected, appointed, qualified, or sworn as a member of the common council of any city, solicits any money or

other valuable thing to influence him with respect to the discharge of his duties as such, shall be imprisoned, which charges the offense in the language of such statute, is sufficient, though it does not allege that defendant intended to vote for the ordinance, as charged, because of the money solicited.—*Higgins v. State*, 60 N. E. 685, 157 Ind. 57.

[x] (Sup. 1902)

An affidavit and information charging the statutory offense of practicing medicine without a license, in the form prescribed by Burns' Rev. St. 1901, § 7323c, providing that it shall be sufficient to charge that defendant at a certain time and place engaged in the practice of medicine, he not having a license so to do, sufficiently states the nature of the accusation.—*Parks v. State*, 64 N. E. 862, 159 Ind. 211, 59 L. R. A. 190.

[xx] (Sup. 1902)

If a criminal statute provides a definition of an offense, and states specifically what acts constitute it, it will suffice to charge the offense in the language of the statute. But, where the definition of the offense contains generic terms, it is not sufficient to allege the species of the crime, but the pleader must descend to particulars.—*Johns v. State*, 63 N. E. 287, 159 Ind. 413, 59 L. R. A. 789; *Haughn v. Same*, Id.

An information for bunko steering, charging that the defendants, by duress and fraud, compelled a certain party to lose and part with a large amount of money, is insufficient in failing to state the nature of the fraud and duress, though stated in the language of the statute defining the crime. The element of duress or fraud is essential to the offense charged, but it is evident that they must consist of acts.—Id.

An information charging bunko steering, which alleged that defendants compelled another by "duress and fraud" to part with a certain sum upon a foot race, is void for uncertainty in failing to describe the nature of the fraud and duress, though cast in the language of the statute defining the crime (Burns' Rev. St. 1901, § 2178).—Id.

[y] (Sup. 1906)

Where the statute defining a crime omits an element thereof, or the statute has been narrowed by judicial construction so that an indictment in the language of the statute would be uncertain, an indictment should include such element and is not sufficient if it merely follows the statute.—*Vinnedge v. State*, 167 Ind. 415, 79 N. E. 353.

[yy] (Sup. 1908)

Public Offense Act 1905, Acts 1905, p. 750, c. 169, § 675 (Burns' Ann. St. 1901, § 2353), provides that whoever knowing the same to be false or fraudulent makes or presents for payment, or certifies as correct, to the county commissioners, any claim or other evidence of indebtedness, false or fraudulent, to procure

its allowance, shall on conviction be punished, etc. *Held*, that such section defines the offense in generic terms, so that an indictment charging the offense in the language of the statute without the particulars was insufficient.—*State v. Metsker*, 169 Ind. 555, 83 N. E. 241; Id., 169 Ind. 701, 83 N. E. 1135.

[z] (Sup. 1908)

In a prosecution for the illegal sale of intoxicating liquors, under Acts 1907, pp. 27, 28, c. 16, § 1, it is not necessary that the affidavit allege the place of the illegal sale, or that the place of sale be an inclosure or "blinded"; it being sufficient to describe the place of sale in the language of the statute.—*Donovan v. State*, 170 Ind. 123, 83 N. E. 744.

[zz] (Sup. 1908)

It will not suffice to charge a crime in the language of the statute, where that defines the offense in generic terms; but particulars are required.—*State v. Bridgewater*, 171 Ind. 1, 85 N. E. 715; *Same v. Henson*, 171 Ind. 725, 85 N. E. 718; *Same v. Larter*, 171 Ind. 725, 85 N. E. 719; *Same v. Brooks*, 171 Ind. 725, 85 N. E. 975; *Same v. Charles*, Id.; *Same v. Ritter*, Id.; *Same v. Turner*, 171 Ind. 725, 85 N. E. 1027; *Same v. Ballard*, Id.; *Same v. Romaine*, 171 Ind. 725, 86 N. E. 73.

An affidavit for visiting a gambling house, in violation of Public Offense Statute 1905 (Laws 1905, p. 693, c. 169) § 470, being Burns' Ann. St. 1908, § 2371, is sufficient, where charging the offense in the language of the statute, and need not particularly designate the gambling house visited.—Id.

[zzz] (Sup. 1908)

The crimes denounced by the blind tiger law (Act February 13, 1908; Acts 1907, p. 27, c. 16, § 1; Burns' Ann. St. 1908, § 8338) and Act March 16, 1907 (Acts 1907, p. 689, c. 293, § 1; Burns' Ann. St. 1908, § 8351), both providing that any person who shall keep a place where intoxicating liquors are sold, bartered, or given away in violation of the state law, or who shall be found in possession of such liquors for such purpose, shall be guilty of a misdemeanor, may be charged in the language of the statute, except that the matters stated disjunctively should be charged conjunctively.—*Regadanz v. State*, 171 Ind. 387, 86 N. E. 449.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 267, 289-294; 2 CENT. DIG. Anim. § 95; 4 CENT. DIG. Assault, §§ 106, 108; 6 CENT. DIG. Big. § 22; 8 CENT. DIG. Breach of P. § 5; 8 CENT. DIG. Bribe § 5; 8 CENT. DIG. Burg. § 31; 10 CENT. DIG. Consp. §§ 95, 97; 17 CENT. DIG. Disorderly C. § 13; 17 CENT. DIG. Distur. of Pub. A. §§ 8-10; 23 CENT. DIG. Forg. §§ 61, 64; 23 CENT. DIG. Forn. § 3; 24 CENT. DIG. Gaming, §§ 226, 250; 32 CENT. DIG. Larc. § 58; 33 CENT. DIG. Lotteries, § 30; 35 CENT. DIG. Monop. § 20; 37

CENT. DIG. Neut. Laws, § 15; 42 CENT. DIG. Rec. S. Goods, § 10; 46 CENT. DIG. Tresp. § 176; 48 CENT. DIG. Waters, § 265.

See, also, 22 Cyc. pp. 336-344; note, 94 Am. Dec. 253.

### § 111. — Exceptions and provisos.

[a] If, to a statute on which an indictment is founded, there be an exception in a subsequent statute, the exception need not be negated in the indictment.—(Sup. 1845) Colson v. State, 7 Blackf. 590; (1844) Alexander v. Same, 48 Ind. 394.

[b] (Sup. 1849)

Where an exception is contained in the enacting clause of a statute, or in the clause creating the offense and prescribing its punishment, the indictment must show that the act or person is not within the exception; but if the exception come in by way of proviso, or is in a subsequent clause or a subsequent statute, it need not be stated in the indictment. It is mere matter of defense.—Bouser v. State, Smith, 408.

[c] Where the definition of a criminal offense contains an exception closely connected with the enacting clause, or in the same clause that creates the offense, an indictment for such offense must show, by negative averment, that the defendant is not within the exception; but, if the exception is contained in a subsequent clause or statute, it is a matter of defense, and need not be negated in the indictment.—(Sup. 1853) Brutton v. State, 4 Ind. 601; (1853) Id. 602; (1853) Lemon v. Same, Id. 603; (1875) Russell v. Same, 50 Ind. 174.

[d] (Sup. 1856)

Where the enacting clause of a statute, under which a criminal prosecution is brought, describes the offense, with certain exceptions, in such clause expressed, it is necessary that an indictment should negative such exceptions.—Peterson v. State, 7 Ind. 560.

[e] (Sup. 1857)

An information which does not negative the exceptions in the statute should be quashed.—Schneider v. State, 8 Ind. 410.

[f] (Sup. 1883)

An indictment for the violation of Rev. St. 1881, § 2087, by permitting a minor to play billiards, which does not aver that the act of the defendant was unlawful, or show that the case was not within the exception contained in section 2089; i. e. that the table was not in a private house,—is bad.—State v. Dupies, 91 Ind. 233.

[g] (Sup. 1898) \*

An information under Rev. St. 1894, § 5595, providing that it shall be unlawful for any one to practice dentistry without being registered, need not negative the granting of a special permit under section 5601, providing that any member of the board of examiners may

grant a permit, which shall be valid only until the next meeting of the board.—Ferner v. State, 51 N. E. 360, 151 Ind. 247.

[h] (Sup. 1907)

An indictment must negative exceptions in the same clause of the act defining the crime.—Steinkuehler v. Wempner, 169 Ind. 154, 81 N. E. 482, 15 L. R. A. (N. S.) 673.

[i] (Sup. 1908)

Where the exceptions or provisos of a statute form no part of the definition of the offense, or are in subsequent sections, or set out in separate provisions, an indictment founded on the statute need not negative such exceptions or provisos.—Yazel v. State, 170 Ind. 535, 84 N. E. 972.

[j] (Sup. 1908)

Acts 1907, p. 355, c. 206, § 2, requires sellers of "concentrated commercial feeding stuff" to affix a label thereto reciting certain facts; section 6 (page 357) makes a failure to do so a misdemeanor, but provides that the act shall not apply to sales in bulk by importers, manufacturers, etc.; and section 11 (page 359) provides that the term "concentrated commercial feeding stuff" shall include wheat middlings, etc., but not unmixed meals made from the whole grain, etc. An affidavit charged the selling of wheat middlings without label, and negated the provisos in section 6. *Held* unnecessary to allege that the feeding stuff was not of that kind excepted by section 11; that section not creating or defining the offense, but only defining the meaning of the term used, and hence the exception being matter of defense.—State v. Weller, 171 Ind. 53, 85 N. E. 761.

[k] (Sup. 1909)

The negative of all provisos, exceptions, or exemptions in the enacting clause of a statute creating an offense, which are affirmative elements in the offense, must be averred; but if the offense is defined without the proviso or exception, and even though in the same section with the enacting clause or clause creating the offense, it does not require negation.—State v. Barrett, 172 Ind. 169, 87 N. E. 7.

[l] (Sup. 1910)

Under Burns' Ann. St. 1908, § 8409, defining what will be regarded as practicing medicine, and declaring the act not applicable to certain persons and acts, and providing that in charging in an affidavit a violation of the law against practicing medicine without a license it shall be sufficient to charge that accused did, upon a certain day and in a certain county, engage in the practice of medicine without a license, without further or more particular facts, an affidavit, alleging that accused on a certain date, in a certain county, unlawfully engaged in the practice of medicine, not then and there having a license, cannot be objected to as failing to negative the provisions in the statute declaring the act not applicable to certain persons and acts, since these are not in the part of the statute defining the crime, and need not be

negated by the state, but, to be of avail to the defendant, must be interposed on the trial as a defense.—Witty v. State, 90 N. E. 627, 25 L. R. A. (N. S.) 1297.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 295–298; 4 CENT. DIG. ARSON, § 41; 6 CENT. DIG. Big. § 23; 24 CENT. DIG. Gaming, § 227.

See, also, 22 Cyc. pp. 344–347.

### § 114. Previous convictions and habitual criminals.

#### [a] (Sup. 1878)

As, under 2 R. S. 1876, p. 434, § 21, a former conviction of petit larceny can only be used to enhance the punishment, in a case where defendant is again charged with petit larceny, it is improper to charge a defendant in an indictment for grand larceny with a former trial and conviction of petit larceny.—Good v. State, 61 Ind. 69.

#### [b] (Sup. 1883)

Where a good count for petit larceny also rehearsed the former conviction of defendant for a similar offense, the count was not thereby vitiated.—Myers v. State, 92 Ind. 390.

#### [c] (Sup. 1898)

When a statute imposes a greater punishment upon second and subsequent convictions of an offense than for a first conviction, the former conviction must be alleged in the indictment and proved at the trial, or the punishment imposed will be that for a first offense.—Evans v. State, 50 N. E. 820, 150 Ind. 651.

#### [d] (App. 1906)

Where a statute imposes a different punishment for a second or subsequent offense, it is not necessary to the sufficiency of an affidavit to state an offense under the statute that it should allege that the crime charged was the first or second or other subsequent offense; it being assumed, in the absence of an allegation to the contrary, that the crime charged was a first offense.—State v. Dawson, 78 N. E. 352, 38 Ind. App. 483.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 301–307.  
See, also, 22 Cyc. p. 356.

### § 115. Attempts.

Attempt to commit arson, see ARSON, § 24.  
Attempt to commit assault and battery, see ASSAULT AND BATTERY, § 79.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. § 308.  
See, also, 22 Cyc. p. 363.

### § 117. Construction in general.

#### [a] (Sup. 1854)

When the life or liberty of the accused is in danger, the pleadings are to be construed in

his favor and against the pleader.—Finn v. State, 5 Ind. 400.

[b] The word "said," in an indictment, will be referred to the next antecedent only when the plain meaning requires it.—(Sup. 1858) Wilkinson v. State, 10 Ind. 372; (1860) State v. Fisher, 15 Ind. 374.

[c] An indictment or information ought to be most strongly construed against the state, where its language admits of more than one construction, and is uncertain or ambiguous.—(Sup. 1864) Walker v. State, 23 Ind. 61; (1893) Littell v. Same, 33 N. E. 417, 133 Ind. 577.

#### [d] (Sup. 1876)

Words in an indictment, except such as are technical or defined by law, must be construed in their common and usual acceptation.—State v. Day, 52 Ind. 483, 486.

#### [e] (Sup. 1886)

Where a personal pronoun is so used in an affidavit and information that it may refer to either of two persons, it does not necessarily refer to the person whose name immediately precedes it, but to the one to whom the entire affidavit shows it was intended to refer.—Miller v. State, 107 Ind. 152, 7 N. E. 898.

#### [f] (Sup. 1906)

No intendments are made in aid of a criminal charge, and all doubts are determined in favor of defendant.—Padgett v. State, 167 Ind. 179, 78 N. E. 663.

#### [g] (Sup. 1908)

In considering the sufficiency of an indictment, the court will not indulge a presumption against accused.—State v. Metsker, 169 Ind. 555, 83 N. E. 241; Id., 83 N. E. 1135, 169 Ind. 701.

#### [h] (Sup. 1908)

While ungrammatical or awkwardly constructed sentences will not vitiate an indictment or information where the meaning is plain, Burns' Ann. St. 1908, § 2040, provides that it must contain a statement of the facts constituting the offense in plain and concise language, and, as the burden cannot be cast upon the opposite party to correctly interpret doubtful allegations as to matters of substance, all substantial doubts on seasonable attack will be resolved against the pleader.—Regadanz v. State, 171 Ind. 387, 86 N. E. 449.

The sufficiency of a criminal charge must be judged according to the force of its general scope and structure.—Id.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. § 310.

See, also, 22 Cyc. pp. 300, 301; note, 28 L. R. A. 395.

**§ 118. Surplusage and unnecessary matter.**

See RIOT, § 5.

Carrying weapons, see WEAPONS, § 17.

Charge of assault and battery with intent to kill, see ASSAULT AND BATTERY, § 74.

Necessity of proof, see post, § 167.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 311-315.

See, also, 22 Cyc. pp. 367-371.

**§ 119. — In general.**

[a] (Sup. 1857)

An information for a tort will not be quashed for alleging that the defendant is a person of color.—*Weaver v. State*, 8 Ind. 410.

[b] (Sup. 1882)

Where an information sufficiently charges one offense, and insufficiently charges another, the latter may be rejected as surplusage. The information is good as to the offense sufficiently charged.—*Smith v. State*, 85 Ind. 553.

[c] Surplusage does not invalidate an indictment.—(Sup. 1882) *Feigel v. State*, 85 Ind. 580; (1907) *Myers v. Same*, 169 Ind. 403, 82 N. E. 703.

[d] (Sup. 1893)

Rev. St. 1881, § 1756, subd. 6, providing that no indictment shall be quashed "for any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged," does not authorize the striking out of words and sentences, regardless of the general tenor and scope of the indictment, so as to entirely change its meaning.—*Littell v. State*, 133 Ind. 577, 33 N. E. 417.

[e] (Sup. 1904)

An indictment or information will not be condemned for surplusage or informality when the language used charges a public offense with reasonable certainty.—*Selby v. State*, 69 N. E. 463, 161 Ind. 607.

[f] (App. 1905)

*Burns' Ann. St. 1901*, § 1825, provides that no information shall be quashed on account of any repugnancy or surplusage. Section 7283c declares it unlawful for the proprietor of a saloon to "permit" any person to go into the saloon room at times when the sale of liquor is prohibited by law. *Held*, that an allegation that defendant did unlawfully "suffer, allow, and permit" a certain person to go into the saloon room on a day when the sale of liquor was prohibited by law was sufficient, excluding the words "suffer" and "allow," which would be rejected as surplusage.—*Botkins v. State*, 75 N. E. 298, 36 Ind. App. 179.

[g] (App. 1906)

If one offense be sufficiently averred in an indictment or affidavit, the pleading will not be rendered bad by the fact that another of-

fense also is defectively averred, as the latter will be treated as surplusage.—*State v. Dawson*, 78 N. E. 352, 38 Ind. App. 483.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 311-314.

See, also, 22 Cyc. p. 369.

**§ 121. Bill of particulars.**

[a] (Sup. 1906)

Under Acts 1905, p. 626, c. 169, § 191, providing that the facts must be stated in an indictment in such a clear, full, and certain manner as to reasonably apprise the defendant of what he is required to meet, and that any failure to do so may be reached by a motion to quash, a defendant indicted for embezzlement is not entitled to an order directing the state to furnish a bill of particulars.—*Sherrick v. State*, 167 Ind. 345, 79 N. E. 193.

Where a public officer was charged with conversion of moneys, bills, bank checks, and drafts belonging to the state, which he had in his possession and under his control as Auditor of State, he was not entitled to a bill of particulars for the purpose of informing him as to how, from whom, and on what account, the property alleged to have been converted came into his hands.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 316-320;

14 CENT. DIG. Crim. Law, § 1378; 24

CENT. DIG. Gaming, § 229.

See, also, 22 Cyc. p. 371.

**§ 122. Variance from preliminary proceedings.**

*Idem sonans*, see NAMES, § 16.

[a] (Sup. 1856)

An information under 2 Rev. St. p. 437, § 28, charged that A. kept a tenpin alley for hire, and that defendant and a companion hired the alley to play a game of tenpins, for which they agreed to pay A. ten cents, and then played the game, by which defendant won of his companion five cents, the half of the hire of the alley, by unlawfully wagering with him the said five cents on the result of the game. *Held*, that there was no variance between the information and an affidavit filed therewith which averred that defendant and his companion each agreed to pay five cents for the use of the alley, instead of agreeing jointly to pay ten cents.—*Mount v. State*, 7 Ind. 654.

The affidavit in a prosecution for a misdemeanor must allege the same offense and person subsequently charged in the information, but the information need not follow the affidavit in the manner in which it sets forth the particular facts which constitute the offense.—*Id.*

[b] (Sup. 1861)

An affidavit alleged that defendant lived in open fornication from October 20, 1858, to September 25, 1859, and the information based

thereon alleged the time to be from September 20, 1858, to October 25, 1859. *Held*, that, whatever the effect might have been on motion to quash, the information was good on motion in arrest.—*State v. Record*, 16 Ind. 111.

[c] (Sup. 1867)

Information for rape which charged that the offense was committed by "Louis Girous" upon the person of "Sarah Tougaw" is supported by an affidavit charging that it was committed by "Lewis Geroux" upon one "Sarah F. Tugaw."—*Girous v. State*, 29 Ind. 93.

[d] (Sup. 1882)

The affidavit must support the information. Where one charges the offense as having been committed on December 24, 1881, and the other charges it as having been committed on January 24, 1881, a motion to quash must be sustained.—*Dyer v. State*, 85 Ind. 525.

[e] (Sup. 1889)

There is no variance between the charge in an affidavit, before a justice, of receiving stolen goods knowing them to be stolen, and an amended affidavit and information, in the circuit court, charging, in the first count, that defendant received stolen goods, and, in the second, the larceny of the goods.—*Kennegar v. State*, 120 Ind. 176, 21 N. E. 917.

[f] (Sup. 1890)

An information charged that defendant falsely swore upon being examined on a criminal charge commenced on an affidavit made by "James R. Shea." The record entry made by the mayor stated that the affidavit was made by "R. Shea," but the affidavit itself, as it appeared in the record, purported to be signed by "James R. Shea." *Held* no variance.—*Stefani v. State*, 124 Ind. 3, 24 N. E. 254.

[g] (Sup. 1896)

In a prosecution for perjury the affidavit alleged the perjury to have been at the trial of a certain action on September 26, 1893. The information, after alleging that the action was "pending" September 26, 1899, alleged that the perjury was committed at the trial of the action September 26, 1893. *Held*, that there was no repugnancy between the affidavit and the information.—*Smith v. State*, 145 Ind. 176, 42 N. E. 1019.

[h] (App. 1896)

Upon a prosecution by affidavit and information, where the affidavit failed to allege the county in which the offense was committed, the information founded thereon was bad, even though the venue was properly laid in the information.—*Rice v. State*, 15 Ind. App. 427, 44 N. E. 319.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 321-325;  
24 CENT. DIG. Gaming, § 230.

## § 123. Aider by preliminary complaint or warrant.

[a] (Sup. 1881)

On a motion to quash an indictment which fails to designate the name of the accused, the affidavit on which it was based cannot be considered with it; and it cannot be presumed to have been amended to conform to the affidavit.—*Keiser v. State*, 78 Ind. 430.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. § 320.

## VI. JOINDER OF PARTIES, OFFENSES, AND COUNTS, DUPLICITY, AND ELECTION.

Verdict on indictment containing several counts, see CRIMINAL LAW, § 878.

## § 124. Joinder of parties.

[a] (Sup. 1826)

A count for larceny against A., and another for receiving stolen goods against B., are properly joined.—*Redman v. State*, 1 Blackf 429.

[b] (Sup. 1868)

The fact that some of the counts of an indictment, all the counts of which charge the same felony, against the same persons, include also another person as a defendant, does not render the whole indictment bad.—*Casily v. State*, 32 Ind. 62; *Clark v. Same*, Id. 67.

[c] (Sup. 1898)

Where two defendants joined in a false affidavit for a continuance, signing it together, being sworn together, and one certificate of oath being attached, an indictment charging both with perjury is not joint only, but joint and several.—*State v. Winstandley*, 51 N. E. 92, 151 Ind. 316.

Burns' Rev. St. 1894, § 1891 (Rev. St. 1881, § 1822), provides that when an indictment is for a felony charged against two or more defendants jointly, any defendant requesting it before the jury is sworn must be tried separately; and section 1825, cl. 10, provides that defects in criminal pleadings, which do not tend to prejudice the substantial rights of the defendant upon the merits, shall be disregarded. *Held*, that since two defendants jointly indicted for perjury were entitled to separate trials, if demanded, they were not prejudiced by the fact that they were jointly indicted, and that such an indictment was valid.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 327-333;  
4 CENT. DIG. Assault, § 113; 24 CENT.  
DIG. Gaming, § 231.

See, also, 20 Cyc. p. 902, 22 Cyc. pp. 373-376.

## § 125. Duplicity.

Motion to quash or set aside, see post, § 137.

[a] An indictment charging that the defendant unlawfully, maliciously, etc., destroyed, and maliciously, etc., caused to be destroyed a certain quantity of potatoes, cannot be objected to on the ground that it contains two distinct offenses.—(Sup. 1840) *State v. Kuns*, 5 Blackf. 314; (1857) *Boswell v. State*, 8 Ind. 499.

[aa] (Sup. 1841)

An indictment for disturbing a religious society, etc., may charge defendant, in the same count, with disturbing the society and its members.—*State v. Ringer*, 6 Blackf. 109.

[b] (Sup. 1846)

A count in an indictment charging three offenses is bad for duplicity.—*State v. Shields*, 8 Blackf. 151.

[bb] (Sup. 1847)

An indictment alleging that defendant did "destroy and injure and cause to be destroyed" a certain mare is not multifarious.—*State v. Slocum*, 8 Blackf. 315.

[c] An indictment for keeping a gaming house is not bad for charging that the defendant kept and suffered his house to be used for gaming, etc.; otherwise, if the allegation is used in the disjunctive.—(Sup. 1850) *Dormer v. State*, 2 Ind. 308; (1870) *Crawford v. Same*, 33 Ind. 304.

[cc] (Sup. 1850)

An indictment charging defendant with keeping and suffering a house to be kept for gaming is not bad, as charging two offenses.—*State v. Ryman*, 2 Ind. 370.

[d] (Sup. 1853)

A count in an indictment under Rev. St. 1843, c. 53, § 100, alleging that defendant did "suffer his house, building, room, arbor, booth, shed, and tenement to be used and occupied for gaming, is not duplicious because of the places being alleged in the conjunctive.—*State v. Alsop*, 4 Ind. 141.

[dd] (Sup. 1853)

The offenses of receiving and concealing a specified stolen article may be joined in the same count.—*Keefer v. State*, 4 Ind. 246.

[e] (Sup. 1860)

An indictment charging that defendants did "make an assault," and then and there did "beat, bruise," etc., is not bad as charging both an assault and an assault and battery with intent, etc.—*State v. Farley*, 14 Ind. 23.

[ee] (Sup. 1860)

An information for maliciously killing two horses, the one by poisoning and the other by stabbing, is not duplicious.—*Hayworth v. State*, 14 Ind. 590.

[f] (Sup. 1866)

An indictment under 1 Gav. & H. Rev. St. p. 16, alleging that defendant, without a license, did unlawfully sell for one dime, barter for, and give away certain intoxicating liquor

in a less quantity than a quart, is not objectionable as duplicitous or uncertain; it not being an offense under the statute to give away or barter for liquor.—*Steel v. State*, 26 Ind. 92.

[ff] Duplicity in an indictment for a misdemeanor is a formal defect, not affecting the substantial rights of the defendant, and hence, under the statute (2 Gav. & H. St. p. 404, § 61), is not a defect for which the indictment can be quashed.—(Sup. 1866) *Shafer v. State*, 26 Ind. 191; (1876) *State v. Wickey*, 54 Ind. 438.

[g] (Sup. 1869)

An indictment of T. for obtaining money and a signature as surety by false pretenses charged that defendant "feloniously, designedly and with intent to defraud one G., did fraudulently pretend to said G. that he, said T., was then and there the owner of a certain house and lot in a certain town named, in an adjoining state named, of great value, to wit, \$2,000 and a certain harness shop in another town named, in said adjoining state named, of great value, to wit, \$650, by means of which said false pretenses, the said G. relying upon and believing the same to be true, said T. did then and there feloniously obtain from said G. on his, said T.'s sole, and individual credit, the sum of \$400 lawful money as a loan for nine months, and the signature of said G.," etc., "with intent then and there to defraud said G., whereas in truth said T. was not then and there the owner," etc. *Held*, that the indictment was not double.—*Todd v. State*, 31 Ind. 514.

[gg] An indictment under Rev. St. 1881, § 2079, charged defendant with "knowingly permitting" gaming to be carried on in his building, and also with "keeping" a building to be used for gaming, in the same count. *Held* not bad for duplicity, since, where both offenses were committed at the same time, by the same person, as a part of the same transaction, and subject the offender to the same punishment, they may be joined conjunctively in one count as one offense.—(Sup. 1870) *Crawford v. State*, 33 Ind. 304; (1885) *Davis v. State*, 100 Ind. 154.

[h] (Sup. 1872)

An indictment charging that defendant did "barter and sell" intoxicating liquor, and alleging that the liquor was sold for 20 cents, is an indictment for a sale only; the word "barter" being surplusage.—*Leary v. State*, 39 Ind. 360.

[hh] (Sup. 1876)

In an indictment for selling intoxicating liquor on Sunday, an averment that defendant had no license or permit to sell does not render the indictment bad for duplicity. The averment is merely surplusage.—*State v. Hutzell*, 53 Ind. 160.

## [l] (Sup. 1876)

An information charging that defendant did "sell, barter and give away" intoxicating liquor, but not alleging that anything was paid or exchanged for the liquor, charges neither a sale nor a barter, and hence is not duplicitous, being a charge merely of giving away.—*Eagan v. State*, 53 Ind. 162.

[ii] An indictment for the sale of intoxicating liquors without license, charging the sale of such liquor "in a less quantity than a quart at a time, to wit, the quantity of two gills, at and for the price of 10 cents, to be then and there drunk, and suffered to be drunk in the house," etc., of the defendant, is not bad for duplicity.—(Sup. 1876) *State v. Wickey*, 54 Ind. 438; (1877) *Id.*, 57 Ind. 596.

## [j] (Sup. 1877)

An indictment charging the defendant with having been found on the Sabbath day "unlawfully at common labor, and engaged in his usual avocation, to wit," etc., is not bad for duplicity.—*McCarthy v. State*, 56 Ind. 203.

## [jj] (Sup. 1877)

An indictment for assault with intent to murder, charging that the defendant did "unlawfully, feloniously, purposely, and with premeditated malice" make an assault upon a certain person, and "did feloniously, purposely, and with premeditated malice shoot a certain pistol" at such person, with intent to kill him, was not bad for duplicity.—*Jones v. State*, 60 Ind. 241.

## [k] (Sup. 1880)

An indictment which charges in technical terms an assault and an assault and battery with intent to rob is not bad for duplicity.—*Dickinson v. State*, 70 Ind. 247.

## [kk] (Sup. 1881)

An indictment for larceny in several counts where a different person is charged as the owner in each count, is not bad for duplicity.—*Cooper v. State*, 79 Ind. 206.

## [kkk] (Sup. 1881)

Acts 1881, p. 211, § 172, prescribes a fine for writing, printing, advertising, or in any way publishing an account of a lottery or gift enterprise, or for "in any way giving publicity to such lottery, gift enterprise," etc. *Held*, that an information charging that the defendant did "unlawfully write, advertise, and publish an account of" a gift enterprise named, and did "give publicity to such gift enterprise by unlawfully circulating a large number of printed copies of said account," did not charge two offenses under the statute.—*Lohman v. State*, 81 Ind. 15.

## [l] (Sup. 1882)

An indictment for maintaining a public nuisance, charging in one count the maintenance of a slaughter house and the pollution of the water of a running stream, *held* bad for duplicity.—*Knopf v. State*, 84 Ind. 316.

## [ll] (Sup. 1883)

In criminal pleadings there can be no joinder of separate and distinct offenses in one and the same count.—*State v. Weil*, 89 Ind. 286.

## [m] (Sup. 1884)

An indictment under Rev. St. 1881, § 5320, for selling intoxicating liquors without license, and charging that a certain quantity was sold to be drunk and suffered to be drunk in the defendant's house, outhouse, yard, garden, and the appurtenances thereto, is not bad for duplicity.—*Stout v. State*, 93 Ind. 150.

## [mm] (Sup. 1884)

Where defendant is charged in technical terms in a single count with an assault and an assault and battery with intent to commit a felony, for each of which offenses the same punishment is prescribed by Rev. St. 1881, § 1909, there is no such duplicity as will afford ground for quashing the indictment.—*Siebert v. State*, 95 Ind. 471.

## [n] (Sup. 1884)

An indictment alleging that defendant at a certain time and place did unlawfully, feloniously, without malice, and involuntarily kill a person named by shooting him, while the defendant was in the commission of an unlawful act, to wit, drawing a deadly weapon, a revolver, and not in defense of his person or property, or of those lawfully entitled to his protection, is not bad for duplicity.—*Surber v. State*, 99 Ind. 71.

## [nn] (Sup. 1885)

An indictment is not bad for duplicity for joining in one count, as one offense, offenses committed at the same time by the same person as parts of the same transaction, and subjecting defendant to the same punishment.—*Davis v. State*, 100 Ind. 154.

## [o] (Sup. 1885)

An indictment charging the procuring an abortion, and closing, "and, in manner and form and by the means aforesaid, did then and there \* \* \* kill and murder her, the said A. B.," *held* not bad for duplicity.—*Traylor v. State*, 101 Ind. 65.

## [oo] (Sup. 1885)

An indictment which charges the defendant with only one offense, as the same is defined in the statute, is not bad for duplicity merely because it charges him with the commission of several distinct acts at the same time and place, either one of which would be sufficient alone to constitute a proper charge of such offense.—*Fahnestock v. State*, 102 Ind. 156, 1 N. E. 372.

## [p] (Sup. 1886)

An indictment charging a single sale to a minor of "intoxicating, spirituous, vinous, and malt liquors" is not bad for duplicity.—*Kreamer v. State*, 106 Ind. 192, 6 N. E. 341.

[pp] (Sup. 1886)

An indictment which charges that the accused created a nuisance by doing all of the acts prohibited by the single section of the statute (Rev. St. 1881, § 2066), defining a nuisance, is not bad for duplicity.—*Mergentheim v. State*, 107 Ind. 567, 8 N. E. 568.

[q] (Sup. 1887)

An information under section 2003 of the Criminal Code, which charges that the accused did unlawfully frequent and live in a house of ill fame, kept by J. S., did unlawfully associate with women of bad character for chastity in public places, and did commit fornication for hire, charges but one offense, that of being a prostitute, and is not bad for duplicity.—*State v. Stout*, 112 Ind. 245, 13 N. E. 715.

[qq] (Sup. 1888)

An affidavit charging that defendant, at a certain place, did then and there unlawfully sell to W. and B. a less quantity than a quart of intoxicating liquor, to wit, four gills of beer, for the sum of 10 cents, to be drunk as a beverage, said day being the first day of the week, commonly called "Sunday," sufficiently charges the unlawful sale of liquors on Sunday, under Rev. St. 1881, § 2098, and does not charge a sale without a license, contrary to section 5320, so as to make it bad for duplicity.—*Henry v. State*, 113 Ind. 304, 15 N. E. 593.

[r] (Sup. 1888)

An indictment for murder charging an assault as part of the offense, is not bad for duplicity.—*Warner v. State*, 114 Ind. 137, 16 N. E. 189.

[rr] (Sup. 1889)

The two offenses of receiving stolen goods and of the larceny of the goods are properly joined in the same information.—*Kennegar v. State*, 120 Ind. 176, 21 N. E. 917.

[s] (Sup. 1890)

Under Rev. St. 1881, § 1983, which makes it an offense to provoke or attempt to provoke, one having the present ability so to do, to commit an assault and battery, an affidavit charging in a single count that defendant "did provoke, and attempt to provoke," is not bad for duplicity.—*Marshall v. State*, 123 Ind. 128, 23 N. E. 1141.

[ss] (Sup. 1891)

An information which charges in one count that the defendant stole an article belonging to one man and an article belonging to another man, without alleging that the two articles were stolen at the same time and by the same act, is bad for duplicity.—*Joslyn v. State*, 128 Ind. 160, 27 N. E. 492, 25 Am. St. Rep. 425.

[t] (Sup. 1891)

An indictment is not bad because it charges that defendant did "introduce" and "cause to be introduced" an instrument to produce an abortion, since an accessory before the fact may be charged as a principal.—*Rhodes v. State*,

128 Ind. 189, 27 N. E. 866, 25 Am. St. Rep. 429.

An indictment for abortion is not bad for duplicity because it shows both miscarriage and death.—*Id.*

[tt] (Sup. 1893)

*Elliott*, Supp. § 362 (White Cap Act.) provides "that if three or more persons shall unite or combine together for the purpose of doing any unlawful act in the nighttime, or for the purpose of doing any unlawful act, while wearing white caps, masks, or being otherwise disguised, shall be deemed guilty of a riotous conspiracy, and upon conviction therefor shall be imprisoned in the state prison not more than ten years nor less than two years, and fined in any sum not exceeding two thousand dollars." *Held*, that a count in an information charging that defendants did "unlawfully and feloniously unite and combine together for the purpose of unlawfully and feloniously, in a rude, insolent, and angry manner, striking, beating, and bruising one B. in the nighttime, and for the said unlawful purpose said defendants did then and there disguise themselves by wearing masks and being otherwise disguised," is not bad for duplicity.—*Hobbs v. State*, 133 Ind. 404, 32 N. E. 1019, 18 L. R. A. 774.

[ttt] Where a statute makes it an offense to do any one of a number of things mentioned disjunctively, all of which are punishable alike, any or all of them may be charged conjunctively in a single count.—(Sup. 1893) *State v. Sarlls*, 34 N. E. 1129, 135 Ind. 195; (App. 1893) *Same v. Malone*, 35 N. E. 198, 8 Ind. App. 8; (Sup. 1897) *Same v. Fidler*, 47 N. E. 464, 148 Ind. 221; (App. 1906) *Same v. Dawson*, 78 N. E. 352, 38 Ind. App. 483.

[u] (App. 1893)

An indictment charging defendants with obstructing certain public highways, by erecting and maintaining in said highways a certain pole and post, is not bad for duplicity in that it charges more than one offense, when it appears that the obstruction, though affecting more than one road, was placed at their intersection.—*Clift v. State*, 6 Ind. App. 199, 33 N. E. 211.

[uu] (App. 1893)

Rev. St. 1881, § 2170, provides that a conductor or other person having charge of a freight train, who suffers it to remain standing across a highway, street, or alley, or who, when it becomes necessary to stop a train across such way, fails to leave a space of 60 feet, shall be fined. *Held*, that an affidavit charging that a conductor did unlawfully suffer a train to remain standing across a street, and did fail to leave a space of 60 feet across said street, was not bad for duplicity.—*State v. Malone*, 8 Ind. App. 8, 35 N. E. 198.

[uuu] (Sup. 1896)

It is proper under Rev. St. 1894, § 1817 (Rev. St. 1881, § 1748), to include in the same

indictment a charge of theft and also of receiving stolen property.—*Goodman v. State*, 141 Ind. 35, 39 N. E. 939.

[v] (Sup. 1897)

An indictment charged that defendant did falsely, etc., make, forge, counterfeit, and utter a certain promissory note, with intent to feloniously, falsely, and fraudulently defraud, etc. *Held* not to charge two offenses, under Rev. St. 1894, § 2354, providing that whoever falsely makes, alters, forges, etc., any promissory note, etc., with intent to defraud, or utters or publishes as true any such instrument, knowing the same to be false, with intent to defraud, shall be imprisoned in the state prison, etc.—*State v. Fidler*, 47 N. E. 464, 148 Ind. 221.

[vv] (Sup. 1897)

An indictment under Burns' Rev. St. 1894, § 1996, imposing a penalty on one attempting to procure a miscarriage, "if the woman miscarries or dies in consequence," is not bad for duplicity because it alleges both miscarriage and death.—*Hauk v. State*, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465.

[vvv] (App. 1897)

Before an affidavit can be held bad for duplicity, there must be a joinder of two or more separate offenses in one count; it not being duplicitous merely because it contains a part only of the averments necessary to charge a second offense.—*Herron v. State*, 46 N. E. 540, 17 Ind. App. 161.

[w] (Sup. 1899)

An information charging that defendant, on a certain day, at a certain place, did "then and there," steal of the property of J., \$5, and the property of S., \$4.50, is not bad for duplicity, as prima facie it discloses that the property of both J. and S. was taken at the same time, and as part of the same transaction.—*Furnace v. State*, 54 N. E. 441, 153 Ind. 93.

[ww] (Sup. 1900)

Under Burns' Rev. St. 1894, § 1992 (Rev. St. 1881, § 1919; Horner's Rev. St. § 1919), providing that whoever administers "or" procures poison to be administered to any other human being, with intent to kill, shall be guilty, etc., an indictment which charged that the defendant did administer "and" procure to be administered a certain poison to another is not bad for duplicity or uncertainty, since the statute punishes both the administering of the poison and the procuring of the same to be administered, and proof of one or both will sustain a conviction; and under such a statute the pleader has the right to charge as many of the specified offenses, by using the conjunction "and," as he thinks the evidence will support.—*Rosenbarger v. State*, 56 N. E. 914, 154 Ind. 425.

[www] (Sup. 1901)

Where, in a prosecution for obtaining personality under false pretenses, an information

alleging that the accused obtained possession of the property by giving in exchange therefor Confederate money, which he represented to be the good and lawful money of the United States, does not charge two offenses in the same count, that of obtaining the property by false tokens and by false representations, but only that of obtaining the property by the false representations of the value of the money used, since the Confederate money was genuine when issued.—*Pinney v. State*, 59 N. E. 383, 156 Ind. 167.

[x] (Sup. 1901)

The words "false" and "fraudulent" being used disjunctively in the statute, the indictment for presenting a false and fraudulent claim against a county did not charge two crimes, and therefore was not bad for duplicity.—*Ferris v. State*, 59 N. E. 475, 156 Ind. 224; *Wilson v. State*, 59 N. E. 380, 60 N. E. 1086, 156 Ind. 631.

[xx] (Sup. 1901)

In a prosecution under Burns' Rev. St. 1894, § 2353 (Rev. St. 1881, § 2205; Horner's Rev. St. 1897, § 2205), providing that whoever, knowing the same to be false, shall present for payment to the county auditor or other officer any claim, false or fraudulent, for the purpose of procuring the allowance of the same, or an order for payment thereof, shall be imprisoned, etc., an indictment charging that defendant, with intent to cheat and defraud, filed a false and fraudulent claim against the county, "for the purpose of securing its allowance by the board of commissioners, and procuring an order on the county for payment thereof," was not bad for duplicity.—*Ferris v. State*, 59 N. E. 475, 156 Ind. 224.

[xxx] (Sup. 1901)

Burns' Rev. St. 1894, § 2353, makes it an offense to present for payment to a board of county commissioners any claim, knowing the same to be false or fraudulent. *Held*, that an indictment was not bad for duplicity because it charged defendant with having presented a false and fraudulent claim, since the language of the indictment only charged defendant with one crime—presenting a claim that was both false and fraudulent.—*Wilson v. State*, 59 N. E. 380, 60 N. E. 1086, 156 Ind. 631.

[y] (App. 1904)

Under Burns' Ann. St. 1901, § 2180, providing that whoever, for the purpose of gambling with cards or otherwise, travels from place to place, or frequents any place where gambling is permitted, or engages in gambling for a livelihood, is a common gambler, all the acts mentioned disjunctively in the statute may be charged conjunctively in a single count of an indictment as constituting a single offense.—*Bickel v. State*, 70 N. E. 548, 32 Ind. App. 656.

[yy] (App. 1904)

Burns' Ann. St. 1901, § 2291, imposes a penalty on any one having charge of a railway train who permits the same to remain standing across any street, or who, whenever it becomes necessary to stop a train across any street, fails to leave a certain space across the street. *Held*, that where, on a prosecution under the statute, the affidavit charged the stopping of a train across a street, and failure to leave a space, the act charged constituted but one offense.—Becker v. State, 71 N. E. 188, 33 Ind. App. 261.

[yyy] (App. 1904)

An information charging defendant with unlawfully using a building as a slaughterhouse, and rendering animals therein at and near certain public highways, and with unlawfully permitting the slaughterhouse to become offensive from decayed animal matter, so that the air thereabouts was contaminated, whereby the enjoyment of life of the inhabitants there living was prevented, and their health and the health of the public passing along the highway endangered, does not charge two separate offenses.—Lipschitz v. State, 72 N. E. 145, 33 Ind. App. 648.

[z] (Sup. 1907)

An indictment alleging that accused operated, near public highways and residences of divers inhabitants, a grease and fertilizer factory; that he hauled to the factory carcasses of dead animals, cut the same to pieces, cooked the bodies thereof, and caused offensive smells to escape; that large quantities of blood and offal of the bodies were permitted to run over the floor of the building; that he stored in the building and threw out on the ground nearby large quantities of the cooked meat and bones, whereby the air in and about the factory became noxious, and that the inhabitants residing in the neighborhood and the persons traveling on the highways were injured thereby—charges an offense under the public offense act (Acts 1905, p. 709, c. 169, § 535), punishing one who maintains any building for any business which by occasioning noxious exhalations becomes injurious to the comfort and property of individuals or the public, and does not charge an offense under section 537, punishing one who puts the carcass of dead animals on any field, street, etc., to the annoyance of any persons, and it is not bad for duplicity.—Myers v. State, 169 Ind. 403, 82 N. E. 763.

[zz] (Sup. 1908)

Under Act March 16, 1907 (Acts 1907, p. 689, c. 293, § 1; Burns' Ann. St. 1908, § 8351), making it an offense to keep a place where intoxicating liquors are illegally sold, or to be found in possession of such liquors for such purpose, an affidavit charging defendant with unlawfully keeping a place where intoxicating liquors were illegally sold, and with keeping in his possession such liquors for the purpose of making such unlawful sales thereon, charged

but one offense, and was not bad for duplicity.—Yazel v. State, 170 Ind. 535, 84 N. E. 972.

[zzz] (Sup. 1908)

An indictment for rape on a child under 16 years of age, which charges an assault and battery and rape, is not bad for duplicity.—Cheek v. State, 171 Ind. 98, 85 N. E. 779.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 334-400; 4 CENT. DIG. Assault, § 114; 24 CENT. DIG. Gaming, §§ 224, 232; 25 CENT. DIG. High. § 449; 37 CENT. DIG. Nuis. § 206; 41 CENT. DIG. R. R. § 784.  
See, also, 20 Cyc. p. 902, 21 Cyc. p. 859, 22 Cyc. pp. 376-389.

#### § 126. Joinder of counts.

Alder by verdict, see post, § 202.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 401-424; 18 CENT. DIG. Embez. § 39; 24 CENT. DIG. Gaming, § 233.  
See, also, 6 Cyc. p. 224, 8 Cyc. p. 660, 20 Cyc. p. 902, 21 Cyc. p. 859, 22 Cyc. pp. 389-404.

#### § 127. — In general.

[a] (Sup. 1875)

An indictment containing a valid charge of an assault and battery, and a bad charge of an intent to commit a crime, is good on a motion to quash.—Greer v. State, 50 Ind. 267, 19 Am. Rep. 709; McGuire v. Same, 50 Ind. 284.

[b] (Sup. 1905)

Under the statutes, a prosecution by affidavit and information may be on more than one count.—Knox v. State, 73 N. E. 255, 164 Ind. 226, 108 Am. St. Rep. 291.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 401, 402.  
See, also, 22 Cyc. p. 389.

#### § 128. — Same offense.

[a] (Sup. 1835)

A count charging a robbery of A. may be joined with a count charging an assault with intent to rob A.—McGregg v. State, 4 Blackf. 101.

[b] (Sup. 1850)

An indictment may contain several counts charging the same transaction, though amounting to a felony, in different modes, in order to meet the proof of the case; and the indictment cannot be quashed for this cause if it do not appear that different transactions or felonies are charged.—Engleman v. State, 2 Ind. 91, 52 Am. Dec. 494.

[c] (Sup. 1860)

Counts alleging a murder by burning, by beating, and by both burning and beating, may be joined.—Joy v. State, 14 Ind. 139.

## [d] (Sup. 1873)

An indictment may charge a larceny of A.'s property in one count, and of B.'s in another count, at the same time and place, where the character of the property is such that it may have constituted one offense, and a conviction of one of the alleged larcenies might be a bar as to the other.—*Bell v. State*, 42 Ind. 335.

## FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 403-413;

18 CENT. DIG. Embez. § 39; 24 CENT. DIG. Gaming, § 233.

See, also, 22 Cyc. pp. 390-393.

## § 129. — Different offenses in same transaction.

[a] One may be charged in one count of an indictment with stealing and in another with receiving stolen goods.—(Sup. 1853) *Keefer v. State*, 4 Ind. 246; (1860) *Maynard v. State*, 14 Ind. 427.

## [b] (Sup. 1860)

Where an indictment contains two counts, one for making and the other for uttering false coin, it is discretionary with the trial court whether or not the indictment shall be quashed for charging more than one felony against defendant.—*McGregor v. State*, 16 Ind. 9.

Different felonies, not belonging to different classes or growing out of separate transactions, may sometimes be joined in the same indictment, without subjecting it to be quashed, or the prosecutor being put to his election.—*Id.*

## [c] (Sup. 1892)

Under Rev. St. 1881, § 1748, providing that an indictment for larceny may contain a count for obtaining the same goods by burglary, it need not affirmatively appear from the indictment that the goods are the same, and it is sufficient that the contrary does not appear.—*McCullough v. State*, 31 N. E. 1116, 132 Ind. 427.

## [d] (Sup. 1897)

Under Rev. St. 1894, § 1817 (Rev. St. 1881, § 1748), allowing an indictment for larceny to contain a count charging burglary, the latter count need not describe the goods intended to be stolen as the same goods charged in the other count to have been stolen.—*Reed v. State*, 46 N. E. 135, 147 Ind. 41.

## FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 414-418;

4 CENT. DIG. Arson, § 33.

See, also, 22 Cyc. pp. 394-397; note, 41 Am. Rep. 249.

## § 130. — Distinct offenses in general.

## [a] (Sup. 1844)

The joinder of counts for separate felonies in an indictment is a good cause for quashing the indictment, on motion made before pleading to issue.—*Weinzorpflin v. State*, 7 Blackf. 186.

## [b] (Sup. 1847)

If it appear that the several counts in an indictment charge distinct felonies, and not one and the same felony in different words, the indictment should be quashed.—*State v. Smith*, 8 Blackf. 489.

## [c] (Sup. 1875)

Different counts charging felonies may be joined in the same indictment.—*Mershon v. State*, 51 Ind. 14.

## [d] (Sup. 1878)

Several felonies of the same class may be joined in different counts in the same indictment.—*Merrick v. State*, 63 Ind. 327.

## [e] (Sup. 1881)

An indictment properly charged a larceny in separate counts in each of which the goods stolen were alleged to be the property of different persons.—*Cooper v. State*, 79 Ind. 206.

## [f] (Sup. 1887)

Where an indictment contained several counts, it should not be quashed because of misjoinder, unless it clearly appeared on the face thereof that different and distinct crimes were charged in the different counts which could not be joined in the same indictment, and unless the prosecutor declined to elect and manifested a purpose to insist on a conviction on each count.—*Glover v. State*, 10 N. E. 282, 109 Ind. 391.

## FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 419-421.

See, also, 22 Cyc. p. 398.

## § 132. Election.

Election between acts of accused, proof of which is offered under one count, see CRIMINAL LAW, § 678.

## [a] (Sup. 1835)

If an indictment for a felony contain several counts, and it be proved to be the design of the prosecuting attorney to convict the defendant of separate felonies, the court will compel him to elect on which count he will rely; but the mere circumstance of there being several counts is not of itself sufficient to require such an election to be made.—*McGregg v. State*, 4 Blackf. 101.

## [b] (Sup. 1844)

The joinder of counts for separate felonies in an indictment is a good cause for quashing the indictment, on motion made before pleading to issue; but the refusal of the court, in such case, after plea, to compel the prosecuting attorney to elect on which count he will proceed, is not error.—*Weinzorpflin v. State*, 7 Blackf. 186.

## [c] (Sup. 1850)

If an indictment contains several counts charging the same larceny in different modes, the defendant cannot, without showing other cause than what appears on the face of the in-

dictment, on motion, compel the prosecutor to elect on which count he will proceed; but the prosecutor may apply the evidence relating to the larceny to whichever count it will sustain; but if, on the trial, the evidence tends to show distinct larcenies which might be embraced in the indictment, the prosecutor will be compelled to elect as to which of the larcenies he will rely upon on the trial, and confine his evidence to that.—*Engleman v. State*, 2 Ind. 91, 52 Am. Dec. 494.

[d] The state need not elect on which count of an indictment it will proceed to trial where the several counts relate to the same transaction.—(Sup. 1860) *Joy v. State*, 14 Ind. 139; (1875) *Mershon v. Same*, 51 Ind. 14; (1875) *Miller v. Same*, Id. 405; (1875) *Wall v. Same*, Id. 453; (1905) *Knox v. Same*, 73 N. E. 255, 164 Ind. 226, 108 Am. St. Rep. 291.

[e] (Sup. 1860)

Counts alleging a murder by burning, by beating, and by both burning and beating, may be joined; and the state cannot be compelled to elect between them at the trial.—*Joy v. State*, 14 Ind. 139.

Where the court orders an election on the trial of an indictment containing several counts, it will be presumed that the indictment charged distinct offenses.—Id.

[f] (Sup. 1870)

An indictment charged a burglary and larceny in the first account, larceny in the second, and receiving stolen goods in the third; it being apparent that the same larceny was the subject of the three counts. *Held*, that the state could not be required to elect upon which count it would first put defendant on trial.—*Gandolpho v. State*, 33 Ind. 439.

[g] (Sup. 1871)

Where a defendant was indicted in separate counts in the same indictment for embezzlement and grand larceny, it was not error for the court to refuse to require the state to elect on which count he should be tried.—*Griffith v. State*, 36 Ind. 406.

[h] (Sup. 1875)

An indictment charged, in the first instance, an assault and battery on a certain female, and then, after the words, "and did, then and there," etc., charged substantially that in the same transaction defendant did, "unlawfully, forcibly, and against her will, feloniously ravish, and carnally know," such woman, thereby charging only one substantive offense, that of rape. On motion of defendant the court improperly required the prosecuting attorney to elect whether to put defendant on trial for a rape, or for an assault and battery, and the prosecuting attorney elected to try him for a rape, but the jury returned a verdict for assault and battery. *Held* that on a new trial being granted, it was not error for the court to overrule a motion to quash the indictment, on the ground that such

election eliminated the charge of an assault or an assault and battery, since every charge of rape necessarily includes a charge of assault and battery.—*Mills v. State*, 52 Ind. 187.

[i] (Sup. 1877)

Under an indictment charging a disturbance of a religious body on a certain date, when met for business purposes, evidence was received, without objection, of a prior disturbance of a meeting for purposes of worship. Subsequently evidence was introduced of a disturbance of the meeting charged. *Held*, that the court properly refused to require the state to elect on which disturbance it would rely for a conviction.—*Kidder v. State*, 58 Ind. 68.

[j] (Sup. 1877)

It rests in the discretion of the trial court to compel the state to elect on which of two counts, in an indictment for murder in the first degree, it will put the defendant on trial.—*Snyder v. State*, 59 Ind. 105.

[k] (Sup. 1878)

Where the state gives evidence of one act of the description charged, an election is thereby made, and the state will not then be permitted to show another specific act, and claim a conviction therefor, or abandon the act first shown.—*Richardson v. State*, 63 Ind. 192.

[l] (Sup. 1878)

Several felonies of the same class may be joined in different counts in the same indictment, and the state cannot be compelled to elect upon which one the defendant shall be tried.—*Merrick v. State*, 63 Ind. 327.

[m] (Sup. 1878)

On trial of an indictment containing one count charging burglary and another charging larceny, the court overruled the defendant's motion to compel the state to elect on which count to proceed, and the jury found him guilty of burglary. *Held*, that this was within the discretion of the court, and that the verdict acquitted him of larceny.—*Short v. State*, 63 Ind. 376.

[n] (Sup. 1878)

It is within the discretion of the court to require prosecuting attorney in a criminal case to elect on which of the counts of the indictment he will go to trial; and, where evidence of the facts charged in all of the other counts is admissible under the count on which he has so elected to go to trial, error in compelling the election will be regarded harmless.—*State v. Dufour*, 63 Ind. 567.

[o] (Sup. 1882)

It is a matter for the discretion of the trial court whether the state shall be compelled to elect on which count it will proceed, each count charging the same felony; and the supreme court will not review the decision of the trial court on the point.—*Beaty v. State*, 82 Ind. 228.

[p] (Sup. 1882)

The compelling of an election as to which count of an indictment shall be proceeded upon is discretionary with the court.—*Dantz v. State*, 87 Ind. 398.

[q] (Sup. 1889)

When an information charges in the first count that defendant received stolen goods, and in the second the larceny of the goods, the state is not compelled to elect on which count it will proceed.—*Kennegar v. State*, 120 Ind. 176, 21 N. E. 917.

[r] (App. 1891)

A motion to require the prosecuting attorney to elect for what particular offense he will seek to convict is premature when made before it has been clearly shown by the evidence that more than one distinct offense of the kind charged has been committed by the defendant.—*Squires v. State*, 3 Ind. App. 114, 28 N. E. 708.

[s] (Sup. 1892)

Where an indictment contains counts charging the larceny and burglary of the same goods, it is largely in the court's discretion whether or not to compel the prosecution to elect on which count it will proceed.—*McCollough v. State*, 31 N. E. 1116, 132 Ind. 427.

[t] (Sup. 1897)

Where an indictment charges burglary and larceny in separate counts, the state need not elect.—*Reed v. State*, 147 Ind. 41, 46 N. E. 135.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 425-453; 4 CENT. DIG. Assault, § 114; 6 CENT. DIG. Big. § 32; 23 CENT. DIG. Forg. § 122; 24 CENT. DIG. Gaming, § 234.

See, also, 1 Cyc. p. 194, 20 Cyc. p. 902, 22 Cyc. pp. 404-410; note, 92 Am. Dec. 660.

### VII. MOTION TO QUASH OR DISMISS, AND DEMURRER.

Appellate jurisdiction of proceedings to quash indictment as dependent on whether constitutional question is involved, see COURTS, § 220 (7).

As bar to subsequent prosecution, see CRIMINAL LAW, § 177.

Motion to direct verdict, see CRIMINAL LAW, § 753.

Quashing indictment as termination of prosecution, see MALICIOUS PROSECUTION, § 35.

Waiver of objections to rulings, see post, § 197.

### § 133. Mode of making objections in general.

[a] (Sup. 1842)

An objection to an indictment because the grand jury that found it was irregularly im-

paneled must be made by plea, and not by motion to quash.—*State v. Freeman*, 6 Blackf. 248.

[b] (Sup. 1846)

An indictment cannot be objected to because one of the grand jurors who found it was an alien, since the objection should have been made by challenge.—*State v. Taylor*, 8 Blackf. 178.

[c] (Sup. 1847)

Whether the joinder of counts for distinct felonies in an indictment is a good cause for quashing part of the indictment, quære.—*State v. Smith*, 8 Blackf. 489.

[d] (Sup. 1881)

Where objection is made that the indictment does not accurately describe the property, the same should not be quashed if the objection is not applicable to all the property described. The proper way to save the question is to object to the admission of any evidence concerning the property alleged to have been improperly described.—*Shafer v. State*, 74 Ind. 90.

[e] (Sup. 1881)

A plea in abatement, seeking to attack the manner in which a grand jury was organized, must show, not only that the question presented by it was not raised by a challenge to the array, but also that the defendant had no suitable opportunity of challenging the array.—*McClary v. State*, 75 Ind. 260.

[f] (Sup. 1882)

Merely formal objections to an indictment, such as the manner in which it is signed, by the prosecuting attorney, are not presented either by a motion to quash or in arrest of judgment.—*Knight v. State*, 84 Ind. 73.

[g] (Sup. 1883)

Defects and irregularities not apparent on the face of the indictment must be pleaded in abatement.—*Pointer v. State*, 89 Ind. 255.

[h] (Sup. 1884)

The fact that the grand jurors were not freeholders of the county, if not shown on the face of the indictment itself, cannot be taken advantage of by motion to quash, but only by plea in abatement.—*Mathis v. State*, 94 Ind. 562.

[i] (Sup. 1888)

In criminal pleading for uncertainty in the statement of the facts constituting the offense intended or attempted to be charged, an indictment or information can only be assailed or questioned by a motion to quash, and never by a motion in arrest or by an assignment here, for the first time, that the facts stated in the pleadings are not sufficient to constitute a public offense.—*Stewart v. State*, 16 N. E. 186, 113 Ind. 505.

[j] (Sup. 1895)

For uncertainty in the statement of the facts constituting the offense, an indictment

can only be assailed by a motion to quash, and never by a motion in arrest, nor by an assignment on appeal for the first time that the facts stated do not constitute a public offense.—*Chandler v. State*, 39 N. E. 444, 141 Ind. 106.

[k] (Sup. 1897)

The question whether an indictment states facts constituting an offense should be presented by motion to quash or in arrest, and not by motion to direct a verdict.—*State v. Beach*, 43 N. E. 949, 46 N. E. 145, 147 Ind. 74, 36 L. R. A. 179.

[l] (Sup. 1905)

Though *Burns' Ann. St.* 1901, § 1456 (Rev. St. 1881, § 1391), provides that no person shall be appointed a jury commissioner who at the time is a party to or interested in a cause pending in the county, which may be tried by a jury to be drawn during the calendar year next succeeding his appointment, an indictment found by the grand jury appointed by jury commissioners, one of whom was a stockholder in a corporation against which an action was pending, is not subject to attack by plea in abatement.—*State v. Sutherlin*, 165 Ind. 339, 75 N. E. 642.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 454-468;

24 CENT. DIG. Gaming. § 220.

See, also, 22 Cyc. p. 410.

§ 135. Motion to quash or set aside.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 470-487.

See, also, 22 Cyc. pp. 412-427.

§ 137. — Grounds.

[a] If any of several counts of an indictment are good, a motion addressed to them jointly to quash the indictment should be overruled.—(Sup. 1853) *State v. Staker*, 3 Ind. 570; (1859) *Dukes v. State*, 11 Ind. 557, 71 Am. Dec. 370; (1877) *Jarrell v. Same*, 58 Ind. 293; (1882) *Dantz v. Same*, 87 Ind. 398; (1886) *Bryant v. Same*, 106 Ind. 549, 7 N. E. 217.

[b] (Sup. 1853)

The fact that one of the grand jury was discharged, and another sworn and sent to the grand jury room in his stead, is insufficient grounds to quash an indictment founded upon a bill found by them, where the record shows that there were still 14 grand jurors, and did not show that the juror sworn in the place of the one discharged acted with them in finding the bill.—*State v. Wingate*, 4 Ind. 193.

[c] (Sup. 1853)

The absence of a Christian name of accused from an indictment and of an allegation that he has none may be availed of by motion to quash.—*Gardner v. State*, 4 Ind. 632.

[d] (Sup. 1864)

No indictment shall be quashed for any surplusage or repugnant allegation when there

is sufficient matter alleged to indicate the crime and the person charged, or when the offense is charged with such a degree of certainty that the court may pronounce judgment on a conviction according to the right of the case.—*Wall v. State*, 23 Ind. 150.

[e] A motion to quash an indictment must, as a general rule, be predicated upon objections apparent on the face of the indictment.—(Sup. 1873) *Bell v. State*, 42 Ind. 335; (1874) *Willey v. Same*, 46 Ind. 363.

[f] (Sup. 1875)

An indictment containing a valid charge of an assault and battery, and a bad charge of an intent to commit a crime, is good on a motion to quash.—*Greer v. State*, 50 Ind. 267, 19 Am. Rep. 709; *McGuire v. Same*, 50 Ind. 284.

[g] (Sup. 1878)

Under the express provisions of 2 Rev. St. 1876, p. 399, an indictment may be quashed when it appears upon its face that the grand jury had no legal authority to inquire into the offense, that the facts stated do not constitute a public offense, or that the indictment contains matter which, if true, would constitute a legal justification of the offense charged.—*State v. Howard*, 63 Ind. 502.

2 Rev. St. 1876, p. 386, expressly provides that no indictment or information shall be quashed for any defect or imperfection which does not tend to the prejudice of the substantial rights of defendant upon the merits.—Id.

[h] (Sup. 1881)

Where separate affidavits in support on an information for the illegal sale of intoxicating liquors were treated as separate counts of a single affidavit, and no objection was urged to what was treated as the second count of the affidavit which was sufficient, there was no error in the court's refusing to quash the affidavit as a whole.—*Stoner v. State*, 80 Ind. 89.

[i] (Sup. 1886)

The accused has no right under the rules of criminal procedure to move to strike out part of an indictment.—*Gallaher v. State*, 101 Ind. 411.

[j] (Sup. 1892)

Under Rev. St. 1881, § 1759, prescribing the grounds on which a motion to quash an indictment or information may be based, the failure of an information to allege that the court was in session when the same was filed, and to refer to the affidavit filed as the source of the prosecutor's information, is not ground for quashing such information.—*Blaker v. State*, 29 N. E. 1077, 130 Ind. 203.

[k] (Sup. 1896)

Rev. St. 1894, § 1802 (Rev. St. 1881, § 1733), provides that it shall not be necessary to state in an information the reason for not prosecuting by indictment, in order to exercise the right provided by Rev. St. 1894, § 1748 (Rev.

St. 1881, § 1679), to prosecute by information when the court is in session and the grand jury is not in session or has been discharged. *Held*, that an objection that the information does not affirmatively disclose the right to so prosecute was not raised by a motion to quash the information.—*Wright v. State*, 144 Ind. 210, 43 N. E. 10.

[l] (App. 1897)

Duplicity in an affidavit charging an offense is ground for quashing the affidavit.—*Heron v. State*, 46 N. E. 540, 17 Ind. App. 161.

[m] (Sup. 1905)

Under Burns' Ann. St. 1901, §§ 1824, 1825, 1828, providing the general requisites of an indictment, the defects for which it may be quashed, etc., where an indictment purports to have been returned by a legal grand jury, a motion to quash does not present any question concerning the qualifications of the grand jurors or as to their having been regularly charged and sworn.—*Donahue v. State*, 74 N. E. 906, 165 Ind. 148.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 480–487.

See, also, 22 Cyc. pp. 416–425.

### § 138. — Form and requisites in general.

[a] (Sup. 1866)

Where a person prosecuted by information for an offense punishable by a fine only is not personally present at the trial, but files the undertaking of a responsible person to the approval of the court for the payment of the fine, etc., under Cr. Code, § 95 (2 Gav. & H. St. § 413), he has the same right to test the sufficiency of the information by a motion to quash that he would have if personally present.—*Luther v. State*, 27 Ind. 47.

[b] A motion to quash an information and affidavit need not specifically state the grounds of objection.—(Sup. 1879) *Davis v. State*, 69 Ind. 130; (1882) *Dyer v. Same*, 85 Ind. 525.

[c] (Sup. 1908)

A motion to quash an affidavit charging an assault and battery, coupled with a felonious intent to murder, directed generally against the count as an entirety, and not in any manner specifically against that part charging the felonious intent to kill, was properly overruled, the affidavit sufficiently charging the offense of assault and battery.—*Stucker v. State*, 171 Ind. 441, 84 N. E. 971.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. § 472.

See, also, 22 Cyc. p. 416.

### § 139. — Time for making.

[a] A motion to quash an indictment, to be available, must be made before arraignment and

plea.—(Sup. 1874) *West v. State*, 48 Ind. 483; (1885) *Epps v. State*, 102 Ind. 539, 1 N. E. 491.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. § 473.

See, also, 22 Cyc. pp. 414, 415.

### § 140. — Hearing and determination.

[a] (Sup. 1843)

The manner of selecting the grand jury is not a matter of which the court can take cognizance on a motion to quash an indictment.—*State v. Bolt*, 7 Blackf. 19.

[b] (Sup. 1878)

An indictment for grand larceny contained an allegation of a former conviction for petit larceny. *Held*, on motion to quash, that only such allegation should be stricken out; the indictment being otherwise sufficient.—*Good v. State*, 61 Ind. 69.

[c] (Sup. 1887)

A motion to quash, as well as in arrest, raises the question as to whether the information was filed, and, if so, whether at the proper time.—*Hoover v. State*, 11 N. E. 434, 110 Ind. 349.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 474, 475, 478.

See, also, 22 Cyc. p. 425; note, 16 Am. Dec. 281.

### § 141. — Order or judgment.

Right to appeal from order, see CRIMINAL LAW, § 1023.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. § 476.

See, also, 22 Cyc. p. 427.

### § 143. — Failure to move.

[a] (Sup. 1896)

Where an information charges an assault in the language of the statute (Rev. St. 1894, § 1982; Rev. St. 1881, § 1900), a failure to aver that defendant unlawfully attempted to commit a violent injury on the person named, and that he had the present ability so to do, is waived without a motion, before verdict, to quash the information.—*Woodworth v. State*, 145 Ind. 276, 43 N. E. 933.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. § 479.

### § 145. Demurrer.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 489–501.

See, also, 22 Cyc. pp. 427–432.

### § 146. — Nature of remedy.

[a] (Sup. 1876)

The office of a demurrer to a pleading is to question the sufficiency of the facts contained therein, not to admit them as proved for

the purpose of the trial.—*State v. Barrett*, 54 Ind. 434.

FOR CASES FROM OTHER STATES,  
SEE 27 CENT. DIG. Ind. & Inf. § 489.  
See, also, 22 Cyc. p. 427.

**§ 149. — Time for filing.**

[a] (Sup. 1885)  
A demurrer to an indictment, in regular order, precedes the arraignment.—*Epps v. State*, 102 Ind. 539, 1 N. E. 491.

FOR CASES FROM OTHER STATES,  
SEE 27 CENT. DIG. Ind. & Inf. § 496.  
See, also, 22 Cyc. p. 427.

**VIII. AMENDMENT.**

Of jurat, see AFFIDAVITS, § 16.

**§ 155. Defects and omissions requiring amendment in general.**

[a] (Sup. 1882)  
Failure to aver that acts constituting grand larceny were "feloniously" done may be cured by amendment; but on motion to quash the supreme court will not treat the information as having been amended.—*Sovine v. State*, 85 Ind. 576.

FOR CASES FROM OTHER STATES,  
SEE 27 CENT. DIG. Ind. & Inf. § 502.  
See, also, 22 Cyc. p. 439.

**§ 157. Defects cured by statute.**

[a] (Sup. 1889)  
An indictment must be good according to the statute in force at the time the judgment was pronounced, and the repeal of the statute cannot cure an error which was committed while it was in force.—*Sage v. State*, 22 N. E. 338, 120 Ind. 201.

FOR CASES FROM OTHER STATES,  
SEE 27 CENT. DIG. Ind. & Inf. § 504.

**§ 158. Indictment.**

FOR CASES FROM OTHER STATES,  
SEE 27 CENT. DIG. Ind. & Inf. §§ 505-515.  
See, also, 22 Cyc. pp. 432-436.

**§ 159. — In general.**

[a] (Sup. 1838)  
An indictment, concluding "against the peace of the state," may be so amended with leave of the court as to read, "against the peace and dignity of the state."—*Cain v. State*, 4 Blackf. 512.

[b] (Sup. 1843)  
Indictments are not within the operation of the statutes of amendment.—*Finch v. State*, 6 Blackf. 533.

[c] (Sup. 1846)  
The caption of an indictment may by leave of the court be amended by the prosecuting attorney.—*Moody v. State*, 7 Blackf. 424.

[d] (Sup. 1849)

The insertion of the word "oath" after the word "their," in an indictment reading: "Warrick County—ss.: The grand jurors impaneled and sworn to inquire for the state of Indiana, and for the body of the county of Warrick, upon their present"—etc., is an amendment of no consequence, where the caption of the indictment gives the names of the grand jurors and states that they were sworn, and in view of the sentence in the indictment itself, "The grand jurors impaneled and sworn to inquire," etc., and cannot be complained of.—*State v. Moore*, 1 Ind. 548, Smith, 316.

[e] (Sup. 1860)

The consent of the defendant to a correction of the indictment in open court, with reference to the date of the alleged defense is binding on him.—*McCorkle v. State*, 14 Ind. 39.

FOR CASES FROM OTHER STATES.

SEE 27 CENT. DIG. Ind. & Inf. §§ 505-514;  
1 CENT. DIG. Adultery, § 34.  
See, also, 22 Cyc. pp. 432-436.

**§ 160. — Amendment to conform to proof.**

[a] (Sup. 1906)  
Const. art. 7, § 17, authorizes the General Assembly to modify or abolish the grand jury system; and article 1, § 7, provides that a person accused of an offense shall be entitled to a public trial by jury in the county in which the offense shall have been committed. Burns' Ann. St. 1901, § 1900, declares that when, before verdict or judgment, it appears that a defendant is prosecuted in a county not having jurisdiction, the court may order the venue of the indictment or information corrected, and transfer the cause to the proper county for trial. *Held*, that where defendant was indicted for bigamy, alleged to have been committed in V. county, and on the trial it appeared that the offense, if any, was committed in W. county, an order that the venue of the indictment be corrected, operated as a proper amendment of the indictment to that extent. Judgment (1904) 72 N. E. 596, affirmed on rehearing.—*Welty v. Ward*, 73 N. E. 889, 164 Ind. 457.

FOR CASES FROM OTHER STATES.

SEE 27 CENT. DIG. Ind. & Inf. § 513.  
See, also, 22 Cyc. pp. 433-436.

**§ 161. Information.**

[a] (Sup. 1833)  
It is in the discretion of the court to allow the prosecutor on a trial for a misdemeanor or time to amend or to order the amendment instantler.—*State v. Thompson*, 4 Ind. 623.

[b] (Sup. 1854)  
An information for retailing spirituous liquor omitted to state a price for which the liquor was sold. The Supreme Court directed the court of common pleas to permit the district attorney to amend by inserting a price.—*Miles v. State*, 5 Ind. 215.

[c] (Sup. 1856)

An information can be amended in matter of substance only when there is an affidavit on file which is substantially sufficient.—*State v. Wise*, 7 Ind. 645.

[d] (Sup. 1882)

Where a motion to quash is interposed there is no right to amend the information after the case gets into the appellate court.—*Dyer v. State*, 85 Ind. 525.

[e] (Sup. 1882)

An information may be amended so as to make it conform to the affidavit on which it is based where the offense is well charged in the affidavit, but, where the sufficiency of the information is challenged, it must be judged by what it contains, and not by what it might have been made to contain by some admissible amendment. Act 1879, p. 144, § 3, Rev. St. 1881, § 1735.—*Sovine v. State*, 85 Ind. 576.

[f] (Sup. 1889)

Under Rev. St. § 1735, permitting an amendment in matter of form or substance at any time before defendant pleads, where an affidavit before a justice charges the receiving of stolen goods knowing them to be stolen, it is proper to allow an amendment of the affidavit and information in the circuit court charging in the first count that defendant received stolen goods, and in the second the larceny of the goods.—*Kennegar v. State*, 120 Ind. 176, 21 N. E. 917.

FOR CASES FROM OTHER STATES.

SEE 27 CENT. DIG. Ind. & Inf. §§ 516-523;  
23 CENT. DIG. Form. § 2.  
See, also, 22 Cyc. pp. 436-439.

**IX. ISSUES, PROOF, AND VARIANCE.**

See—

Applicability of instructions to issues. CRIMINAL LAW, § 814.  
*Idem* sonans. NAMES, § 16.

In prosecutions for particular offenses.

See—

ABORTION, § 6.  
AFFRAY, § 4.  
ARSON, § 25.  
ASSAULT AND BATTERY, § 80.  
Betting on election. ELECTIONS, § 328.  
BLASPHEMY, § 3.  
BURGLARY, § 28.  
Carrying weapons. WEAPONS, § 17.  
CONSPIRACY, § 43.  
COUNTERFEITING, § 17.  
Cruelty to animals. ANIMALS, § 42.  
DISORDERLY HOUSE, § 13.  
DISTURBANCE OF PUBLIC ASSEMBLAGE, § 7.  
EMBEZZLEMENT, § 35.  
ESCAPE, § 9.  
EXTORTION, § 14.  
Failure to deliver express matter. CARRIERS, § 21.  
FALSE PRETENSES, § 38.

FORCIBLE ENTRY AND DETAINER, § 57.

FORGERY, § 34.

FRAUD, § 69.

GAMING, § 94.

HOMICIDE, § 142.

KIDNAPPING, § 4.

LARCENY, § 40.

Maintaining lotteries. LOTTERIES, § 28.

MALICIOUS MISCHIEF, § 5.

NUISANCE, § 91.

Obstruction of railroad tracks. RAILROADS, § 255.

PERJURY, § 29.

PRIZE FIGHTING, § 3.

RAPE, § 35.

RECEIVING STOLEN GOODS, § 7.

ROBBERY, § 20.

Taking or exacting usury. USURY, § 149.

TRESPASS, § 87.

VAGRANCY, § 2.

Violations of laws for protection of children.

INFANTS, § 20.

Of license laws. LICENSES, § 42.

Of liquor laws. INTOXICATING LIQUORS, § 223.

Of regulations relating to animals. ANIMALS, § 65.

Of regulations relating to articles of food or drink. FOOD, § 20.

Of regulations relating to carriers. CARRIERS, § 21.

Of Sunday law. SUNDAY, § 29.

**§ 164. Issues in general.**

[a] (Sup. 1819)

It is not material of what part of the charge the defendant is acquitted, if that part of which he is found guilty constitutes a specific indictable offense.—*Durham v. State*, 1 Blackf. 33.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. § 526.

**§ 165. Matters to be proved.**

FOR CASES FROM OTHER STATES.

SEE 27 CENT. DIG. Ind. & Inf. §§ 527-534.  
See, also, 22 Cyc. pp. 445-449.

**§ 166. — In general**

[a] (Sup. 1851)

It is not necessary to prove sums of money, as laid in an indictment, unless they form part of the description of a written instrument, or the exact sums be of the essence of the offense.—*Parsons v. State*, 2 Ind. 499.

[b] (Sup. 1865)

The allegation of the time of the commission of an offense is not material in an indictment, except in cases where the indictment may be barred by lapse of time, or the time is an essential ingredient of the offense.—*Hubbard v. State*, 7 Ind. 160.

[c] (Sup. 1860)

The judgment must be reversed where there is no proof that the offense was commit-

ted in the county where it was prosecuted, or where it was committed.—*Pirtle v. State*, 15 Ind. 21.

[d] (Sup. 1862)

It is error to convict of an offense when there is no evidence that the offense was committed in the county.—*Sohn v. State*, 18 Ind. 389.

[e] (Sup. 1868)

To justify a conviction under an indictment, which states that the Christian or given name of the defendant is unknown to the grand jury, the proof must correspond with the allegation, and the jury be satisfied that the Christian name of the defendant was unknown.—*Stone v. State*, 30 Ind. 115.

[f] (Sup. 1873)

Upon the trial of a criminal action, the evidence must show in what county and state the offense was committed.—*Mullinix v. State*, 43 Ind. 511.

[g] (Sup. 1873)

On the trial of a person indicted for keeping a nuisance, the evidence must show that the offense was committed in the county where charged.—*McLaughlin v. State*, 45 Ind. 338.

[h] (Sup. 1875)

The offense charged in an indictment must be proved in substance as charged.—*Keller v. State*, 51 Ind. 111.

[i] (Sup. 1876)

The addition of "Senior" or "Junior" to the name of a person in an indictment is a mere matter of description, and forms no part of the name, and need not be proved where proof of the name is necessary.—*Allen v. State*, 52 Ind. 486.

[j] (Sup. 1899)

Proof of the venue as laid in the indictment must be made to sustain a conviction.—*Strickland v. State*, 87 N. E. 12, 171 Ind. 642.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. IND. & INF. §§ 527-530, 532, 533.

See, also, 22 Cyc. p. 445.

**§ 167. — Surplusage and unnecessary allegations.**

[a] (Sup. 1858)

Though an indictment in the words of the statute alleging the passing of a counterfeit with intent to defraud generally would be good, if the intent to defraud a particular person is averred, it must be proved.—*Wilkinson v. State*, 10 Ind. 372; *State v. Fisher*, 15 Ind. 374.

[b] (Sup. 1900)

Under Burns' Rev. St. 1894, § 1819 (Rev. St. 1881, § 1750; Horner's Rev. St. 1897, § 1750), providing that in indictments in which

it is necessary to make averments as to any money or bank bills or notes or United States treasury notes, etc., it shall be sufficient to describe such bank bills or notes, etc., as money, and such allegation shall be sustained by proof of any amount, the fact that there is no evidence, in a prosecution for embezzlement, to sustain the allegation that a "more particular description of the money embezzled is to the grand jury unknown," is insufficient to warrant a reversal of a conviction, since such allegation was surplusage, and not necessary to the validity of the indictment.—*Crawford v. State*, 57 N. E. 931, 155 Ind. 692.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. IND. & INF. § 531.

See, also, 22 Cyc. p. 448.

**§ 168. — Part of charge sufficient to constitute offense.**

[a] (Sup. 1881)

Where there are several counts in an indictment, each count need not be sustained, but, if the evidence fully sustains one good count, the verdict will stand.—*Cooper v. State*, 79 Ind. 206.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. IND. & INF. § 534.

See, also, 22 Cyc. p. 449.

**§ 169. Evidence admissible under pleadings.**

[a] (Sup. 1910)

In a prosecution for an offense other than technical criminal conspiracy, the state may prove, that accused conspired with others in committing the crime charged without alleging or referring to a conspiracy.—*Brunaugh v. State*, 90 N. E. 1019.

Where, in a prosecution for knowingly presenting a false claim against a city, the indictment alleged that accused knowingly and with intent to defraud the city made out and presented to the board of public works, to procure its allowance, a false claim as to the amount of work done, the state could show that accused abetted a principal in committing the crime, or himself committed it through an innocent person or agent, under Burns' Ann. St. 1908, § 2095, making every person who aids in committing a felony subject to conviction as a principal.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. IND. & INF. §§ 320, 535.

See, also, 22 Cyc. pp. 449, 450.

**§ 170. Variance between allegations and proof.**

Waiver of objections, see post, § 199.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. IND. & INF. §§ 536-574.

See, also, 22 Cyc. pp. 450-466.

**§ 171. — In general.**

[a] (Sup. 1878)

The fact that the state conducts a prosecution for homicide on the theory that the same was perpetrated in the manner stated by an accomplice of defendant does not preclude it from claiming a conviction on some other theory of defendant's guilt in case such a theory is sustained by the evidence.—*Jones v. State*, 64 Ind. 473.

[b] (Sup. 1879)

On a trial for simple assault and battery, defendant cannot be convicted on evidence establishing him guilty of assault and battery with intent to murder.—*State v. Hattabough*, 66 Ind. 223.

[c] (Sup. 1899)

A variance in the evidence from the allegations of an information in a criminal case, to warrant a reversal, must be a substantial one, such as might mislead the defendant, or expose him to the peril of being put twice in jeopardy for the same offense.—*Oats v. State*, 55 N. E. 226, 153 Ind. 436.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. IND. &amp; INF. §§ 536, 537, 549.

See, also, 22 Cyc. p. 450.

**§ 174. — Principals and accessories.**

[a] (Sup. 1874)

An indictment as principal in the first degree of one who is in fact principal in the second degree will be sustained by proof showing him to be a principal in the second degree.—*Williams v. State*, 47 Ind. 568.

[b] (Sup. 1880)

Under an indictment for murder one cannot be convicted of the crime of being an accessory after the fact.—*Wade v. State*, 71 Ind. 535.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. IND. &amp; INF. §§ 540–543.

See, also, 22 Cyc. p. 454.

**§ 175. — Place of offense.**

[a] (Sup. 1866)

A variance between an allegation in an indictment as to the place where an offense has been committed, and the proof on the trial, is not material, if both places are within the jurisdiction of the court.—*Carlisle v. State*, 32 Ind. 55.

[b] (Sup. 1884)

Under an indictment laying venue in Floyd county, proof of the commission of the crime in New Albany was sufficient, since the court will take judicial notice that New Albany is in Floyd county.—*Luck v. State*, 96 Ind. 16.

[c] (App. 1896)

An allegation, in the affidavit on which was based a prosecution for keeping a house of

prostitution, that it was situated on a certain lot in a certain addition, being surplusage, the variance between it and proof that the house was situated on a lot of the same number in a subdivision of the same name as that given in the addition, but of lots in a different addition, is not fatal.—*Johnson v. State*, 13 Ind. App. 299, 41 N. E. 550.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. IND. &amp; INF. §§ 544–547.

See, also, 22 Cyc. p. 451.

**§ 176. — Time of offense.**

[a] (Sup. 1873)

On trial of an indictment brought under the act of 1873, relating to sales of liquor on Sunday, the proof showed that the selling was on May 4th and on Sunday, but there was no proof as to the year. *Held*, that a conviction should be set aside, although May 4, 1873, was Sunday.—*Lehritter v. State*, 42 Ind. 383.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. IND. &amp; INF. § 548.

See, also, 22 Cyc. p. 451.

**§ 177. — Intent.**

[a] (Sup. 1875)

Where an indictment for an assault and battery with intent to commit rape, in which an assault and battery is well charged, but the charge of the intent is insufficient, a verdict finding defendant guilty, not only of the assault and battery, but also of the felonious intent, is contrary to law.—*McGuire v. State*, 50 Ind. 284.

[b] (Sup. 1887)

On the trial of an indictment in two counts, the first charging malicious trespass in burning a buggy, and the second larceny of the buggy, where all the evidence as to the intent of the accused is to the effect that he took the buggy and burnt it "to get even" with the owner, there is no proof of the animus furandi, and a verdict of guilty on the second count should be set aside.—*Pence v. State*, 110 Ind. 95, 10 N. E. 919.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. IND. &amp; INF. § 549.

See, also, 22 Cyc. p. 456.

**§ 180. — Designation of persons other than accused.**

Idem sonans, see NAMES, § 16.

[a] (Sup. 1875)

Indictment for giving intoxicating liquor to Edward Gresh, a minor. The evidence showed that the liquor was given to "Gresh," and that "Gresh" was 19 years old. *Held*, that the evidence did not show that the liquor was given to the person named in the indictment, or that the person to whom it was given was a minor, and was therefore insufficient.—*Meyer v. State*, 50 Ind. 18.

[b] (Sup. 1879)

There is no variance between an indictment for trespass upon the property of a church corporation, described as the "Methodist Protestant Church," and evidence showing it to be the "Methodist Protestant Church."—*White v. State*, 69 Ind. 273.

[c] (Sup. 1884)

Under an indictment for selling liquor to "Micheal Burk," a minor, the evidence showed that his real name was "Burk," but that he was generally known as "Buck." *Held* no variance.—*Ehlert v. State*, 93 Ind. 76.

[d] (Sup. 1886)

Naming the person to whom liquor was sold as "Jack" for "John" is not a material variance in an indictment, the man being generally known by latter name.—*Walter v. State*, 105 Ind. 589, 5 N. E. 735.

[e] (Sup. 1889)

On an indictment for selling liquor to William Langford, Jr., a minor, the variance is not fatal, though the evidence shows that the sale was to William H. Langford.—*Ross v. State*, 116 Ind. 495, 19 N. E. 451.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 551-556.

See, also, 22 Cyc. pp. 456-460.

#### § 182. — Ownership, possession, or custody of property.

[a] (Sup. 1896)

By express provision of Rev. St. 1894, § 1822 (Rev. St. 1881, § 1753), it is sufficient for an indictment for an offense in relation to partnership property to allege the ownership in one of the partners.—*Wantland v. State*, 145 Ind. 38, 43 N. E. 931.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 562-572.

See, also, 22 Cyc. pp. 461-463.

#### § 183. — Description of written or printed matter.

[a] (Sup. 1885)

A slight variance between the copy in the indictment and the letter offered in evidence, if not substantial, is not fatal.—*Thomas v. State*, 103 Ind. 419, 2 N. E. 808.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. § 573.

See, also, 22 Cyc. p. 464.

#### § 184. — Matters alleged to be unknown to grand jury.

[a] (Sup. 1882)

Where an indictment alleges that the name of the person to whom liquor was sold is to the grand jury unknown, and the only witness sworn at the trial testifies that he was a witness before the grand jury, and knew the person, and would have disclosed his name had

he been asked, the indictment is not supported.—*Blodget v. State*, 3 Ind. 403.

[b] (Sup. 1879)

In a prosecution for permitting a minor to play billiards with "persons" whose names are unknown to the grand jury, it is not sufficient to prove that the minor played the game with a "person" whose name was not known to the grand jury.—*Moore v. State*, 65 Ind. 213.

[c] (Sup. 1909)

If the name of a person or means to accomplish an unlawful end is alleged by the grand jury to be unknown, it is not incumbent on the state to show in the first instance that such fact was unknown to the grand jury; but it is incumbent that the fact alleged to be unknown should be shown to be unknown to the traverse jury, or such a state of facts or circumstances be shown as to render the alleged unknown fact uncertain, in which event it will be presumed also to have been unknown to the grand jury, and unless it appears from the evidence on the trial that the grand jury did not know the fact to be known which is alleged to be unknown, or is negligent or perverse in not alleging what was at its command to know, the fact of knowledge or want of knowledge on the part of the grand jury is not presented to the traverse jury; but if it appears from the evidence that the grand jury did know, or could by the use of reasonable diligence have known, the fact alleged to be unknown, then the burden is upon the state to show that the grand jury did not know the alleged unknown fact.—*Carter v. State*, 172 Ind. 227, 87 N. E. 1081.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. § 574.

See, also, 22 Cyc. p. 465.

#### X. CONVICTION OF OFFENSE INCLUDED IN CHARGE.

Conviction of different offense included in same act as bar to subsequent prosecution, see CRIMINAL LAW, § 200.

Conviction of lesser offense as bar to subsequent prosecution, see CRIMINAL LAW, § 190.

Subjects and titles of acts, see STATUTES, § 118.

#### § 187. Sufficiency of charge of greater offense.

[a] (Sup. 1864)

There may be a conviction for robbery on an indictment for grand larceny.—*Hickey v. State*, 23 Ind. 21.

[b] (Sup. 1892)

A finding and judgment for grand larceny cannot be entered on an indictment for petit larceny, and the judgment will be reversed, though the sentence imposed by the court is one which, while the extreme penalty for the

lesser offense, might be imposed for the higher grade of the crime.—*McCullough v. State*, 31 N. E. 1116, 132 Ind. 427.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Ind. & Inf. §§ 577-579.

See, also, 22 Cyc. p. 468.

**§ 188. Sufficiency of charge of lesser offense.**

[a] (Sup. 1837)

A verdict of "guilty of petit larceny" will not authorize a judgment, unless that crime is included in the charge of the indictment.—*Wills v. State*, 4 Blackf. 457.

[b] (Sup. 1898)

A charge of larceny is always included in a charge of robbery.—*Vancleave v. State*, 49 N. E. 1060, 150 Ind. 273.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Ind. & Inf. §§ 580, 581.

See, also, 22 Cyc. p. 467.

**§ 189. Lesser grade or degree of offense charged.**

[a] Under an indictment for assault and battery with intent to kill or murder, the defendant may be convicted of a simple assault and battery.—(Sup. 1844) *State v. Kennedy*, 7 Blackf. 233; (1857) *Foley v. State*, 9 Ind. 363; (1857) *Gillespie v. State*, Id. 380, affirmed *Hamilton v. State*, 10 Ind. 8; (1884) *Behymer v. State*, 95 Ind. 140.

[b] (Sup. 1847)

Though, according to the value of the articles as alleged in an indictment, the offense charged be grand larceny, there may be a verdict against the defendant of guilty of petit larceny.—*State v. Murphy*, 8 Blackf. 498.

[c] (Sup. 1859)

Under an indictment properly framed for murder in the first degree, a conviction for murder in a less degree or manslaughter can be sustained.—*Dukes v. State*, 11 Ind. 557, 71 Am. Dec. 370.

[d] (Sup. 1864)

There may be a verdict of guilty of an assault with intent to commit murder in the second degree under an indictment charging an assault with intent to commit murder in the first degree.—*Wall v. State*, 23 Ind. 150.

[e] (Sup. 1866)

Under an indictment for aiding and abetting the crime of murder in the first degree, a verdict convicting defendant of aiding and abetting the crime of manslaughter is valid.—*Goff v. Prime*, 26 Ind. 196.

[f] (Sup. 1876)

On an indictment for assault with intent to commit murder, there can be a conviction for any degree of assault comprehended by an indictment for assault with intent to commit manslaughter.—*State v. Throckmorton*, 53 Ind. 354.

[g] (Sup. 1877)

Under an indictment for an assault and battery with intent to murder, the defendant may be convicted of assault and battery with intent to commit manslaughter.—*Jarrell v. State*, 58 Ind. 293.

[h] (Sup. 1882)

On an indictment for murder, the defendant may be found guilty of manslaughter.—*Powers v. State*, 87 Ind. 144.

On an indictment containing counts only for murder and voluntary manslaughter, a defendant can be convicted and sentenced for involuntary manslaughter.—Id.

[i] (Sup. 1884)

Rev. St. 1881, § 1908, provides that whoever unlawfully kills any human being without malice, express or implied, either voluntarily upon a sudden heat, or involuntarily, but in the commission of some unlawful act, is guilty of manslaughter. *Held*, that an indictment for voluntary manslaughter will not support a conviction for involuntary manslaughter, and vice versa.—*State v. Lay*, 93 Ind. 341.

[j] (Sup. 1884)

In a prosecution for an assault and battery with intent to murder, an instruction that accused can only be convicted on proof that he did, without excuse, commit an assault and battery on a certain person with a felonious intent to take his life, was properly refused because it amounted to a direction to the jury that, unless the proof showed the accused to have committed the assault and battery with intent to kill, he should be acquitted, whereas accused might have been acquitted of the felonious intent and convicted of an assault and battery.—*Behymer v. State*, 95 Ind. 140.

[k] Under an indictment charging murder in the first degree, there may be a conviction for manslaughter.—(Sup. 1884) *Barnett v. State*, 100 Ind. 171; (1896) *Pigg v. State*, 145 Ind. 560, 43 N. E. 309.

[l] (Sup. 1885)

One indicted under Rev. St. 1881, §§ 1912, 1913, for having committed malicious mayhem, may, if the evidence warrants it, be convicted of simple mayhem, under sections 1834, 1835.—*State v. Fisher*, 103 Ind. 530, 3 N. E. 379.

[m] (Sup. 1886)

A person charged with an assault and battery with intent to murder may be convicted of an assault with intent to murder if the evidence makes such a case.—*Keeling v. State*, 8 N. E. 559, 107 Ind. 563.

[n] (Sup. 1905)

A charge of murder in the first degree comprehends every grade of felonious homicide, and a finding of involuntary manslaughter cannot be disturbed on appeal because the evidence shows that the defendant was guilty of murder.—*Gipe v. State*, 165 Ind. 433, 75 N.

E. 881, 1 L. R. A. (N. S.) 419, 112 Am. St. Rep. 238.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Ind. & Inf. §§ 582-595.

See, also, 22 Cyc. pp. 468-470.

**§ 190. Attempt to commit offense charged.**

[a] (Sup. 1857)

2 Rev. St. p. 370, § 72, providing that, upon an indictment for any offense consisting of different degrees, the jury may find defendant guilty of an attempt to commit the offense, does not apply to an indictment for murder or manslaughter.—Gillespie v. State, 9 Ind. 380, affirmed Hamilton v. Same, 10 Ind. 8.

[b] (Sup. 1890)

Under a charge that the defendant attempted to provoke an assault and battery, he may be convicted of an attempt to commit a simple assault.—Marshall v. State, 123 Ind. 128, 23 N. E. 1141.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Ind. & Inf. §§ 596-603.

See, also, 22 Cyc. pp. 470-472.

**§ 191. Different offense included in offense charged.**

[a] (Sup. 1854)

Defendant was tried on an indictment for murder, and the jury found him guilty of an assault and battery. *Held*, that as assault and battery is not included in any of the degrees of felonious homicide, but is merged in the felony in a case of felonious homicide, the verdict was a nullity.—Wright v. State, 5 Ind. 527.

[b] (Sup. 1887)

A simple assault and battery is not any of the degrees of murder.—Gillespie v. State, 9 Ind. 380, affirmed Hamilton v. Same, 10 Ind. 8.

[c] (Sup. 1870)

Under 2 Gav. & H. St. p. 405, §§ 72, 73, which provides that, upon an indictment for an offense consisting of different degrees, the jury may acquit of the degree charged and convict of an inferior degree, and that, "in all other cases, the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment," a party against whom an information is found for rescuing a prisoner may, on the trial, be acquitted of the charge of rescue, and convicted of an assault and battery.—Rose v. State, 33 Ind. 167.

[d] (Sup. 1889)

A defendant may be convicted of assault and battery, under an indictment charging rape.—Jones v. State, 118 Ind. 39, 20 N. E. 634.

[e] (Sup. 1886)

Rev. St. 1881, §§ 1834, 1835 (Rev. St. 1894, §§ 1903, 1904), providing that, upon an in-

dictment for an offense consisting of degrees, the defendant may be found guilty of any degree inferior to the one charged, or of an attempt to commit the offense, and that in other cases the defendant may be found guilty of any offense necessarily included in the one charged, do not authorize a conviction of assault and battery under a charge of murder in the first degree.—Reed v. State, 141 Ind. 116, 40 N. E. 525.

[f] (Sup. 1900)

Robbery includes petit larceny, and hence, under an indictment for the former, defendant may properly be convicted of larceny.—Duffy v. State, 56 N. E. 209, 154 Ind. 250.

[g] (Sup. 1907)

Acts 1905, p. 720, c. 169, § 573, making the selling, bartering, or giving away of intoxicating liquor to a person in a state of intoxication a criminal offense, defines three crimes—selling, bartering, and giving away intoxicating liquors—and on proof of one offense a person cannot be convicted of either of the others.—State v. Reed, 168 Ind. 588, 81 N. E. 571.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Ind. & Inf. §§ 265, 604-621; 42 CENT. DIG. Rape. § 82.

See, also, 22 Cyc. pp. 472-481.

**§ 192. Sufficiency or failure of proof of offense charged.**

[a] (Sup. 1823)

Proof of burglary, on trial of a charge of larceny, does not entitle the prisoner to an acquittal.—Wyatt v. State, 1 Blackf. 257.

[b] (Sup. 1894)

Rape includes assault and battery with intent to commit rape; and, both crimes being felonies of the same class, one accused of the lesser can be convicted of it though he be proved guilty of the greater.—Polson v. State, 137 Ind. 519, 35 N. E. 907.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Ind. & Inf. §§ 622-625; 42 CENT. DIG. Rape. § 82.

See, also, 22 Cyc. p. 482.

**XI. WAIVER OF DEFECTS AND OBJECTIONS, AND AID BY VERDICT.**

**§ 195. Waiver.**

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Ind. & Inf. §§ 628-638; 6 CENT. DIG. Big. § 33.

See, also, 22 Cyc. pp. 482-484.

**§ 196. — Objections to indictment or information.**

[a] (Sup. 1846)

A mistake in an indictment as to the defendant's name cannot be taken advantage of after a plea of not guilty.—Uterburgh v. State, 8 Blackf. 202.

[b] (Sup. 1881)

Error in the use of the word "affiant," instead of "prosecuting attorney," in an information under Acts 1879, p. 143, is waived by going to trial on the merits without objection, and cannot be first urged on appeal.—*Sturm v. State*, 74 Ind. 278.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 628-635.

See, also, 22 Cyc. pp. 483, 484.

### § 197. — Objections to rulings on motion or demurrer.

[a] (Sup. 1901)

Where, after defendant's motion to quash an affidavit and information charging him with perjury had been granted, the state moved for leave to amend, and its motion was denied, the state did not waive its exception to the order quashing the affidavit and information by the motion, though the exception would have been waived if its motion had been granted and it had filed amended papers.—*State v. Wilson*, 59 N. E. 932, 156 Ind. 343.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. § 636.

See, also, 22 Cyc. p. 484.

### § 199. — Objections on ground of variance.

[a] (Sup. 1891)

A party objecting to a variance between the pleadings and the proof must make his objection at the proper time during the trial in order to avail himself thereof.—*Taylor v. State*, 29 N. E. 415, 130 Ind. 66.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. § 638.

See, also, 22 Cyc. p. 484.

### § 200. Aider by verdict.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 639-656;

4 CENT. DIG. Assault, § 125.

See, also, 22 Cyc. pp. 485-490.

### § 202. — Defects cured.

[a] (Sup. 1853)

In an indictment for retailing spirituous liquor without a license, the failure to allege the price for which the liquor was sold is a defect which is cured by verdict.—*Hare v. State*, 4 Ind. 241; *Lewadag v. Same*, Id. 611.

[b] (Sup. 1865)

An indictment charging defendant with selling and giving away, for the sum of 10 cents, intoxicating liquor, charges two offenses, but is sufficient after verdict.—*Simons v. State*, 25 Ind. 331.

[c] (Sup. 1890)

A defect in an indictment which relates to the mode of constituting the grand jury, and which does not appear of record, cannot

be raised by a motion for new trial.—*Deitz v. State*, 123 Ind. 85, 23 N. E. 1086.

[d] (Sup. 1891)

The defect in an indictment for enticing away a girl of chaste character for the purpose of prostitution, in not stating the house from which the girl was enticed, is no ground for arresting judgment, since the defect is cured by the verdict.—*Nichols v. State*, 127 Ind. 406, 26 N. E. 839.

[e] (Sup. 1893)

Where an indictment contains all the essential elements of a public offense, but is defective by reason of uncertainty and imperfection in the manner of describing the offense charged, it will be held good after verdict, though it might have been quashed on motion.—*Baker v. State*, 34 N. E. 441, 134 Ind. 657.

[f] (Sup. 1894)

The failure of an indictment for embezzling funds of Hoosier Lodge No. 261, Brotherhood of Railroad Trainmen, to allege whether the lodge is a corporation or an association is cured by the verdict, and a motion in arrest of judgment will not reach the defect, since Rev. St. 1881, § 1891, requires the Supreme Court on appeal to disregard technical defects.—*Laycock v. State*, 136 Ind. 217, 36 N. E. 137.

[g] (Sup. 1894)

Mere formal or technical errors in an indictment, which do not obscure the meaning, are cured by the verdict, and are not available on motion in arrest of judgment or on appeal.—*Lavelle v. State*, 136 Ind. 233, 36 N. E. 135.

[h] (Sup. 1896)

Where an information charges an assault in the language of the statute (Rev. St. 1894, § 1982; Rev. St. 1881, § 1909), a failure to aver that defendant unlawfully attempted to commit a violent injury on the person named, and that he had the present ability so to do, is waived without a motion, before verdict, to quash the information.—*Woodworth v. State*, 145 Ind. 276, 43 N. E. 933.

[i] (Sup. 1897)

Where there is a misjoinder of counts in an indictment, and a conviction on one only, there is no error.—*Reed v. State*, 147 Ind. 41, 46 N. E. 135.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 640-650;

4 CENT. DIG. Assault, § 125; 29 CENT. DIG. Int. Lq. § 236.

See, also, 22 Cyc. pp. 485-488.

### § 203. — Verdict on good and bad counts.

[a] A conviction on a general verdict will be sustained, even though some of the counts are faulty, if there be one good count in the indictment or information.—(Sup. 1859) *Dukes v. State*, 11 Ind. 557, 71 Am. Dec. 370; (1897) *Dean v. Same*, 46 N. E. 528, 147 Ind. 215.

[b] (*Sup.* 1877)

A verdict of guilty referring specially to two counts, one of which is bad, cannot be sustained as a conviction on good and bad counts, because of the special reference to the bad count.—*Enwright v. State*, 58 Ind. 567.

[c] (*Sup.* 1882)

Where a general verdict is rendered on an information containing both good and bad counts, error in overruling a motion to quash the bad counts is not reversible error, as it will be presumed that the judgment was entered on the good counts.—*Powers v. State*, 87 Ind. 97.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ind. & Inf. §§ 651-656.

See, also, 22 Cyc. pp. 488-490.

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**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

# INFANTS.

## *Scope-Note.*

[INCLUDES persons not of full age; their rights and disabilities in general; judicial control and protection of their persons and property; and legal proceedings affecting them.

[EXCLUDES matters peculiar to particular personal relations (see *Parent and Child*; *Guardian and Ward*; *Master and Servant*; and other specific heads); marriage of infants (see *Marriage*); testamentary capacity (see *Wills*); competency as witnesses (see *Witnesses*); effect of disability on running of statute of limitations (see *Limitation of Actions*); pauper children (see *Paupers*); asylums for orphans and indigent children (see *Asylums*); sale of intoxicating liquors to minors (see *Intoxicating Liquors*); and particular wrongs and offenses of which infants are the subjects (see specific heads). For complete list of matters excluded, see cross-references, post.]

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 Statutory actions for causing death of. DEATH, § 9.

**I. DISABILITIES IN GENERAL.**

Administratrix de facto who is a minor, see EXECUTORS AND ADMINISTRATORS, § 86.  
 Capacity to marry, see MARRIAGE, § 5.  
 Capacity to sue and be sued, see post, § 70.  
 Presumption that person is adult, see EVIDENCE, § 56.  
 Proof of infancy, see post, § 99.

**§ 1. Who are infants.**

Pleading infancy, see post, §§ 93, 94.

[a] (Sup. 1855)

An infant attains his majority on the day preceding the twenty-first anniversary of his birth.—Wells v. Wells, 6 Ind. 447.

FOR CASES FROM OTHER STATES,  
 SEE 27 CENT. DIG. Infants, § 1.  
 See, also, 22 Cyc. pp. 511, 512.

**§ 2. Status in general.**

[a] (Sup. 1867)

The phrase "under legal disabilities" includes persons under the age of 21 years.—Hawkins v. Hawkins' Adm'r, 28 Ind. 66.

FOR CASES FROM OTHER STATES,  
 SEE 27 CENT. DIG. Infants, § 2.

**§ 5. Capacity to appoint agent or trustee.**

[a] (Sup. 1854)

An infant distributee cannot appoint an agent or attorney to receive and receipt for his

distributive share in an intestate's estate.—Tapley v. McGee, 6 Ind. 56.

[b] (Sup. 1856)

The appointment of an agent by an infant is void; and, upon an infant arriving at full age, he cannot give validity to the act of a person appointed by him during minority, as such, by ratifying it.—Trueblood v. Trueblood, 8 Ind. 195, 65 Am. Dec. 756.

[c] (Sup. 1862)

A warrant of attorney, executed by an infant, is probably void.—Pickler v. State ex rel. Brickley, 18 Ind. 266.

[d] (Sup. 1902)

An infant, even though married, could not appoint an agent, or become liable for the latter's tortious acts.—Burns v. Smith, 20 Ind. App. 181, 64 N. E. 94, 94 Am. St. Rep. 268.

FOR CASES FROM OTHER STATES,  
 SEE 27 CENT. DIG. Infants, §§ 5, 7.  
 See, also, 22 Cyc. p. 514.

**§ 7. Eligibility for office or public employment or service.**

[a] (Sup. 1857)

An infant may be deputed to serve a particular writ, but cannot act as general deputy.—New Albany & S. R. Co. v. Grooms, 9 Ind. 243.

FOR CASES FROM OTHER STATES,  
 SEE 27 CENT. DIG. Infants, § 8.  
 See, also, 22 Cyc. p. 515.

**§ 9. Emancipation by parent.**

In general, see PARENT AND CHILD, § 16.

[a] (Sup. 1898)

The emancipation of a child may be effected by the consent of the parent, evidenced by a written or oral agreement, or from the circumstances when the parent abandons or fails to support the child. A child may be released from parental control and become entitled to his earnings and liable for his necessary support, in which event he is said to be emancipated.—*Robinson v. Hathaway*, 50 N. E. 883, 150 Ind. 679.

**FOR CASES FROM OTHER STATES.**

SEE 27 CENT. DIG. Infants, § 10.

See, also, 22 Cyc. p. 516; note, 75 C. C. A. 393; note, 113 Am. St. Rep. 113.

**II. CUSTODY AND PROTECTION.**

Custody and support on divorce of parents, see DIVORCE, §§ 289-312½, 323, 324.

Effect of marriage of ward as to authority of guardian, see GUARDIAN AND WARD, § 21.

Habeas corpus to determine right to custody, see HABEAS CORPUS, § 25.

Habeas corpus to determine right to custody, decision of issues, see HABEAS CORPUS, § 99.

Habeas corpus to determine right to custody, evidence, see HABEAS CORPUS, § 85.

Laws relating to as denial of due process of law, see CONSTITUTIONAL LAW, § 309.

Subject and title of act establishing board of children's guardians, see STATUTES, § 111.

Unlawful employment as affecting liability of master for injury to infant servant, see MASTER AND SERVANT, § 95.

**§ 12. Constitutionality of statutes.**

Class legislation, see CONSTITUTIONAL LAW, § 208.

Denial of protection of laws, see CONSTITUTIONAL LAW, § 238.

Persons entitled to raise question, see CONSTITUTIONAL LAW, § 42.

[a] (Sup. 1892)

The statute which provides that children may be taken from the custody of parents whose course of life or whose evil conduct unfits them to rear children is constitutional, inasmuch as it guards the interests and rights of parents by requiring that their children shall not be taken from them without a hearing on due notice in the courts of the state.—*Van Walters v. Board of Children's Guardians of Marion County*, 32 N. E. 568, 132 Ind. 567, 18 L. R. A. 431.

[b] (Sup. 1908)

Under Burns' Ann. St. 1901, § 3189, authorizing the board of children's guardians to file a petition in the circuit court for the placing of neglected children in the custody of the board, etc., a complaint filed in the circuit court

by the board to secure the custody of a neglected child, accompanied by the appearance of the person having the custody of the child, and contesting the right of the board to be awarded the custody, confers on the court jurisdiction of the subject-matter, and of the child and of the person claiming the right to the custody.—*Egoff v. Board of Children's Guardians of Madison County*, 170 Ind. 238, 84 N. E. 151.

Acts 1901, p. 360, c. 173 (Burns' Ann. St. 1908, § 3657 et seq.), establishing a board of children's guardians in each county, with power to care for dependent children, etc., is valid as an exercise of the police power of the state: the welfare of children being paramount to the claim of parents.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Infants, § 13.

See, also, 22 Cyc. p. 521.

**§ 13. Protection of health and morals.**

Sale of ammunition for weapon to infant, see WEAPONS, § 18.

Sale or gift of intoxicating liquors to minor, see INTOXICATING LIQUORS, § 159.

[a] To constitute the offense prohibited by Act March 8, 1873 (2 Rev. St. 1876) p. 484, of permitting a minor to play at any game on a billiard table, bagatelle table, or pigeon hole table other than one kept or used in a private family, it is not necessary that anything be wagered on the game.—(Sup. 1876) *Bond v. State*, 52 Ind. 457; (1877) *State v. Ward*, 51 Ind. 537; (1878) *Ready v. State*, 62 Ind. 1.

[b] (Sup. 1878)

A city ordinance, prohibiting the owner of a place where intoxicating liquors are sold from allowing a minor to there participate in any game on the result of which a wager depends, is not violated by allowing a minor to play billiards at such a place for amusement and without a wager.—*Williams v. City of Warsaw*, 60 Ind. 457.

[c] (Sup. 1880)

One having the general care and management of a billiard table cannot evade the law by showing that, at the time the game was played by the minor, he was present, but did not personally control or manage the table.—*Hipes v. State*, 73 Ind. 39.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Infants, § 14; 21

CENT. DIG. Gaming, §§ 135, 203.

See, also, 22 Cyc. p. 525.

**§ 14. Regulation of employment and education.**

As denial of due process of law, see CONSTITUTIONAL LAW, § 275.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Infants, § 15.

See, also, 22 Cyc. p. 525.

**§ 16. Juvenile delinquents and vagrants.**

Commitment after conviction of crime, see post, § 69.

Crimes and punishment, see post, § 69.

Laws relating to as denial of due process of law, see CONSTITUTIONAL LAW, § 255.

Proceedings affecting custody, see post, § 19.

Reformatories for juvenile delinquents, see REFORMATORIES.

Refusal to receive in house of refuge as contempt of court, see CONTEMPT, § 20.

Right to trial by jury in proceedings to commit to industrial school or reformatory, see JURY, § 21.

Subjects and titles of acts, see STATUTES, § 119.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Infants, § 16.

See, also, 22 Cyc. p. 521.

**§ 17. Societies and officers.**

Amendment of act establishing board of children's guardians, see STATUTES, § 143.

[a] (Sup. 1884)

The Children's Home of Cincinnati, Ohio, is a corporation organized under the laws of that state, and as such has lawful charge and custody of infants, and power to procure for them permanent homes in Christian families. By a written agreement the home transferred the care, custody, and education of an infant to defendant, where after, in the judgment of the trustees and managers of the home, defendant's home became unsuitable for the child, and he became an unsuitable person to have the custody and management of such child. *Held*, that the Children's Home had the right to remove the child from the home of the defendant and resume its original power and authority over such child.—*Milligan v. State ex rel. Children's Home of Cincinnati, Ohio*, 97 Ind. 355.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Infants, § 17.

See, also, 22 Cyc. p. 522.

**§ 18. Jurisdiction of courts.**

In actions for divorce, see DIVORCE, § 290.

[a] (App. 1907)

The power conferred upon the juvenile court is of the same character as the jurisdiction exercised by courts of chancery over the person and property of infants, and flows from the general power and duty of the state to protect those who have no other lawful protector.—*Dinson v. Drosta*, 39 Ind. App. 432, 80 N. E. 32.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Infants, § 18; 42

CENT. DIG. Reformatories, § 7.

See, also, 22 Cyc. p. 519.

**§ 19. Proceedings affecting custody.**

[a] (Sup. 1857)

The Supreme Court will not go beyond the statute to hold the court whose peculiar duty it is to guard the interests of minors to a strict regularity in summary proceedings.—*Shaw v. Smith*, 8 Ind. 485.

[b] (Sup. 1887)

The question of the custody of a minor child, once properly adjudicated, whether in a habeas corpus proceeding or otherwise, is settled, unless there be an appeal, and the judgment rendered is impregnable as against a collateral attack.—*Brooke v. Logan*, 13 N. E. 609, 112 Ind. 183, 2 Am. St. Rep. 177.

[c] (Sup. 1888)

A complaint for commitment of a person to the reform school, which alleges that such person's guardian, because of advanced age, cannot exercise that control and restraint which is necessary to prevent the ward from becoming an evil member of society, and shows also that the latter is vicious, and associates late at night with immoral, drunken, and dissolute persons, at his own pleasure, contains enough to make it good, though other statements therein are trifling and ridiculous.—*Jarrard v. State*, 116 Ind. 98, 17 N. E. 912.

[d] (Sup. 1892)

A petition, filed by a mother and her husband, asking to have a decree that deprived her of the custody of her children, and committed them to the Board of Children's Guardians, set aside, alleging that at the time of the decree she was crazy with grief over her children being taken from her; that she was incapable of comprehending or doing anything; and that she and her husband are able and willing to make reasonable provision for the physical comfort, welfare, and education of the children,—is not sufficient to overthrow the validity of the former judgment.—*Van Walters v. Board of Children's Guardians of Marion County*, 32 N. E. 568, 132 Ind. 567, 18 L. R. A. 431.

[e] (App. 1907)

In the absence of a statute giving a right of appeal from a judgment of the juvenile court committing a girl to the industrial school for girls, no appeal lies from the judgment of commitment.—*Dinson v. Drosta*, 80 N. E. 32, 39 Ind. App. 432.

[f] (Sup. 1908)

Where parents were present with an attorney making a defense against a petition to take from them the custody of their children, they cannot, without proper exceptions or motion for new trial, secure another trial of the case, though the judge announced during the introduction of evidence that sufficient evidence to take the custody from the parents had been introduced.—*Egoff v. Board of Children's Guard-*

ians of Madison County, 170 Ind. 238, 84 N. E. 151.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, § 19; 42 CENT. DIG. Reformatories, §§ 6, 8-15.

See, also, 22 Cyc. pp. 523, 524; notes, 15 L. R. A. 593, 58 L. R. A. 931.

§ 20. Criminal prosecutions under laws for protection of children.

[a] (Sup. 1874)

An indictment under St. 1873, § 1 (Acts 1873, p. 30), making it a misdemeanor for any person owning any billiard, bagatelle, or pigeonhole table, to allow, suffer, or permit any minor to play billiards, bagatelle, or any other game at or upon such table, and inflicting a fine for each game so allowed, suffered, or permitted to be played, must charge that a game was played, and name the person with whom it was played by the minor, or give a reason why he is not named.—*Zook v. State*, 47 Ind. 463; *Russell v. Same*, Id. 465.

[b] (Sup. 1876)

An indictment against the owner of a billiard table for permitting a minor "to play a certain game said table, called 'pool,'" is bad because of the omission of the word "at" or "upon" before the words "said table," and is also defective in not disclosing the name of the person with whom the minor was suffered to play the game.—*Donniger v. State*, 52 Ind. 326.

[c] (Sup. 1877)

Under 2 Rev. St. 1876, p. 484, providing that any person, having the care, management, or control of any billiard table kept in any saloon, etc., who shall suffer any minor to play, etc., an indictment charging defendant with having the management and control of a saloon, in which billiard tables were kept, etc., is insufficient, since the management of the saloon and the management of the tables might be in two different persons.—*Hanrahan v. State*, 57 Ind. 527.

[d] In an indictment under 2 Rev. St. 1876, p. 484, for permitting a minor to play billiards, it is not necessary to allege that the game was played for a wager; gambling not being an element of the offense.—(Sup. 1877) *State v. Ward*, 57 Ind. 537; (1878) *Ready v. State*, 62 Ind. 1.

[e] (Sup. 1877)

An indictment under 2 Rev. St. 1876, p. 484, for allowing a minor to play billiards "in his saloon, of which he was then and there the owner," does not sufficiently charge defendant to be the owner of the table.—*State v. Ward*, 57 Ind. 537.

[f] (Sup. 1878)

The word "game," in the city incorporation law (1 Rev. St. 1876, p. 267, § 53), means one upon the result of which a wager is made; and hence a complaint by a city for violation

of an ordinance, prohibiting one from allowing a minor to "participate in any game of any kind whatever," must allege that the game was one upon the result of which a wager was made.—*Williams v. City of Warsaw*, 60 Ind. 457.

[g] (Sup. 1878)

An indictment under Act March 8, 1873, § 2 (2 Rev. St. 1876, p. 484), for permitting minors to congregate at a public place where any billiard table, etc., was kept, cannot be sustained without proof that minors did in fact congregate at the place alleged, and that two or more minors were found there together.—*Powell v. State*, 62 Ind. 531.

[h] (Sup. 1879)

An indictment for allowing a minor to play billiards on a public table averred that said minor had been allowed to so play with "persons" whose names were unknown to the jury. *Held*, that evidence that the minor had played with a "person" whose name, etc., would not sustain a verdict of guilty.—*Moore v. State*, 65 Ind. 213.

[i] (Sup. 1879)

Under 2 Rev. St. 1876, p. 484, making it an offense to permit minors to congregate and play upon billiard tables in any saloon, hotel, or other public place, an indictment charging the place to be a "public billiard hall" charges a public place within the statute.—*Manheim v. State*, 66 Ind. 65; *Faber v. State*, Id. 600.

[j] (Sup. 1879)

An indictment alleging that defendant "having the care, management, and control of certain billiard tables, then and there kept in a public billiard hall," did unlawfully permit certain minors "to then and there unlawfully congregate at, in, and about said public billiard hall, wherein said billiard tables were so kept," etc., is sufficient under 2 Rev. St. 1876, p. 484.—*Manheim v. State*, 66 Ind. 65.

[k] (Sup. 1879)

An indictment for allowing a minor to play billiards is not supported by proof that he played 15-ball pool, though pool is played on a table with billiard balls.—*Squier v. State*, 66 Ind. 317.

[l] (Sup. 1879)

A prosecution for unlawfully suffering a minor to play a game of billiards is not sustained by evidence that defendant allowed the minor to play a game of 15-ball pool.—*Squier v. State*, 66 Ind. 604.

[m] (Sup. 1880)

The following words: "Which said billiard table, he, the said H., then and there being the owner of, and then and there having the care, control, and management of," in an information for permitting a minor to play billiards, is a sufficient averment of defendant's ownership of the table.—*Hipes v. State*, 73 Ind. 39.

[n] (*Sup.* 1886)

The Supreme Court will not reverse a conviction for allowing minors to play pool, on the ground that the verdict is not sustained by the evidence, where both of the players testified that no inquiry was made as to their age, although the accused and his bartender testified that inquiries were made, and answers returned by the players that they were of age, before they were permitted to use the table.—*Taylor v. State*, 107 Ind. 483, 8 N. E. 430.

[o] (*Sup.* 1889)

In a prosecution under Rev. St. 1881, § 2087, providing for the punishment of any one allowing minors to play billiards, etc., an instruction allowing the jury to "take into consideration the number of games played, \* \* \* if more than one," is proper.—*Kiley v. State*, 120 Ind. 65, 22 N. E. 99.

An indictment for permitting a minor "to play four games of pool" charges but a single offense, under Rev. St. 1881, § 2087, providing that any person who shall allow any minor "to play billiards, bagatelle, pool, or any other game" upon his table shall, upon conviction "for such game so allowed \* \* \* to be played, be fined," etc.—*Id.*

[p] (*Sup.* 1908)

That an affidavit under which defendant was held was defective or failed to properly charge a public offense, under Acts 1905, p. 441, c. 145, § 2, as amended by Acts 1907, pp. 266, 267, c. 169, providing that any person who encourages children to commit acts of delinquency shall be guilty of a misdemeanor, did not render the conviction void or subject to collateral attack.—*Tullis v. Shaw*, 169 Ind. 922, 83 N. E. 376.

Acts 1905, p. 441, c. 145, § 2, as amended by Acts 1907, pp. 266, 267, c. 169, provides that any person who encourages any girl under 17 to commit any act of delinquency as defined in section 1, or who violates any provision of section 2, as amended, is guilty of a misdemeanor, and may be tried and convicted in the juvenile court. Laws 1905, p. 662, c. 169, § 361, amended by Acts 1907, p. 85, c. 60, § 1, declares that whoever unlawfully has carnal knowledge of a female child under 16 is guilty of rape. An affidavit charged that defendant, on a specified day, did encourage prosecutrix, a girl under 15 years of age, to commit an act of delinquency, to wit, that defendant held illicit sexual intercourse with her, etc. *Held*, that the affidavit did not charge defendant with rape in violation of section 361, but charged a misdemeanor only, within the jurisdiction of the juvenile court.—*Id.*

A complaint charging that defendant did encourage prosecutrix, a girl under the age of 15 years, to commit an act of delinquency, to wit, that defendant held illicit sexual intercourse with her, should be construed, in so far as the allegation of prosecutrix's age was con-

cerned, as if it alleged merely that she was under the age of 17, within Acts 1905, p. 441, c. 145, § 2, as amended by Acts 1907, pp. 266, 267, c. 169, providing that any person who causes or encourages any girl under the age of 17 to commit an act of delinquency, as defined, etc., shall be guilty of a misdemeanor, under the rule that in criminal cases the substance of the charge only need be proved, the substance in the instant case, so far as the age of prosecutrix was concerned, being that she was under 17.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, § 20; 24 CENT. DIG. Gaming, §§ 272, 278, 280, 297, 301; 27 CENT. DIG. Ind. & Inf. § 282.

See, also, 22 Cyc. pp. 525-527; note, 61 L. R. A. 200.

### III. PROPERTY AND CONVEYANCES.

Capacity to contract for or consent to improvements on land as affecting right to mechanic's lien, see *MECHANICS' LIENS*, § 67.

Excuse for nonperformance of conditions in deed, see *DEEDS*, § 163.

Failure of administrator to redeem mortgaged property as affecting title of minor heirs, see *EXECUTORS AND ADMINISTRATORS*, § 133.

Funeral expenses as claim against estate of deceased infant, see *EXECUTORS AND ADMINISTRATORS*, § 214.

Presumption of acceptance of deed to, see *DEEDS*, § 194.

Right of infant coheir to bring suit in partition, see *PARTITION*, § 32.

Taxation of property, see *TAXATION*, § 827.

Time for presentation of claim against decedent's estate, see *EXECUTORS AND ADMINISTRATORS*, § 225.

### § 21. Rights of property in general.

[a] (*Sup.* 1869)

The owner in fee of certain real estate conveyed the same in fee, his wife joining in the deed, to his brother, who, having received the title for such purpose, immediately conveyed in fee to the wife and minor daughter of the original grantor. Both deeds were voluntary; the former expressing a consideration in a certain sum, the latter none. After the deeds were recorded, the daughter intermarried with one who had knowledge of the deeds and believed her to be the lawful owner of the land so conveyed to her. The daughter died, leaving one child, the only issue of such marriage; and the child died, leaving its father its sole heir at law. *Held*, in a suit by the surviving father of such child for partition, the original grantor still retaining possession, that the marriage of the daughter made her a purchaser for a valuable consideration, and it would be a fraud upon her husband to withdraw the estate passed to her.—*McCaw v. Burk*, 31 Ind. 56.

[b] (App. 1905)

The personal and property rights of an infant do not attach until birth.—State ex rel. Niece v. Soale, 36 Ind. App. 73, 74 N. E. 1111.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, § 21.

See, also, 22 Cyc. p. 527.

§ 23. Capacity to convey.

[a] (Sup. 1873)

Under Rev. St. 1843, p. 421, c. 28, § 41, a married woman under the age of 18 years could not, either with or without the consent of her father or guardian, relinquish her dower in the lands of her husband by him sold and conveyed.—Law v. Long, 41 Ind. 586.

[b] (Sup. 1884)

An infant feme covert may convey her lands by deed in which her husband joins, or she may incur them by mortgage.—Losey v. Bond, 94 Ind. 67.

[c] (Sup. 1895)

An infant wife may join with her husband in the conveyance of his real estate the same as if she were of age.—Kennedy v. Hudkins, 40 N. E. 52, 140 Ind. 570.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, § 24.

See, also, 22 Cyc. pp. 530-538.

§ 24. Adverse possession.

[a] (Sup. 1878)

A conveyance made by an infant, upon coming of age, of land previously conveyed by him during his infancy to a third person, operates as a disaffirmance of the former deed; but, where such third person is in adverse possession of the lands, the second deed is inoperative as to him.—Riggs v. Fisk, 64 Ind. 100.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, § 25.

See, also, 22 Cyc. p. 528.

§ 25. Contracts for sale of realty.

[a] (Sup. 1859)

Where a contract binding on an infant to convey land is with an adult, the adult is bound, and he cannot avoid the contract on account of the infancy of the other contracting party.—Johnson v. Rockwell, 12 Ind. 76.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, § 26.

See, also, 22 Cyc. p. 538.

§ 26. Validity of conveyances.

[a] The deed of an infant, purporting to convey lands, operates to transmit the title, and is voidable only, not void.—(Sup. 1845) Doe ex dem. Moore v. Abernathy, 7 Blackf. 442; (1856) Pitcher v. Laycock, 7 Ind. 398; (1859) Johnson v. Rockwell, 12 Ind. 76; (1873) Law v. Long, 41 Ind. 586.

[b] (Sup. 1850)

An infant can assign dower at common law; but, if he so assign, he will be protected against the consequences of excessive assignment, and may have his writ of admeasurement of dower.—McCormick v. Taylor, 2 Ind. 336.

[c] (Sup. 1856)

An infant gave a deed of land, and died before arriving at full age. Held, that the deed of an infant was not void, but voidable only, and that said deed was valid and operative.—Babcock v. Doe ex dem. Bowman, 8 Ind. 110.

[d] (Sup. 1873)

The joinder of a married woman, who is also a minor, in the execution of a deed conveying the lands of her husband, being voidable merely, relinquishes her right of dower, subject to her right of election, on arriving at full age, either to affirm or disaffirm the deed.—Law v. Long, 41 Ind. 586.

[e] (Sup. 1875)

A joint conveyance by husband and wife during infancy of the wife is not void but voidable, and vests the title to the land in the grantee, subject to her right of disaffirmance on arrival at majority and until divested by some act done by her to disaffirm the contract.—Scranton v. Stewart, 52 Ind. 68.

[f] (Sup. 1882)

A conveyance by an infant married woman and her husband of her real estate is voidable as to her, but, where such conveyance was executed prior to 1847, would operate as an absolute transfer of the husband's interest in the land, and entitle the grantee and his heirs to possession of the land during the joint lives of the grantors.—Sims v. Bardoner, 86 Ind. 57, 44 Am. Rep. 263; Sims v. Snyder, 86 Ind. 602.

[g] (Sup. 1884)

An answer by a wife in a suit against herself and husband to foreclose a mortgage, alleging that at the time of the execution of the mortgage she was a minor, but failing to allege that her husband was a minor or that the land was her separate property, was demurrable.—Bakes v. Gilbert, 93 Ind. 70.

[h] (Sup. 1884)

A conveyance by a wife who is a minor, jointly with her husband, does not estop her from afterwards claiming dower in the land.—Applegate v. Conner, 93 Ind. 185.

[i] (Sup. 1895)

Rev. St. 1894, § 3330 (Rev. St. 1881, § 2917), prohibits infants from conveying their lands. Rev. St. 1894, § 3340 (Rev. St. 1881, § 2921) provides that the joint deed of the husband and wife shall be sufficient to pass the lands of the wife. Held, that the conveyance of an infant feme covert and her minor husband is void.

able, not void.—*Gillenwater v. Campbell*, 142 Ind. 529, 41 N. E. 1041.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Infants, §§ 27-34.

See, also, 22 Cyc. pp. 531-530.

**§ 29. Estoppel.**

[a] (Sup. 1853)

Where a married woman, being an infant, joined with her husband in a conveyance of land, and neglected until 17 years afterwards to give notice of her intention to avoid it, it was held that she, having after her majority been discovert about 10 years, was thereby estopped from asserting her title.—*Hartman v. Kendall*, 4 Ind. 403.

[b] (Sup. 1865)

To estop the minor from disaffirming his deed on coming of age, some act or omission on his part since his majority must be shown which was prejudicial to the person in possession of the granted premises.—*Miles v. Lingerman*, 24 Ind. 385.

[c] (Sup. 1875)

Where an infant married woman joined with her husband in a conveyance of a separate estate, the fact that, when she became of age, the grantee was indebted to the husband upon notes given for the purchase money, which notes were afterwards paid, did not estop her from subsequently disaffirming the contract, unless she knew that the purchase money was unpaid and the grantee was ignorant of the fact that the grantor was an infant when she executed the conveyance.—*Scranton v. Stewart*, 52 Ind. 68.

[d] (Sup. 1883)

The fact that where an infant wife joined her husband in a conveyance of his land full value was paid to the husband for the land, and that with the purchase money other lands were bought, of which she received one-third as the husband's widow, did not prevent her disaffirmance as it did not amount to an estoppel.—*Richardson v. Pate*, 93 Ind. 423, 47 Am. Rep. 374.

[e] (Sup. 1884)

A married woman is not estopped from disaffirming at any time during coverture a deed made by her during infancy, by the fact that the grantee believed her an adult, and after her majority improved the land with her knowledge, and conveyed to an innocent third person, and that she and her husband enjoyed the consideration since her majority.—*Buchanan v. Hubbard*, 96 Ind. 1.

[f] (Sup. 1892)

In an action to quiet title, where the complaint alleges that defendant purchased the land of a minor, who disaffirmed the sale on becoming 21 years of age, and afterwards sold it to plaintiff, an answer which attempts to plead an estoppel is defective if it fails to allege that

the minor made misrepresentations as to his age, in connection with the sale to defendant, as an inducement for him to purchase, and upon which he relied.—*Bradshaw v. Van Winkle*, 133 Ind. 134, 32 N. E. 877.

[g] (App. 1904)

An owner conveyed a part of his land to a married woman and her children, and another part to her husband and his children. The husband and wife, believing that the conveyance to them gave them the title in fee, sold the land to a third person. Subsequently the husband and wife and the third person discovered that the children had rights. The husband and the third person then instituted in the name of the children, who were minors, and the third person, an ex parte proceeding for partition. The children had no knowledge of the proceedings, and no one had authority to act for them. The husband was appointed commissioner, and the land was sold to the third person for the consideration given in the conveyance by the husband and wife. The children received no part of this consideration. Held, that the children, on attaining full age, were not equitably estopped, as against the third person, from asserting their rights.—*Underwood v. Deckard*, 70 N. E. 383, 34 Ind. App. 198.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Infants, §§ 37-40.

See, also, 22 Cyc. pp. 548-550; note, 44 Am. Dec. 285.

**§ 30. Ratification.**

[a] (Sup. 1845)

A female infant, residing in Pennsylvania, executed there a deed of bargain and sale for land situate in Indiana. She afterwards married, but whether before or after her majority did not appear; nor did it appear where, after the execution of the deed, she and her husband had resided, nor that her husband had acquiesced in the deed after he knew of it. Held, that the lapse of about five years after the wife's majority, without any attempt to disaffirm the conveyance, did not, under the circumstances, prevent the husband and wife from disaffirming it.—*Doe ex dem. Moore v. Abernathy*, 7 Blackf. 442.

[aa] (Sup. 1865)

Though, under our present statute, a married woman may disaffirm a conveyance made by her during minority, and bring an action to recover the lands without the assent, and even against the will of the husband, yet she will not be estopped from avoiding the conveyance merely by an omission for any length of time during her coverture to disaffirm it, unconnected with any other circumstances.—*Miles v. Lingerman*, 24 Ind. 385.

[b] (Sup. 1873)

Where an infant makes and delivers a deed, she must on attaining full age do some act to disaffirm the contract.—*Law v. Long*, 41 Ind. 586.

## [c] (Sup. 1875)

An infant married who joins with her husband for the conveyance of a separate estate must avoid the conveyance if at all within a reasonable time after she attains majority, although she is not required to bring her action to recover possession during continuance of her coverture.—*Scranton v. Stewart*, 52 Ind. 68.

## [d] (Sup. 1879)

Infants cannot ratify, on attaining majority, a mortgage void as to them.—*Wetherill v. Harris*, 67 Ind. 452.

## [e] (Sup. 1881)

Where an infant, together with a person of full age, retains possession of leased premises under a contract therefor 10 months after attaining majority, he thereby ratifies such contract.—*McClure v. McClure*, 74 Ind. 108.

## [f] (Sup. 1881)

An instruction that disaffirmance of a conveyance of land by a minor, made within 10 months after the grantor has arrived of age, was not within a reasonable time, without showing any circumstances making haste necessary, was erroneous.—*Wiley v. Wilson*, 77 Ind. 596.

## [g] (Sup. 1884)

A deed or mortgage executed by an infant feme covert is voidable, and may be affirmed or disaffirmed by her after attaining full age.—*Losey v. Bond*, 94 Ind. 67.

An infant feme covert's mortgage is affirmed by her executing a deed after majority, reciting that it is subject to the mortgage.—*Id.*

## [h] (Sup. 1885)

Where a wife executed a deed before attaining her majority, but it was not delivered until after she became of age, it was valid, though she was then feme covert.—*Sims v. Smith*, 99 Ind. 469, 50 Am. Rep. 99.

## [i] (Sup. 1889)

Where the specific property received as a consideration, whatever it be, exists and remains in the hands of the infant at the time of disaffirmance, and is capable of return, the latter is bound to give it up. If, after arriving at age, he disposed of the property received, or asserts title to it as his own, he thereby confirms the contract, and cannot recover that which he conveyed.—*Buchanan v. Hubbard*, 21 N. E. 538, 119 Ind. 187.

Plaintiff, the owner of land in controversy, agreed, through the agency of her husband, to exchange it with P. for lands in Kansas, she to receive in addition \$400. When the agreement and conveyance were made plaintiff had not reached her majority. P., without her knowledge or consent, conveyed the Kansas land to her husband, but before she delivered the conveyance for the land in controversy she was apprised of this fact. The \$400 was paid to plaintiff's husband for her benefit by P., who had no knowledge of her minority. After

plaintiff instituted suit to recover the land in controversy she joined her husband in a conveyance of the Kansas land. *Held*, that the conveyance was a complete ratification of the conveyance of the land in controversy.—*Id.*

## [j] (Sup. 1893)

Before an independent action will lie by a grantor to set aside a deed made in infancy, the grantor must disaffirm; but, where the grantee gets into court first and seeks a confirmation of the deed, it will not be too late on that account to disaffirm before the grantor files pleadings to obtain his interest.—*McClanahan v. Williams*, 35 N. E. 897, 136 Ind. 30.

## [k] (Sup. 1903)

Where an infant executed a deed in January, 1884, to land in Indiana, while she resided in Dakota, and on her return the next year repudiated the deed, the disaffirmance was within a reasonable time after the execution of the deed.—*Shroyer v. Pittenger*, 67 N. E. 475, 31 Ind. App. 158.

## [l] (Sup. 1905)

Where during the minority of a co-tenant another co-tenant purchased at a mortgage sale of the property, the infant co-tenant, after reaching majority, might waive his right to sue for his share in the claim purchased against the land.—*Ryason v. Dunten*, 73 N. E. 74, 164 Ind. 85.

## FOR CASES FROM OTHER STATES.

SEE 27 CENT. DIG. Infants, §§ 41-49, 54, 55.

See, also, 22 Cyc. pp. 538-545.

## § 31. Avoidance.

[a] Defendant purchased premises for a valuable consideration of one of two lessors, who was an infant female. This grantor afterwards married the other lessor, and the defendant continued in possession of the premises under his purchase for several years after the marriage, and after the grantor's majority, with the acquiescence of herself and husband. *Held* that, if the lessors might under the circumstances avoid the conveyance, they could not maintain suit for that purpose, unless notice of their intention had been given to defendant.—(Sup. 1840) *Clawson v. Doe ex dem. Moore*, 5 Blackf. 300; (1845) *Doe ex dem. Berry v. Shaw*, 7 Blackf. 642.

## [b] (Sup. 1845)

An action of ejectment for premises conveyed by the lessor while an infant, commenced after his majority and within a proper period, is a valid avoidance of the conveyance.—*Doe ex dem. Moore v. Abernathy*, 7 Blackf. 442.

The grantee or tenant in possession of premises conveyed by the lessor while an infant must be notified of the intention of the infant to disaffirm his contract before commencement of an action of ejectment by the infant for the premises after attaining majority.—*Id.*

[c] (Sup. 1850)

An infant cannot defeat an assignment of dower by entry.—*McCormick v. Taylor*, 2 Ind. 336.

[d] The return of the consideration is not a condition precedent to the disaffirmance of a conveyance of land executed by an infant.—(Sup. 1856) *Pitcher v. Laycock*, 7 Ind. 398; (1873) *Carpenter v. Carpenter*, 45 Ind. 142.

[e] An infant's conveyance of land is disaffirmed by the execution of the deed thereof to another after attaining full age.—(Sup. 1856) *Pitcher v. Laycock*, 7 Ind. 398; (1884) *Losey v. Bond*, 94 Ind. 67.

[f] (Sup. 1859)

One who has contracted with infants to receive from them a conveyance which he knows must be executed by them before they become of age cannot, after having availed himself of the benefits of the contract, plead their infancy in bar of an action on his promissory note given for the purchase money.—*Bee-son v. Carlton*, 13 Ind. 354.

[g] (Sup. 1859)

Where a conveyance is made by a husband and wife, the wife being under age, on her avoidance of the contract she cannot obtain possession until after the death of her husband.—*Chapman v. Chapman*, 13 Ind. 396.

A conveyance by husband and wife, she being under age, cannot be avoided by her on that ground until she attain her majority.—*Id.*

Where a conveyance is made by a husband and wife, the wife being under age, she might probably avoid the conveyance as to herself for fraud before arriving at majority.—*Id.*

[h] (Sup. 1862)

An infant may avoid his power of attorney at any time.—*Pickler v. State ex rel. Brickley*, 18 Ind. 266.

[i] (Sup. 1865)

The circumstance that land conveyed by an infant has subsequently been sold by the grantee to a person who did not know of the disability will not of itself prevent the minor from afterward disaffirming the conveyance.—*Miles v. Lingerman*, 24 Ind. 385.

A married woman joined with her husband during her minority in executing a deed of her real estate to a railroad company, which was aware of her age and marriage, agreeing to reacknowledge the deed upon the completion of the road, which, however, was never finished. She disaffirmed the deed at the end of 10 years, after coming of age, being at that time still married. Some slight improvements had in the meantime been made on the premises, and they had been conveyed to a third party, of all which, however, she was not aware until her disaffirmance of the deed, although she resided within a short distance from the land. *Held*, that she was not precluded from asserting her title.—*Id.*

[j] (Sup. 1873)

An infant feme covert may bring an action to avoid a deed made by her husband, in which she joined to bar dower, without paying or tendering back the purchase money.—*Law v. Long*, 41 Ind. 586.

A deed, voidable by an infant, may be avoided by his privies in blood or heirs.—*Id.*

[k] (Sup. 1873)

On avoidance of a contract of purchase by an infant, the infant is liable only in tort, if at all, for any damages to the property bought while in his possession.—*Carpenter v. Carpenter*, 45 Ind. 142.

[l] (Sup. 1875)

A written notice of disaffirmance of a deed executed by a married woman jointly with her husband, during her infancy, given by her 3½ years after her arrival at full age, *held* a sufficient act of disaffirmance, and to have been done within a reasonable time.—*Scranton v. Stewart*, 52 Ind. 68.

[m] (Sup. 1876)

Land belonging to joint owners, one of whom was a minor, was conveyed by them jointly by warranty deed. The minor, after having received her full share of the purchase money, disaffirmed the deed and recovered her portion of the land. *Held*, that the other joint owner, who had paid to the purchaser damages accrued by reason of the breach of warranty, could not recover from the minor.—*Dill v. Bowen*, 54 Ind. 204.

[n] (Sup. 1878)

Privies in estate of an infant may avail themselves of his avoidance of his contract.—*Price v. Jennings*, 62 Ind. 111.

[o] (Sup. 1878)

Where an infant, who has previously conveyed land, disaffirms such conveyance on coming of age by making a conveyance to a third person, the second conveyance is inoperative as against the first grantee in possession; but the second grantee may, however, maintain an action in the name of the grantor against such possessor for the recovery of the land.—*Riggs v. Fisk*, 64 Ind. 100.

[p] It is the disaffirmance which avoids the deed of an infant, and not the bringing of an action to recover the land.—(Sup. 1881) *Long v. Williams*, 74 Ind. 115; (1882) *Sims v. Bardoner*, 86 Ind. 87, 44 Am. Rep. 203; (1882) *Same v. Snyder*, 86 Ind. 602.

[q] (Sup. 1881)

A deed, voidable because of infancy, may be disaffirmed by entry on the land, by written notice of disaffirmance, by subsequent conveyance, or by any other equally emphatic act declaratory of an intention to disaffirm; and it is not necessary to the act of disaffirmance of a deed by an infant that the grantor should be in a position to recover possession of the land

conveyed when the disaffirmance is made.—*Long v. Williams*, 74 Ind. 115.

The fact that the mother of a minor heir to real estate to whom the fee belongs is in possession thereof under right of dower affords no excuse for a failure on the part of such heir to disaffirm within a reasonable time after coming of age a deed made thereof.—*Id.*

[r] (Sup. 1882)

Though the privilege of disaffirming the voidable acts of an infant belongs to him for his own protection and strictly speaking is not assignable, yet the vendee of an infant's real estate on which the infant had executed a mortgage prior to the conveyance is entitled to take advantage of a plea of infancy by the mortgagor in an action to foreclose the mortgage, though, after the plea of infancy was held sufficient, the plaintiff dismissed as to the mortgagor and sought to enforce the mortgage against the vendee.—*Shrock v. Crowl*, 83 Ind. 243.

[s] An infant cannot disaffirm a conveyance made by him until after he attains his majority.—(Sup. 1882) *Welch v. Bunce*, 83 Ind. 382; (App. 1903) *Shroyer v. Pittenger*, 67 N. E. 475, 31 Ind. App. 158.

[t] (Sup. 1882)

The conveyance of an infant married woman may be disaffirmed by her within a reasonable time after removal of her disability.—*Sims v. Bardoner*, 86 Ind. 87, 44 Am. Rep. 263; *Same v. Snyder*, 86 Ind. 602.

[tt] (Sup. 1882)

A woman who, prior to 1847 and when an infant, joined with her husband in the conveyance of real estate, may disaffirm the conveyance during coverture and before her right of entry is barred by limitations.—*Sims v. Smith*, 86 Ind. 577.

If an infant, who is also a married woman, makes an instrument voidable because of her infancy, the disability of coverture enables her to postpone the act of avoidance until a reasonable time after the coverture ends.—*Id.*

[u] (Sup. 1883)

Rev. St. 1881, §§ 2939-2941, provide that a married woman over 18 and less than 21 years of age may join in deed of her husband's lands, if the father, or, in case there is no father, if the mother, declare before the officer taking the acknowledgment that he or she believes that such conveyance is for the benefit of the wife, or that it would be prejudicial to her and her husband to be prevented from disposing of the land, and that, if there is neither father nor mother living, such conveyance may be made by obtaining the assent of the circuit judge. *Held*, that a complaint by a woman over 21, after her husband's death, to recover her interest in her husband's land, conveyed by them when she was about 19 years old, on the ground that she disaffirmed the conveyance, is insufficient, where it does not allege

that the conveyance was made without the consent of father, mother, or circuit judge.—*Fisher v. Payne*, 90 Ind. 183.

[uu] (Sup. 1883)

Where a married woman during her infancy has relinquished her right of dower in her husband's estate, she may, after his death, avoid the relinquishment and claim dower, without refunding any portion of the purchase money received by her husband upon the sale of the property.—*Richardson v. Pate*, 93 Ind. 423, 47 Am. Rep. 374.

An infant married woman, aged 17 years, joined her husband in the execution of a deed conveying his lands. Twenty-one years later he died, and 19 months thereafter she gave notice of disaffirmance to the grantees of the husband's vendee, and 4 months later sued them in partition. Defendants answered that the conveyance was for full value; that they were purchasers for full value without knowledge of plaintiff's claim; that her husband with the proceeds of his sale bought other lands near those in controversy, and resided thereon with plaintiff from the time of the sale until his death, since which time she has resided thereon, and took a third thereof as a widow; that with her knowledge defendants made valuable improvements and for 23 years paid all taxes, yet she failed to disaffirm or give notice of her intention for 23 years after execution of the deed. *Held*, that the answer was insufficient, since conveyances executed by infant females covert of their common interest in their husband's real estate, by joining with him in a deed prior to the passage of Rev. St. 1881, § 2943, was voidable like any other conveyance of a minor at her pleasure on the removal of her disability.—*Id.*

[uuu] (Sup. 1884)

As the law stood prior to September 19, 1881, one who during her infancy and coverture made conveyance of her real estate was not estopped or compelled to disaffirm her deed until her removal from disability of coverture as well as that of infancy.—*Applegate v. Canner*, 93 Ind. 185.

[v] (Sup. 1884)

A married woman may at any time during coverture disaffirm a deed executed by her before she arrived at full age.—*Buchanan v. Hubbard*, 96 Ind. 1.

[vv] (Sup. 1890)

Where, in an action against a minor grantor to reform a deed, a decree against him was not rendered until after he became of age, he was thereby barred from afterwards disaffirming the deed because of his minority.—*Thain v. Rudisill*, 26 N. E. 46, 126 Ind. 272.

[w] (Sup. 1893)

In an action to quiet title, a cross complaint seeking to set aside a conveyance to plaintiff on the ground that defendant was an infant when she joined therein, is sufficient if

it alleges a disaffirmance of the conveyance before the filing of the cross complaint, though not before the institution of the suit to quiet title.—*McClanahan v. Williams*, 136 Ind. 30, 35 N. E. 897.

Rev. St. 1881, § 1283, which removes the disability of coverture on the avoidance of deeds by infants, does not apply where an infant wife has joined with her husband in a conveyance of his land, so as to render necessary a disaffirmance by her within a reasonable time after attaining majority, since her only interest in the land is inchoate, and no right of action accrues, either to her to enforce her interest, or to the grantee to quiet his title, till the death of her husband.—Id.

[ww] (Sup. 1894)

One dealing with minors in relation to real property, with full knowledge of their incapacity, cannot insist upon a restoration of the consideration as a condition precedent to their right to disaffirm, under Rev. St. 1881, § 2045 (Rev. St. 1894, § 3365), providing for such restoration where the minor has falsely represented himself to be of age, and his grantee acted in good faith, and relied upon those representations.—*Shaul v. Rinker*, 139 Ind. 163, 38 N. E. 593.

[x] (Sup. 1895)

A complaint averring that plaintiff in 1881, when a minor, joined with her husband in a deed of his lands, and that after plaintiff's majority, and her husband's death, she disaffirmed the deed, and praying to quiet title, does not state a cause of action, in the absence of any averment that her husband was also a minor when the deed was executed, under Act April 13, 1866, which empowered an infant wife of an adult husband to join with him in the conveyance of his real estate.—*Kennedy v. Hudkins*, 140 Ind. 570, 40 N. E. 52.

[xx] (Sup. 1895)

Burns' Rev. St. 1894, § 3364 (Rev. St. 1881, § 2044), provides that an infant feme covert cannot disaffirm a conveyance of land in which her husband has joined, he being of full age, without restoring the consideration. *Held* that, though such infant cannot disaffirm a mortgage given for borrowed money, she can disaffirm the note secured thereby, so as to escape personal liability.—*United States Saving Fund & Investment Co. v. Harris*, 142 Ind. 226, 40 N. E. 1072, 41 N. E. 451.

[y] (Sup. 1895)

Rev. St. 1894, §§ 3364, 3365 (Rev. St. 1881, §§ 2044, 2045), providing that restoration of the purchase money must be made to avoid the conveyance of an infant feme covert, in which her husband, being of full age, has joined, or to avoid the conveyance of an infant who falsely represents himself to be of age, do not require an offer to restore the purchase price, where it was alleged that the husband was not of full age, and the facts pleaded did not disclose any representation by the infant as to age.—*Gillen-*

*waters v. Campbell*, 41 N. E. 1041, 142 Ind. 529.

[yy] (App. 1903)

Plaintiff, suing to set aside a conveyance of land made by her while an infant married woman, was not required to first restore the consideration received, as required by Burns' Rev. St. 1901, § 3364, where she averred that she received no consideration.—*Shroyer v. Pittenger*, 67 N. E. 475, 31 Ind. App. 158.

Disaffirmance by one of a conveyance made by him during minority is accomplished where, after majority, with intent to disaffirm, he does some positive and distinct act inconsistent with the validity of the conveyance.—Id.

Disaffirmance of a conveyance made by one while an infant need not be in writing, and served on the grantee.—Id.

Disaffirmance of a conveyance of land made by one while an infant need not be by an instrument of equal solemnity with the one sought to be avoided.—Id.

[z] (App. 1903)

Under the express provisions of the statute, a married woman cannot disaffirm a conveyance made during minority, in which her husband, being of full age, joined, without first restoring the consideration received.—*Blair v. Whittaker*, 69 N. E. 182, 31 Ind. App. 664.

A conveyance by a married woman, after reaching majority, of land previously conveyed by her while a minor, cannot be considered as a disaffirmance of her former conveyance, where it was shown that she did not intend to include the land formerly conveyed, but specifically affirmed the former conveyance by acknowledging the deed after majority.—Id.

[zz] (Sup. 1904)

Burns' Ann. St. 1901, § 2690 (Rev. St. 1881, § 2526; Horner's Ann. St. 1901, § 2528), provides that marriage of any female ward to a person of full age shall operate as a discharge of her guardianship, and that the guardian shall be authorized to account to the wife, with the assent of the husband. *Held*, that the statute does not emancipate an infant married woman, whose husband is of full age, from the disability of infancy, save in so far as such accounting is concerned, and hence, where an infant married woman, together with her adult husband, leased her lands for two years, and received rent for the first year during her minority, on arriving at her majority, at the beginning of the second year, she might disaffirm the lease, and take possession, without restoring the rent previously received.—*Shipley v. Smith*, 70 N. E. 803, 162 Ind. 526.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, §§ 41, 46, 50-63.

See, also, 22 Cyc. pp. 546-561; note, 62 Am. Dec. 734.

**§ 32. Jurisdiction of courts.**

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, §§ 64-67.

See, also, 22 Cyc. pp. 561-579.

**§ 33. — In equity.**

[a] (Sup. 1846)

The courts of equity possess the power, in addition to their usual jurisdiction, of taking cognizance of, and protecting the persons, rights, and property of, infants.—McCord v. Ochiltree, 8 Blackf. 15.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, §§ 64-66.

See, also, 22 Cyc. pp. 561, 563; note, 98 Am. Dec. 733; note, 120 Am. St. Rep. 654.

**§ 36. Sale, mortgage, or lease under order of court.**

Collateral attack on order of sale of ancestor's lands, see EXECUTORS AND ADMINISTRATORS, § 349.

Hearing of petition for sale of ancestor's property, see EXECUTORS AND ADMINISTRATORS, § 339.

Minor heir of heir as party to sale of decedent's property, see EXECUTORS AND ADMINISTRATORS, § 335.

Notice of sale of property of ancestor under order of court, see EXECUTORS AND ADMINISTRATORS, § 337.

Right to attack sale of ancestor's property to pay debts, see EXECUTORS AND ADMINISTRATORS, § 376.

Sale under order of court as equitable conversion, see CONVERSION, § 9.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, §§ 82-97.

See, also, 22 Cyc. pp. 563-579.

**§ 39. — Proceedings.**

[a] (Sup. 1840)

A petition for an order of sale of the real estate of minors, showing the situation of the real estate, and stating that their interest would be greatly promoted by a sale of the property and a reinvestment of the proceeds, is sufficient under the statute (Rev. Code, 1873, p. 173), without specifying the causes which, under the statute, would authorize an order of sale.—Doe ex dem. Greater v. Wise, 5 Blackf. 402.

[b] (Sup. 1848)

A sale of land made under a decree against infants, without proof and on admission of the allegations of the bill by their guardian ad litem, is not necessarily void, though the decree may be void.—Taylor's Heirs v. Parker, Smith, 225.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, §§ 85-89.

See, also, 22 Cyc. p. 566.

**§ 41. — Title and rights of purchaser.**

[a] (Sup. 1838)

Where the lands of an infant are sold under an order of court, all that a purchaser who has paid his money is bound to do is to see that the court acquired jurisdiction to make the order, and, if he ascertains that jurisdiction was complete, he is not bound to look behind the judgment.—Marquis v. Davis, 15 N. E. 251, 113 Ind. 219.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, § 92.

See, also, 22 Cyc. p. 577.

**IV. CONTRACTS.**

Between parent and child, see PARENT AND CHILD, § 9.

Capacity to contract for or consent to improvements on land as affecting right to mechanic's lien, see MECHANICS' LIENS, § 67.

Presumption of acceptance of contract beneficial to infant, see CONTRACTS, § 45.

Settlement or release by minor prosecutrix pending bastardy proceedings, see BASTARDS, § 26.

Specific enforcement of contract by infant, see SPECIFIC PERFORMANCE, § 17.

**§ 47. Validity in general.**

[a] (Sup. 1854)

The only contract binding on an infant is the implied contract for necessities.—Henderson v. Fox, 5 Ind. 489.

[b] (Sup. 1856)

In a suit on an instrument of settlement between the mother and father of a bastard child, the plea of infancy is bad.—Gavin v. Burton, 8 Ind. 69.

The infant father of a bastard child may settle with the mother and execute the necessary instruments in making such settlement.—Id.

[c] (Sup. 1862)

An agreement of an infant prosecutrix, in a bastardy suit, to take a given sum as a sufficient provision for the maintenance of the child, will not bar her action.—Pickler v. State ex rel. Brickley, 18 Ind. 266.

[d] (Sup. 1872)

A contract of suretyship made by an infant is voidable only, and may be ratified by him upon coming of age.—Fetrow v. Wiseman, 40 Ind. 148.

[e] (Sup. 1875)

In contracts between an adult and an infant, the former may be bound by the contract, although the latter is not.—Lafollett v. Kyle, 51 Ind. 446.

[f] (Sup. 1886)

An infant is not liable on his contracts.—House v. Alexander, 105 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189.

[g] (Sup. 1886)

The contract of an infant for the purchase of a buggy and set of harness is voidable, not void, and may be avoided during nonage, so as to effectually destroy the contract for all purposes.—*Rice v. Boyer*, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53.

[h] (App. 1903)

The contract of an infant is not void, but voidable only.—*Shroyer v. Pittenger*, 67 N. E. 475, 31 Ind. App. 158.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, §§ 90, 101–108, 110.

See, also, 22 Cyc. p. 581; note, 1 L. R. A. (N. S.) 525.

#### § 49. Services.

[a] (Sup. 1861)

In an action to recover for work and labor done by the plaintiff during his minority, the defendant answered, alleging the payment to the plaintiff after he had attained his majority. *Held*, that a reply on the part of the plaintiff pleading infancy was insufficient, as the plaintiff, if paid in full, though an infant at the time, cannot sue for and recover payment again.—*Hobbs v. Godlove*, 17 Ind. 359.

[b] (Sup. 1866)

An infant residing with another as a member of his family, and receiving support and attention as such, and rendering service in return, is not bound by any implied contract which would operate against him as a bar to a recovery for the reasonable value of his services.—*Garner's Adm'r v. Board*, 27 Ind. 323.

[c] (Sup. 1870)

In an action to recover for work and labor done by the plaintiff for the defendant at the request of the latter while the former was a minor, he may recover whatever such services were reasonably worth, not being bound by any special contract as to the time he was to work or the amount to be paid him for his services; and the defendant may set off against the amount so recovered the reasonable value of necessities furnished the plaintiff during the period of such service, such as food, clothing, schooling, etc.—*Meredith v. Crawford*, 34 Ind. 309.

[d] (Sup. 1890)

A minor having entered the service of another and continued therein four years without agreement as to compensation, the law implies a promise to pay what the services were worth, after deducting the board, clothing, washing, and mending furnished the minor, it not appearing that he was taken into his employer's family, and treated as a member thereof.—*Lockwood v. Robbins*, 125 Ind. 398, 25 N. E. 455.

[e] (App. 1896)

An infant is competent to assume by express contract the family relation towards per-

sons not related by blood, so as to prevent his recovery for services rendered in the family.—*Purviance v. Schultz*, 16 Ind. App. 94, 44 N. E. 766.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, §§ 112, 113.

See, also, 22 Cyc. p. 599; note, 24 L. R. A. 231.

#### § 50. Necessaries.

Avoidance of contract, see post, § 58.

Loans used for purchase of necessities, see post, § 51.

[a] (Sup. 1848)

It seems that proof that minors lived in the family of a relative, rendering services to him, and receiving their board and lodging from him, is not, alone, sufficient evidence that compensation was to be made for their support.—*Clark v. Casler*, 1 Ind. 243, Smith, 150.

[b] (Sup. 1854)

Whether articles furnished to an infant were in the particular case necessities is a question of law, to be determined by the court, while their quantity, quality, and value, are questions for the jury.—*Henderson v. Fox*, 5 Ind. 489.

The express contracts of an infant, as by bond and note, are not binding as such, and cannot be enforced without ratification, even if given for necessities.—*Id.*

[c] (Sup. 1861)

In an action to recover for work and labor done by the plaintiff during his minority, defendant answered, pleading a set-off for goods sold; the same being necessities. *Held*, that such set-off could not be avoided by the plaintiff on a plea of infancy.—*Hobbs v. Godlove*, 17 Ind. 359.

[d] (Sup. 1867)

A plea of infancy is a good defense to an action to recover money paid at the request of the infant, to relieve him from a draft for military duty. Such a payment is not within the exception of necessities.—*Dorrell v. Hastings*, 28 Ind. 478.

[e] (Sup. 1878)

In equity, an infant is liable for money obtained on his note or other contract for building, etc., but expended for necessities.—*Price v. Sanders*, 60 Ind. 310.

An infant is not liable at law on his note or other contract whereby he obtains money to build a barn or work his farm, although the money be expended for necessities. The indebtedness for necessities for which he is liable must be created directly therefor.—*Id.*

An infant is liable for necessities furnished his wife.—*Id.*

[f] (Sup. 1878)

Building materials used in the construction of a building on an infant's lands are not necessities.—*Price v. Jennings*, 62 Ind. 111.

**[g] (Sup. 1882)**

Whether articles of a certain class or kind are such as infants would be liable for, or whether certain kinds of expenditures are necessities, must be judged of by the court; but whether a particular class is suitable to the condition and the estate of the infant is for the determination of the jury.—*Garr v. Haskett*, 86 Ind. 373.

**[h] (Sup. 1882)**

A surety on an infant's note given for necessities, having been compelled to pay it, cannot maintain an action against the infant for reimbursement during his infancy.—*Ayers v. Burns*, 87 Ind. 245, 44 Am. Rep. 759.

**[i] (Sup. 1883)**

In an action by an infant to recover for domestic services, the cost of board, clothing, and schooling, furnished her while a member of defendant's family, cannot be pleaded in set-off, as the law implies no promise to pay for them.—*Wright v. McLarinan*, 92 Ind. 103.

**[j] (Sup. 1886)**

Horses are not, as a general rule, considered necessities for an infant, and he may recover the consideration paid for them upon restoration.—*House v. Alexander*, 105 Ind. 109, 4 N. E. 801, 55 Am. Rep. 189.

Articles purchased by an infant for business, agricultural, or commercial purposes are not necessities, and upon restoration of the property he may recover the consideration paid for it.—Id.

**[k] (App. 1893)**

An action to recover for necessities furnished an infant is based upon the theory of some kind of a contract, either express, implied, or resulting by construction of law, and where the family relation exists, whether natural or assumed, there is, in the absence of an express agreement, no liability, unless the circumstances are such that an agreement may be fairly inferred therefrom.—*Turner v. Flagg*, 33 N. E. 1104, 6 Ind. App. 563.

**[l] (App. 1896)**

A minor is liable for necessities procured by an agent to the same extent as if procured by himself.—*Fruchey v. Eagleson*, 15 Ind. App. 88, 43 N. E. 146.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Infants, §§ 114, 115, 117-127; 11 Cent. Dig. Contracts, § 130.

See, also, 22 Cyc. pp. 590-598; note, 47 L. R. A. 307; notes, 18 Am. St. Rep. 606, 643.

**§ 51. Loans and advances.****[a] (Sup. 1878)**

Where a creditor furnishes money to a minor which he uses to purchase necessities, and the creditor shows its application for the purchase of necessities, the minor in equity will be liable.—*Price v. Sanders*, 60 Ind. 310.

Where a person lends money to a minor to pay a debt incurred for necessities and the debts is so actually paid, he will stand in equity in the place of the original creditor, and the minor will be liable to him.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Infants, § 111.

See, also, 22 Cyc. p. 589.

**§ 52. Bills and notes.****[a] (Sup. 1854)**

Since the promissory note of an infant is voidable, the assignee thereof may proceed in the first instance against the assignor without suing the maker.—*Henderson v. Fox*, 5 Ind. 480.

**[b] (Sup. 1860)**

The indorsement of an infant payee enables his indorsee to sue the maker.—*Frazier v. Massey*, 14 Ind. 382.

**[c] (Sup. 1878)**

The note of a minor is voidable only, and not void.—*Board of Trustees of La Grange Collegiate Institute v. Anderson*, 63 Ind. 367, 30 Am. Rep. 224.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Infants, §§ 123, 129.

See, also, 22 Cyc. p. 587.

**§ 53. Students' contracts.****[a] (Sup. 1868)**

In an action by infants against a stepfather, for the use and occupation of their land, he may set off necessities furnished by him for their maintenance and education, if the rents and profits were an inadequate compensation therefor.—*Grossman v. Lauber*, 29 Ind. 618.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Infants, § 116.

**§ 54. Carrying on business.****[a] (Sup. 1888)**

Where an infant partner goes into a court of equity and asks for the appointment of a receiver, he thereby consents that the rights of all parties shall be settled by the court; and where he asks the court to take charge of goods purchased by the firm, as part of its assets, he cannot disaffirm the contract of purchase, so as to escape liability therefor, and, at the same time, retain them; and the court will, in such case, treat them as partnership assets, and apply them first to the payment of the firm debts.—*Shirk v. Shultz*, 113 Ind. 571, 15 N. E. 12.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Infants, §§ 130-131.

See, also, 22 Cyc. pp. 584, 585.

**§ 55. Estoppel in general.****[a] (Sup. 1888)**

An infant cannot be estopped from asserting his true age nor from avoiding his contract

by pleading his disability.—*Alvey v. Reed*, 17 N. E. 263, 115 Ind. 148, 7 Am. St. Rep. 418.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Infants, § 135.

See, also, 22 Cyc. pp. 550, 610, 611.

**§ 56. False representations as to age.**

[a] (Sup. 1873)

That the infant falsely represented that he was of full age will not render his contract valid, nor will it estop him from avoiding the contract.—*Carpenter v. Carpenter*, 45 Ind. 142.

[b] (Sup. 1878)

The fact that an infant represented himself to be of full age will not authorize a recovery for building materials used in the construction of a building on the infant's lands, as against the infant's subsequent grantee, who purchased without notice of the claim for the materials.—*Price v. Jennings*, 62 Ind. 111.

[c] (Sup. 1886)

An infant who secures and retains personal property of an adult, who has acted in good faith, and exercised care and diligence, upon a false representation that he is of full age, is liable for the value of the property.—*Rice v. Boyer*, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53.

Where an infant purchased goods on one year's credit, inducing the seller to enter into the contract by falsely representing that he was of full age, and thereafter he repudiated the contract, he cannot plead, by way of defense, that an action brought during the term of credit is premature.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Infants, § 100.

See, also, 22 Cyc. pp. 550, 611.

**§ 57. Ratification.**

Admissions as evidence of ratification, see EVIDENCE, § 222.

Pleading, see post, § 92.

[a] (Sup. 1852)

Defendant pleaded that when the promise was made he was an infant. Replication that the defendant ratified the promise after attaining to majority and issue thereon. The defendant asked the court to instruct the jury that, if the defendant was an infant when the plaintiff assumed that the promise was made, to find him guilty they must find that the promise was made while he was under age, or they could not inquire as to what he had said or done, after he became of age, that might look like a confirmation of the contract. It was *held* that the instruction was properly refused.—*Conaway v. Shelton*, 3 Ind. 334.

[b] (Sup. 1854)

In a suit by the assignee of a promissory note given by an infant against the assignor, it was *held* that if, between the making of the note and its maturity, the infant had arrived at

full age and ratified the note, the burden of proving that fact was upon defendant.—*Henderson v. Fox*, 5 Ind. 480.

[c] (Sup. 1856)

The promise of an infant cannot be enforced against him upon a mere acknowledgment, nor upon partial payment, after he comes of age. A direct promise to pay is necessary, or an express agreement to ratify his contract.—*Conklin v. Ogborn*, 7 Ind. 533.

[d] (Sup. 1872)

To affirm or ratify a contract of suretyship made by an infant, there must not only be an acknowledgment of liability, but an express promise, voluntarily and deliberately made, after arriving at majority, and with the knowledge that he is not legally liable.—*Fetrow v. Wiseman*, 40 Ind. 148.

[e] (Sup. 1876)

An instruction to the jury that a person of mature age, in order to ratify a contract made by him during infancy, must know that he is not bound by such contract, is not inconsistent with another instruction that every person of sound mind and mature age is presumed to know the law.—*Ogborn v. Hoffman*, 52 Ind. 439.

[f] (Sup. 1881)

An infant must disaffirm a contract within a reasonable time after his arrival at majority, though the statute of limitations has not run against the right of rescission.—*Wiley v. Wilson*, 77 Ind. 596.

[g] (Sup. 1886)

In a case where the infant tenders back the property received by him, and, upon refusal of his tender, brings suit, the mere retention of the property after arrival at majority cannot be deemed a ratification.—*House v. Alexander*, 105 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189.

[h] (App. 1892)

A reply to a plea of infancy, in an action upon a note, which alleges that after defendant came of age, and before suit brought, he ratified his execution of said note by entering into an agreement with plaintiff and his authorized agent in which he promised to pay the same, is not demurrable, since the note of an infant is merely voidable, and may be ratified without a new consideration.—*Heady v. Boden*, 4 Ind. App. 475, 30 N. E. 1119.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Infants, §§ 136-148, 151.

See, also, 22 Cyc. pp. 600-608; note, 53 L. R. A. 365; note, 25 Am. Rep. 30; notes, 18 Am. St. Rep. 606, 610.

**§ 58. Avoidance.**

[a] (Sup. 1837)

If a minor, on the ground of infancy, rescind a contract which has been fairly executed, and which is apparently to his advantage, he cannot afterwards sue for the money or property

advanced or labor performed by him under such contract.—*Harney v. Owen*, 4 Blackf. 337, 30 Am. Dec. 662.

[b] (Sup. 1852)

A minor contracted to work six months for another at \$10 per month, and was to work out the time or have no pay. Having worked about three months, he left his employer, without assigning any reason therefor, and, being yet a minor, sued for his labor. *Held*, that the contract was voidable.—*Dallas v. Hollingsworth*, 3 Ind. 537.

[c] (Sup. 1854)

Where an infant made a special agreement to labor for a certain time for certain wages, and before the time expired, left the service of his employer voluntarily, without any fault on the part of his employer, he may nevertheless recover on a quantum meruit for the services performed.—*Wheatly v. Miscal*, 5 Ind. 142.

[d] (Sup. 1860)

Only the infant or his legal representatives can avoid his contract.—*Frazier v. Massey*, 14 Ind. 382.

[dd] (Sup. 1862)

A power of attorney to one giving no interest to the attorney, and executed by an infant, may be revoked at pleasure.—*Pickler v. State ex rel. Brickley*, 18 Ind. 260.

[e] (Sup. 1866)

A minor may avoid a special contract for personal services, and not necessities.—*Garner's Adm'r v. Board*, 27 Ind. 323.

The rule that where an adult resides with another as a member of his family, receiving support and attention as such, and rendering service in return, there is no implied contract to pay for such services, does not apply to infants, who, as they may avoid their express contracts, cannot be bound by the implied contract growing out of such a relation.—*Id.*

An infant residing with another as a member of his family, receiving support and attention as such, and rendering service in return, avoided his contract and brought suit for the services rendered. *Held* that, in fixing the amount of compensation to be allowed in such case, the jury may consider the circumstances under which the services were rendered.—*Id.*

[f] (Sup. 1866)

Where a promissory note payable to an infant is assigned by him, he may disaffirm the act without tendering back the consideration he had received for the assignment.—*Briggs v. McCabe*, 27 Ind. 327, 89 Am. Dec. 503.

[g] (Sup. 1868)

The maker of a note cannot defend an action brought by an indorsee upon the ground that the payee was an infant. The disability of an infant to make a valid binding contract is a personal privilege, intended for the benefit of the infant himself; and none but he

or his representatives can take advantage of such disability.—*Garner v. Cook*, 30 Ind. 331.

[h] On avoidance of his executed contract, an infant must return the property or consideration received.—(Sup. 1873) *Carpenter v. Carpenter*, 45 Ind. 142; (1886) *House v. Alexander*, 105 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189.

[i] (Sup. 1875)

An infant may recover personal property sold or exchanged, by him, without returning the money or property received therefor. Hence it is no defense to an action by an infant to recover possession of a horse, that another horse received by him in exchange therefor had been so misused by him that, though sound and of equal value with the horse given by him in exchange at the time of the transaction, it became unsound and of no value, and that afterwards the plaintiff offered to rescind, then making known his infancy to the defendant, who had no knowledge thereof at the time of the exchange.—*White v. Branch*, 51 Ind. 210.

[j] (Sup. 1876)

A girl over 18, but under 21, was induced, in consideration of the promise of the putative father of her bastard child, against whom she held a judgment for sums to be paid for maintenance of the child, that he would marry her, to vacate the judgment. *Held* that, on his failure to marry her, she could, on attaining 21, disaffirm her contract and sue to have the satisfaction vacated.—*Reish v. Thompson*, 55 Ind. 34.

[k] (Sup. 1877)

A minor, with his father's consent, purchased of the corporation by which he was employed certain shares of its stock, receiving a certificate therefor and executing to his employer his note. According to an agreement between the minor and the employer, in which the father acquiesced, he received a weekly credit of a certain sum on the note, which credit was deducted from his earnings. Before he attained majority, and before the note was wholly paid, he tendered the certificate back to the corporation, and demanded the return of his note and that the sums credited thereon should be paid him. *Held* that, on evidence showing that the father had relinquished to the minor all claim to his services, he was entitled to recover.—*Indianapolis Chair Mfg. Co. v. Wilcox*, 59 Ind. 429.

[l] (Sup. 1880)

In an action against a partnership, it was answered by one of the partners that during the entire continuance of the partnership he was an infant, and that after attaining his majority the other partner had executed the note in suit without his knowledge. *Held*, that such answer amounted to a dissolution of the partnership on majority of the infant.—*Kins v. Barbour*, 70 Ind. 35.

[m] (Sup. 1882)

Where a voidable contract of an infant is disaffirmed by him, it is rendered void ab initio by relation, and the parties are thereby returned to the same condition as if the contract had never been made.—*Shrock v. Crowl*, 83 Ind. 243.

[n] (Sup. 1886)

Where the voidable act of an infant is disaffirmed, it avoids the contract ab initio.—*Rice v. Boyer*, 9 N. E. 420, 108 Ind. 472, 58 Am. Rep. 53.

An infant may repudiate a contract respecting personal property during nonage, and his repudiation is a complete avoidance of it effectually putting an end to its existence both as to him and as to the adult with whom he contracted.—Id.

[o] (Sup. 1887)

Infancy is a personal privilege, and parties in privity of estate with an infant cannot avail themselves of such privilege for the mere purpose of setting up irregularities of which the infant has never complained.—*Harris v. Ross*, 112 Ind. 314, 13 N. E. 873.

[p] (Sup. 1888)

Though an infant purchasing goods on his own account and paying for them may disaffirm the contract and recover the amount paid without returning or offering to return the goods, to the seller, it does not follow that, after thus disaffirming the contract, he can hold the goods as against the person from whom the purchase was made.—*Shirk v. Shultz*, 15 N. E. 12, 113 Ind. 571.

[q] (Sup. 1895)

If an infant does not live to ratify or reject a voidable contract made during his minority, it may be set aside by parties who are privies in blood, though not by those who are privies in estate only.—*Gillenwaters v. Campbell*, 142 Ind. 529, 41 N. E. 1041.

[r] (App. 1896)

Where an infant executed notes for chattels sold to him by the payee, and, to secure the same, gave a mortgage on the chattels sold and on others, and the infant afterwards repudiated the transaction, plaintiff cannot recover the goods sold under an assignment of the mortgage or an indorsement of the notes.—*Hyde v. Courtwright*, 14 Ind. App. 106, 42 N. E. 647.

[s] (Sup. 1904)

On the disaffirmance of a contract, an infant is not bound to place the other party in statu quo.—*Shipley v. Smith*, 70 N. E. 803, 162 Ind. 526.

All voidable contracts of an infant in reference to personality may be avoided by the infant at any time during his minority, or on his arrival at full age.—Id.

[t] (App. 1909)

Where a minor feme covert, having every appearance of being an adult, and whose hus-

band was over 21 years of age, executed deeds reciting that she had become 21 years of age, her contract, was a palpable fraud on the grantees preventing her from disaffirming the deeds after becoming of age without restoration of the consideration, where the grantees' deals were made in good faith and without taking any unfair advantage of the minor.—*Ackerman v. Hawkins*, 88 N. E. 616.

*Burns' Ann. St. 1908*, §§ 3979, 3980, require the restoration of the consideration on the disaffirmance of a conveyance by a minor feme covert whose husband was of age, where the minor represented herself to be of age, except where no consideration was received by the minor for the conveyance. *Held*, that where the grantees in a deed from a minor feme covert conveyed certain land as a consideration therefor to the minor's adult husband and father-in-law with the assent of the minor, and with the understanding between the minor and her husband and father-in-law that her portion of the land conveyed to them might be partitioned between her and them after she and her husband had seen it, and decided what part would be desirable, the minor could not assert that no consideration was received by her so as to bring her within the exception of the statute.—Id.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, §§ 149-160.

See, also, 22 Cyc. pp. 609-617; notes, 15 L. R. A. 211, 26 L. R. A. 177; note, 13 Am. Dec. 131; notes, 44 Am. Rep. 272, 46 Am. Rep. 317.

### V. TORTS.

#### § 59. Liability in general.

[a] (Sup. 1865)

An infant is not liable for the wrongful conversion of money which has been bailed to him, to be paid over to a third party, when the bailee was only to pay the same sum deposited with him, and not the specific money.—*Root v. Stevenson's Adm'r*, 24 Ind. 115.

[b] (Sup. 1881)

Infancy is no defense to an action of trover or trespass for the unlawful conversion of property.—*McClure v. McClure*, 74 Ind. 108.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, §§ 161, 163-166.

See, also, 22 Cyc. p. 618; notes, 26 L. R. A. 366, 57 L. R. A. 673.

#### § 60. Willful injuries.

[a] (Sup. 1863)

Infancy is no defense to an action for seduction.—*Lee v. Hefley*, 21 Ind. 98.

[b] (App. 1901)

An infant who commits an assault with intent to commit rape is liable in damages for

the injuries therefrom.—*Watson v. Wrightsman*, 59 N. E. 1064, 26 Ind. App. 437.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Infants, §§ 162-166.

See, also, 22 Cyc. p. 618; note, 57 L. R. A. 680.

**§ 61. Negligence.**

[a] (Sup. 1877)

Where an infant, unprovoked, threw a piece of mortar at another, and part of it struck a third person and injured his eye, without his contributory fault, though there was no intent to inflict the injury, and the act was done in sport, yet, it having been done intentionally, the infant was liable for the injury inflicted in an action against him by the person injured.—*Peterson v. Haffner*, 59 Ind. 130, 26 Am. Rep. 81.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Infants, § 167.

See, also, 22 Cyc. p. 619; note, 57 L. R. A. 680.

**§ 62. False representations.**

[a] (Sup. 1873)

An infant may be liable in tort for fraudulent representations.—*Carpenter v. Carpenter*, 45 Ind. 142.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Infants, § 168.

See, also, 22 Cyc. pp. 620-622.

**VI. CRIMES.**

**§ 69. Punishment.**

[a] (Sup. 1877)

Under section 13 of "An act to establish a house of refuge," etc. (1 Rev. St. 1876, p. 545), providing that, as to infants under 16, arraigned for trial on a charge of violating any criminal law of the state, "the judge may, with the consent of the accused, arrest at any stage of the cause any further proceedings on the part of the prosecution," and commit the accused to the House of Refuge, it is not too late to commit after the jury has returned a verdict of guilty, and motions for a new trial and in arrest of judgment have been overruled.—*State v. Smith*, 59 Ind. 179.

There is no conflict between such section 13 as above construed, and Act June 27, 1852, § 122 (Rev. St. 1876, p. 406), which enacts that "after verdict of guilty, or finding of the court against the defendant, if the judgment be in arrest, or a new trial granted, the court must pronounce judgment."—*Id.*

[b] (Sup. 1882)

Where an infant under the age of 16 has been arraigned for a violation of a criminal law of the state, and it appears that the trial court, under Rev. St. 1881, § 6214, has arrested the proceedings and committed the ac-

cused to the guardianship of the house of refuge, the Supreme Court will presume, where the record shows nothing to the contrary, that this action was had with his consent.—*Lindsey v. State*, 82 Ind. 7.

[c] (Sup. 1901)

In an action to recover the custody of plaintiff's minor son, who had been committed to the reform school, plaintiff must show, not only that the order was erroneous or irregular, but that it was absolutely void, since the proceeding is a collateral attack on the order of commitment.—*Lee v. McClelland*, 60 N. E. 692, 157 Ind. 84.

In an action to recover the custody of plaintiff's minor son, who had been committed to the reform school, evidence that no written charge of larceny or any other offense was filed against accused, or read to him in any way, when he was committed to the reform school, was properly excluded as immaterial, where the accused had pleaded guilty to an indictment for larceny six months before, since the power of the court to commit the accused did not depend on the charge being preferred against him or read to him on the day the commitment was pronounced.—*Id.*

A commitment stating that the accused was brought before the court and committed to the reform school on a charge of grand larceny, but not stating when the charge was made against him, is sufficiently shown to have been made under an indictment to which a plea of guilty had been entered six months before, where the record shows only one charge of larceny against accused.—*Id.*

Under Burns' Rev. St. 1894, § 8318 (Horner's Rev. St. 1897, § 6220g), providing that no other record than the commitment shall be made when the occasion of the commitment is a criminal charge, unless demanded by the accused, his parent or guardian, the fact that no record of a commitment of a minor to the reform school for grand larceny was made in the order books of the court will not invalidate the commitment where the right to such record was waived by a failure to make demand.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Infants, §§ 176, 177.

See, also, 22 Cyc. p. 626.

**VII. ACTIONS.**

Right of action for seduction, see SEDUCTION, § 6.

Right of infant coheir to bring suit in partition, see PARTITION, § 32.

**§ 70. Capacity to sue and be sued in general.**

[a] (Sup. 1881)

2 Rev. St. 1876, p. 554, § 177, authorizing the bringing of an action within a certain time after the disability of infancy is removed, does

not prevent an infant from suing before he becomes of age.—*Edwards v. Beall*, 75 Ind. 401.

[b] (App. 1903)

An infant cannot, over objections, prosecute an action by his guardian to recover land of which the guardian never had possession.—*Tucker v. White*, 62 N. E. 758, 28 Ind. App. 328.

[c] (Sup. 1906)

An emancipated ward may bring an action on the bond of his guardian, or against the guardian individually.—*Roberts v. Smith*, 165 Ind. 414, 74 N. E. 894.

[d] (Sup. 1907)

The provisions of the Civil Code of Procedure regulate an action by an infant to contest a will, since *Burns' Ann. St. 1901*, § 2766, authorizing any person to contest the validity of a will, is silent as to the manner in which such an action shall be brought by an infant.—*Campbell v. Fichter*, 168 Ind. 645, 81 N. E. 661.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, § 178.

See, also, 22 Cyc. p. 627.

§ 72. Rights of action.

Action for causing death, see DEATH, § 39.

[a] (Sup. 1852)

A., a minor, contracted to work six months for B. at \$10 per month, and was to work out the time or have no pay. Having worked about three months, he left B., without assigning any reason therefor, and, being yet a minor, sued B., for his labor for that time at \$13 a month. Held, that the suit was sustainable for the value of his labor.—*Dallas v. Hollingsworth*, 3 Ind. 537.

[b] (Sup. 1855)

A suit can be maintained for the value of services rendered by an infant under a special contract not fulfilled.—*Van Pelt v. Corwine*, 6 Ind. 363.

[c] (Sup. 1865)

A party who has avoided, since he arrived at majority, a deed of land executed by him when a minor, need not tender back the purchase money on suing to recover possession of the premises so conveyed by him.—*Miles v. Lingerman*, 24 Ind. 385.

[d] (Sup. 1871)

A minor may, by his next friend, maintain an action against a carrier for the value of clothing or other property given to him by his parents or others and lost by the defendant.—*Perkins v. Wright*, 37 Ind. 27.

[e] (Sup. 1873)

Where an infant has exchanged property with an adult, he is not bound to tender back the property he has received before suing for

the value or the possession of the property given by him to the adult.—*Carpenter v. Carpenter*, 45 Ind. 142.

[f] (Sup. 1881)

An infant may maintain an action to correct a mistake in a decree, and to set aside a conveyance and quiet the title, and for partition of the land in controversy.—*Edwards v. Beall*, 75 Ind. 401.

[g] (Sup. 1896)

Rev. St. 1894, § 297 (Rev. St. 1881, § 296), by which infants are given two years after becoming of age in which to bring suit for a cause of action accruing during their minority, does not prevent a minor from bringing such action before he becomes of age.—*Winer v. Mast*, 146 Ind. 177, 45 N. E. 66.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, §§ 180-185.

See, also, 22 Cyc. p. 627.

§ 74. Parties.

[a] (Sup. 1829)

An infant, having a title to land for which an action of ejectment is brought, has a right to be admitted a defendant on the usual terms.—*Glass v. Doe ex dem. Murphy*, 2 Blackf. 293.

[b] (Sup. 1837)

On a bill brought by an infant, against one who has entered upon his lands and received the proceeds thereof, to compel him to account for the same, a claimant who has no such right in equity because of infancy cannot be joined with him as a co-complainant.—*Grimes v. Wilson*, 4 Blackf. 331.

[c] (Sup. 1870)

The administrator of an infant who died before majority may maintain an action to foreclose a mortgage given to the infant, if brought within the time that the infant, if living, could have maintained such action.—*Nolte v. Libbert*, 34 Ind. 163.

[d] (Sup. 1871)

One who conducts a suit as guardian or next friend of infants is not a party of record, but the infants themselves are the real plaintiffs.—*Whitten v. State*, 36 Ind. 196.

An infant female, suing by next friend for seduction, is plaintiff in the cause, and may or may not, as seems best to her, attend court and prosecute the suit.—Id.

[e] (App. 1891)

In an action by an infant by his next friend for work and labor, where it is averred that from the beginning to the close of the services the plaintiff was the sole party interested in them, having been completely emancipated before any of the services were rendered, a demurrer thereto on the ground of defect of parties, because the plaintiff's father was a necessary party, was properly overruled, for, if there

were any facts which made it necessary that he should become a defendant, they did not appear in the complaint, and should be set up in some pleading or application by the defendant.—*Haugh, Ketcham & Co. Iron-Works v. Duncan*, 28 N. E. 334, 2 Ind. App. 264.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, §§ 188-190.

See, also, 22 Cyc. p. 633.

### § 76. Guardian ad litem or next friend.

Authority to verify pleading, see PLEADING, § 296.

Failure to appoint guardian ad litem for minor defendant as ground for new trial in bastardy case, see BASTARDS, § 73.

Right of guardian ad litem to appeal in own name, see post, § 115.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, §§ 192-252.

See, also, 22 Cyc. pp. 634-670; note, 16 L. R. A. 507.

### § 77. — In general.

[a] (Sup. 1839)

No person can institute a suit in the probate court on behalf of infants unless he is their guardian generally or ad litem.—*Wade v. Fite*, 5 Blackf. 212.

[b] (Sup. 1886)

Infants may defend by guardian ad litem, but cannot so prosecute an action, either upon a complaint or cross complaint.—*Spencer v. Robbins*, 106 Ind. 580, 5 N. E. 726.

[c] (App. 1906)

Courts have inherent power, as well as statutory power, by virtue of *Burns' Ann. St. 1901*, § 2684, to appoint guardians ad litem for an infant impleaded in any suit.—*Ziegler v. Ziegler*, 78 N. E. 1066, 39 Ind. App. 21.

[d] (Sup. 1907)

Under *Burns' Ann. St. 1901*, §§ 252, 256, 257, providing that, where an infant has a right of action he shall be entitled to bring suit thereon by next friend, etc., an infant appearing by next friend may contest a will.—*Campbell v. Fichter*, 168 Ind. 645, 81 N. E. 661.

[e] (Sup. 1908)

When a child of school age is transferred from one school corporation to another, as authorized by *Burns' Ann. St. 1908*, §§ 6449-6453, an action to enforce any right it may have to attend the school to which the transfer has been made may be properly brought, on the relation of such child, by its next friend.—*Teepie v. State ex rel. Bower*, 171 Ind. 268, 86 N. E. 49.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, §§ 192-194, 231.

See, also, 22 Cyc. p. 634.

### § 78. — Necessity of appointment.

In action by wife concerning separate estate, see HUSBAND AND WIFE, § 210.

[a] (Sup. 1829)

Where an infant having a title to land for which an action of ejectment is brought is admitted as a defendant, the court should appoint a guardian for him to defend the suit.—*Glass v. Doe ex dem. Murphy*, 2 Blackf. 293.

[b] (Sup. 1834)

An infant must sue or be sued by next friend or guardian.—*Bouche v. Ryan*, 3 Blackf. 472.

[c] (Sup. 1836)

An infant may sue by guardian, and need not secure appointment of next friend.—*Rucker v. McNeely*, 4 Blackf. 179.

[d] (Sup. 1839)

No person can institute a suit on behalf of an infant unless he is guardian generally or guardian ad litem.—*Wade v. Fite*, 5 Blackf. 212.

[e] (Sup. 1841)

Unless the *prochein ami* of an infant plaintiff is appointed by the court, the defendant is not obliged to plead to the action, and may have the suit dismissed.—*Keeran v. Clowser*, 5 Blackf. 604.

[f] (Sup. 1846)

Where minors are made parties defendant in a suit in equity, a guardian ad litem for them must be appointed by an order of the court.—*Hough v. Canby*, 8 Blackf. 301.

[g] (Sup. 1851)

The probate court granted an order for the sale of real estate of an intestate upon the petition of the administrator. The defendant assigned for error that a final decree was taken against an infant defendant without the appointment of a guardian ad litem for her, and upon appearance by attorney. To that assignment the petitioner pleaded that, at the time of the rendition of the decree, the said defendant was of full age. *Held*, upon demurrer, that the plea was bad.—*Timmons v. Timmons*, 3 Ind. 251.

[h] (Sup. 1853)

An order of a probate court for the leasing of the real estate of an intestate on petition of the administrator is erroneous if the heirs, being infants, did not appear to the action, and no guardian ad litem was appointed to answer for them.—*Compere v. Randall*, 4 Ind. 55.

[i] (Sup. 1854)

It is error to decree a sale of the land of a decedent without the previous appointment of a guardian ad litem for the infant heirs.—*Timmons v. Timmons*, 6 Ind. 8.

## [j] (Sup. 1857)

Where an infant was co-plaintiff with his mother, who described herself as his next friend, it was held sufficient on demurrer.—*Resor v. Resor*, 9 Ind. 347.

## [k] (Sup. 1857)

A guardian ad litem must be appointed for infant defendants before a valid judgment can be rendered against them.—*Alexander v. Frary*, 9 Ind. 481.

The court may appoint a guardian ad litem, though it appear that minor defendants had a guardian regularly appointed by the same court, and living within its jurisdiction.—*Id.*

## [l] (Sup. 1870)

Where the guardian of an infant appears and defends for his ward, it is unnecessary to appoint a guardian ad litem.—*Hughes v. Sellers*, 34 Ind. 337.

## [m] (Sup. 1874)

A married woman, though an infant, cannot have a general guardian of her person or property if her husband be of lawful age. Such infant married woman may sue alone in reference to her separate property by a guardian ad litem or next friend.—*Ex parte Post*, 47 Ind. 142.

## [n] (Sup. 1882)

Where an infant female plaintiff is joined in her suit by her adult husband, no next friend is necessary.—*Welch v. Bunce*, 83 Ind. 382.

## [o] (Sup. 1883)

Where, after the removal of her next friend, a minor on a showing that she could not obtain a responsible person to act in such capacity was permitted to prosecute as a poor person, it was unnecessary for her to do so by next friend.—*Wright v. McLarinan*, 92 Ind. 703.

## [p] (Sup. 1890)

A female infant who has married a man of full age, and whose guardian has settled with her, being entitled to the possession of her estate, may sue one to whom her husband has fraudulently transferred a portion thereof for its recovery by next friend, as authorized by Rev. St. 1881, §§ 255, 256; and she may make a demand for the property before suit without the intervention of a next friend.—*Bush v. Groomes*, 125 Ind. 14, 24 N. E. 81.

## [q] (Sup. 1893)

Proceedings in review of a judgment are a continuation of the original case, and the parties remain the same, and hence a motion in such proceedings for the appointment of a guardian ad litem for plaintiff, a minor, who appeared in the original case by his next friend, and also appears in the proceedings for review by the same friend, is properly overruled.—*Evansville & R. R. Co. v. Maddux*, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511.

## [r] (App. 1899)

A guardian who is the administrator of an estate cannot represent his ward's interests in the estate, but a guardian ad litem should be appointed.—*State ex rel. Goodhue v. Burkam*, 55 N. E. 237, 23 Ind. App. 271.

## [s] (App. 1901)

Where, after a minor has been duly served with process, he appears in person and by counsel, files an answer, goes to trial, and awaits the result of the verdict, he cannot urge the fact that no guardian ad litem had been appointed as a ground for setting aside the verdict.—*Watson v. Wrightsman*, 59 N. E. 1064, 26 Ind. App. 437.

## [t] (App. 1906)

Under Burns' Ann. St. 1901, § 2684, authorizing the court to appoint a guardian ad litem to defend the interest of any minor impleaded in any suit, and to permit any person as next friend to prosecute any suit in a minor's behalf, and section 259, providing that an infant defendant shall appear and defend by guardian appointed by the court, an infant defendant can prosecute an action by cross-complaint only by a next friend.—*Ziegler v. Ziegler*, 78 N. E. 1066, 39 Ind. App. 21.

## FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, §§ 195-207, 209; 22 CENT. DIG. Ex. & Ad. § 1383; 34 CENT. DIG. Marriage, § 129.

See, also, 22 Cyc. pp. 634-645.

## § 79. — Time for appointment.

## [a] (Sup. 1878)

Where defendant pleads that plaintiff, an infant, had not commenced his action by next friend, the court may allow a responsible person to appear as next friend and qualify, even over the objection of defendant.—*Greenman v. Cohee*, 61 Ind. 201.

## FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, §§ 208, 209.

See, also, 22 Cyc. p. 646.

## § 80. — Proceedings for appointment.

## [a] (Sup. 1822)

The informal appointment of a *prochein ami* is not assignable as error.—*Shannon v. Spencer*, 1 Blackf. 526.

## [b] (Sup. 1841)

The appointment of a *prochein ami* for an infant plaintiff, at the term to which a writ is returnable, does not entitle the defendant to a continuance.—*Harvey v. Coffin*, 5 Blackf. 566.

## [c] (Sup. 1848)

If the record of a domestic court of general jurisdiction of the subject-matter then tried recites that a guardian ad litem was appointed "on motion," and no other notice appears to have been given to the infants concerned, it will be presumed that they were present in court at the time of the motion.—*Horner v.*

Doe ex. dem. State Bank of Indiana, 1 Ind. 130, Smith, 10, 48 Am. Dec. 355.

[d] (Sup. 1851)

A., who was sued by an infant before a justice, appeared to the suit before the justice, went to trial on the merits, and suffered judgment to be rendered against him, without making the objection that the next friend of the infant had not consented, in writing, to his appointment. The suit was appealed to the circuit court, where A. moved to dismiss for the want of such written consent; but the circuit court were not informed, by affidavit or otherwise, that the defendant did not know of the omission complained of while the suit was pending before the justice. *Held*, that the circuit court were justified in refusing to dismiss the suit.—*Usher v. Cornwell*, 3 Ind. 210.

In a suit by an infant before a justice of the peace, the naming of a person as *prochein ami* in the summons may be considered as an appointment of such person as *prochein ami*.—*Id.*

[e] (Sup. 1872)

Under 2 Gav. & H. St. p. 42, § 11, a complaint signed by the next friend of an infant is sufficient consent to such representation.—*Rowe v. Arnold*, 39 Ind. 24.

[f] Rev. St. 1881, § 256, providing that, "before any process shall issue in the name of an infant who is sole plaintiff, a competent and responsible person shall consent in writing to appear as next friend," and shall be liable for costs, is merely directory, in respect to the time when such consent shall be filed, and process may issue and the cause proceed without such consent, until it is required by defendant.—(Sup. 1878) *Greenman v. Cohee*, 61 Ind. 201; (App. 1892) *Budd v. Rutherford*, 4 Ind. App. 386, 30 N. E. 1111.

[g] (Sup. 1878)

Before a guardian ad litem can be appointed for infant defendants, it must be shown that a summons duly issued has been served upon them personally, or by publication if nonresidents.—*Carver v. Carver*, 64 Ind. 194.

[h] (Sup. 1883)

The appointment of a guardian ad litem for infant defendants who have not been brought in by the proper service of process is irregular and unauthorized, and will work a reversal of the decree on error.—*Roy v. Rowe*, 90 Ind. 54.

[i] (App. 1901)

In the absence of service on infant defendants, the appointment of a guardian ad litem is a nullity.—*Holliday v. Miller*, 62 N. E. 201, 28 Ind. App. 121.

[j] (Sup. 1902)

A guardian ad litem for an infant party should be appointed by the judge without reference to any suggestions from the attorney representing the opposite interest.—*Allen v. McGee*, 158 Ind. 463, 62 N. E. 1002.

[k] (Sup. 1906)

Courts have inherent jurisdiction to appoint guardians ad litem to protect the interests of minor defendants, both under the express provisions of Burns' Ann. St. 1901, § 2684, and independent thereof.—*Gibbs v. Potter*, 166 Ind. 471, 77 N. E. 942.

FOR CASES FROM OTHER STATES.

SEE 27 CENT. DIG. Infants, §§ 210-221.

See, also, 22 Cyc. pp. 652-658.

§ 81. — Eligibility and qualification.

[a] (Sup. 1839)

If the appointment of a guardian ad litem to institute suit for infants has been made in another state, the guardian must file a copy of his appointment, and give bond and surety for the faithful discharge of his duty, before his authority can be recognized in the courts of this state.—*Wade v. Fite*, 5 Blackf. 212.

A guardian ad litem, appointed by the court to represent infant parties, must give bond for the faithful performance of his duties.—*Id.*

[b] (App. 1892)

Since the enactment of the statutes enlarging the civil rights of married women, a woman is not, because of her marriage, incompetent to act in the capacity of next friend, in an action by a minor, since, under the statute making the next friend liable for costs, a judgment for costs may be rendered against her, and she will be concluded thereby.—*Budd v. Rutherford*, 4 Ind. App. 386, 30 N. E. 1111.

FOR CASES FROM OTHER STATES.

SEE 27 CENT. DIG. Infants, §§ 222-229.

See, also, 22 Cyc. pp. 649-652.

§ 82. — Termination of authority and appointment of successor.

[a] (App. 1892)

Rev. St. 1881, § 2520, provides that courts shall have the power "to permit any person as next friend to prosecute any suit in any minor's behalf." Section 256 declares, when it appears that the next friend is incompetent or irresponsible, the court "may" remove him, and permit some suitable person to be substituted. *Held*, that the provision as to the removal of a next friend is permissive, and not mandatory, and error cannot be predicated on the court's refusal to remove him, though it be shown that he was insolvent.—*Budd v. Rutherford*, 4 Ind. App. 386, 30 N. E. 1111.

FOR CASES FROM OTHER STATES.

SEE 27 CENT. DIG. Infants, §§ 230, 245.

See, also, 22 Cyc. pp. 669-670.

§ 84. — Rights and powers.

[a] (Sup. 1849)

It is erroneous to decree against infants, without proof, on the admission of their guardian ad litem.—*Taylor's Heirs v. Parker, Smith*, 225.

## [b] (Sup. 1860)

Where part of the defendants were infants, on whom no service was had, it was held that the guardian ad litem could not legally waive service of process on them unless their heirs were present in court.—*Robbins v. Robbins*, 2 Ind. 74.

## [c] (Sup. 1867)

A guardian ad litem of a minor cannot waive service of process on the minor.—*Pugh v. Pugh*, 9 Ind. 132.

## [d] (Sup. 1863)

A decree of sale of real estate of a decedent by his administrator, rendered merely upon the answer of a guardian ad litem, without jurisdiction of the persons of minor heirs acquired in strict pursuance of the statute, is a nullity.—*Guy v. Pierson*, 21 Ind. 18. CONTRA, see (Sup. 1840) *Doe ex dem. Hawkins v. Harvey*, 5 Blackf. 487.

## [e] (Sup. 1906)

*Burns' Ann. St. 1901*, § 2684, declares that all courts shall have power to appoint a guardian ad litem to defend the interests of any minor impleaded in any suit, and to permit any person as next friend to prosecute any suit in any minor's behalf; and section 259 declares that an infant defendant shall appear and defend by guardian appointed by the court or chosen by such infant with the consent of the court. Held, that a guardian ad litem appointed to defend an infant defendant in a suit to reform a deed had no power to file a cross-complaint on behalf of the infant to quiet the latter's title to the land.—*Gibbs v. Potter*, 77 N. E. 942, 166 Ind. 471.

## [f] (App. 1906)

The extent of the authority of a guardian ad litem must be found in the statute authorizing his appointment and in the order of the court made in pursuance thereof.—*Ziegler v. Ziegler*, 39 Ind. App. 21, 78 N. E. 1066.

## FOR CASES FROM OTHER STATES.

SEE 27 CENT. DIG. Infants, §§ 236-244; 22 CENT. DIG. Ex. & Ad. § 1402.

See, also, 22 Cyc. pp. 661-667; notes, 32 L. R. A. 671, 70 L. R. A. 170; note, 97 Am. St. Rep. 995.

## § 85. — Duties and liabilities.

## [a] (Sup. 1902)

The duty of a guardian ad litem appointed to represent an infant party does not end with the filing of a general denial, but includes a bona fide examination of the facts, and protection of the infants' interest at the trial.—*Allen v. McGee*, 158 Ind. 465, 62 N. E. 1002.

## FOR CASES FROM OTHER STATES.

SEE 27 CENT. DIG. Infants, §§ 246, 247.

See, also, 22 Cyc. pp. 661-667; note, 97 Am. St. Rep. 995.

## § 87. — Failure to procure appointment.

## [a] (Sup. 1861)

After an answer has been served in an action brought by an infant, the defendant cannot move to set aside the plaintiff's proceedings on the ground that the action is prosecuted without the appointment of a guardian.—*Smith v. Allen*, 16 Ind. 316.

## [b] (Sup. 1877)

Where it does not appear from the pleadings in a bastardy suit that the defendant is a minor, a motion in arrest of judgment, alleging failure to cause him to appear by guardian ad litem, will be overruled.—*Rawles v. State ex rel. Ford*, 56 Ind. 433.

## [c] (Sup. 1892)

A ditch assessment on land owned by minors, though erroneous because there was no guardian ad litem appointed to answer for such minors in the proceedings for the construction of the ditch, is not void for that reason, and cannot be collaterally attacked.—*McBride v. State*, 130 Ind. 525, 30 N. E. 699.

## FOR CASES FROM OTHER STATES.

SEE 27 CENT. DIG. Infants, §§ 248, 250-252.

See, also, 22 Cyc. p. 641.

## § 88. Attainment of majority pending action.

## [a] (Sup. 1850)

Where a suit is commenced by prochein ami, and the infant afterwards becomes of age, the fact should be entered upon the record at the happening of the event, and the cause afterwards be conducted by the plaintiff or his attorney, without the use of the name of the next friend.—*Holmes v. Adkins*, 2 Ind. 398.

## [b] (Sup. 1851)

The probate court granted an order for the sale of real estate of an intestate upon the petition of the administrator. The defendant assigned for error that a final decree was taken against an infant defendant without the appointment of a guardian ad litem for her, and upon appearance by attorney. To that assignment the petitioner pleaded that, at the time of the rendition of the decree, the said defendant was of full age. Held, upon demurrer, that the plea was bad.—*Timmons v. Timmons*, 3 Ind. 251.

## FOR CASES FROM OTHER STATES.

SEE 27 CENT. DIG. Infants, §§ 253, 254; 22 CENT. DIG. Ex. & Ad. § 1383.

See, also, 22 Cyc. p. 671.

## § 89. Process.

## [a] (Sup. 1834)

If the plaintiff is an infant, the form of the writ may be the same as in other cases.—*Bouche v. Ryan*, 3 Blackf. 472.

[b] Process must be served on infants in the same manner as adults.—(Sup. 1846) *Hough v.*

Canby, 8 Blackf. 301; (1855) *Martin v. Starr*, 7 Ind. 224; (1857) *Pugh v. Pugh*, 9 Ind. 132; (1867) *Hawkins v. Hawkins' Adm'r*, 28 Ind. 66; (1877) *De La Hunt v. Holderbaugh*, 58 Ind. 285.

[c] (Sup. 1855)

In a bill in chancery in the circuit court, under Rev. St. 1843, some of the defendants were notified of the pendency of the suit by publication, as being nonresidents, but without any previous affidavit of their nonresidency, and a decree taken against them by default. For other defendants, who were minors, a guardian ad litem was appointed; but it was not shown that these had been served with process, or otherwise notified of the suit. *Held*, that none of said defendants were before the court, and that the decree, as to them, was null and void.—*Peoples v. Stanley*, 6 Ind. 410.

[d] That a decree shall affect infant defendants, they must be served with process.—(Sup. 1855) *Wells v. Wells*, 6 Ind. 447; (Sup. 1857) *Alexander v. Frary*, 9 Ind. 481; (1883) *Roy v. Rowe*, 90 Ind. 54.

[e] (Sup. 1862)

Service of process in a partition suit, made on a testamentary guardian, is sufficient to bring the ward into court.—*Richards v. Richards*, 17 Ind. 636.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, §§ 255-272.

See, also, 22 Cyc. pp. 672-681.

§ 90. Appearance and representation by attorney.

[a] (Sup. 1847)

After a guardian ad litem has been appointed for infant defendants, they will be regarded as properly in court; and, if an attorney afterwards appear and plead for them, it will be presumed that he was authorized to do so, and the relation of the attorney of the infants to them is the same that it would have been if they had been adults.—*Doe ex dem. Martin v. Brown*, 8 Blackf. 443.

[b] (Sup. 1850)

In an action of ejectment, the defendants offered in evidence a transcript of a record of a partition suit, in which it appeared that one of the defendants in such suit was an infant and first appeared by attorney, though the transcript showed that he had a guardian. *Held*, that the appearance of the infant by his attorney was not objectionable.—*Doe ex dem. White v. Scoggin*, 2 Ind. 208.

[c] An infant defendant cannot appear and answer to an action by attorney, but such appearance and answer should be by guardian ad litem.—(Sup. 1851) *Timmons v. Timmons*, 3 Ind. 251; (1854) *Id.*, 6 Ind. 8; (1877) *De La Hunt v. Holderbaugh*, 58 Ind. 285; (1879) *Wetherill v. Harris*, 67 Ind. 452.

[d] (Sup. 1857)

When infants have been duly served with process, a guardian ad litem has been appointed for them, and a formal answer filed, they may defend by attorney. They stand in court on the issues made, like any other defendants, and it is for them, under the advice of their guardians and attorneys, to move for a new trial, and put the evidence on the record in the usual manner.—*Alexander v. Frary*, 9 Ind. 481.

[e] (Sup. 1879)

An appearance of attorneys on behalf of minors to resist the confirmation of a master's report in proceedings to authorize the executrix to mortgage land belonging to his estate was not such an appearance as to bind the minors.—*Spahr v. Dickson*, 67 Ind. 394.

[f] (Sup. 1881)

Where an infant is co-plaintiff with an adult, his appearance by the attorney of the adult is valid.—*Chandler v. Chandler*, 78 Ind. 417.

[g] (Sup. 1883)

When infant defendants do not personally appear, the court has no jurisdiction of their persons.—*Roy v. Rowe*, 90 Ind. 54.

[h] (Sup. 1893)

A decree for the foreclosure of a mechanic's lien is not invalid because the defendant in the action was an infant, and appeared by attorney, instead of by guardian ad litem appointed by the court.—*Cohoe v. Baer*, 134 Ind. 373, 32 N. E. 920, 39 Am. St. Rep. 270.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, §§ 273-276.

See, also, 22 Cyc. p. 682.

§ 91. Pleading.

Aider by verdict or judgment, see PLEADING, § 433.

Issues in action for injuries, see NEGLIGENCE, § 119.

Verification, see PLEADING, § 296.

Waiver of objections, see PLEADING, § 406.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, §§ 277-291.

See, also, 22 Cyc. pp. 683-689.

§ 92. — In general.

[a] A declaration stating that the plaintiff sues by prochein ami, without showing the plaintiff's infancy and the prochein ami's admission, is bad on general demurrer.—(Sup. 1833) *Shirley v. Hagar*, 3 Blackf. 225. Contra, see (1883) *Dodd v. Moore*, 91 Ind. 522.

[b] (Sup. 1840)

In order to sue by his next friend, the pleadings should show plaintiff's disability.—*McGillicuddy v. Forsythe*, 5 Blackf. 435.

## [c] (Sup. 1847)

On proceedings by an administrator for the sale of the lands of an intestate for the payment of debts, the infant heirs were joined, and a guardian ad litem appointed, who filed an answer for them, admitting the allegations in the petition. *Held*, that the order of sale was erroneous, but not void, and the purchase under it was valid.—*Thompson v. Doe ex dem. Hare*, 8 Blackf. 336.

## [d] (Sup. 1847)

In proceedings to subject lands of a decedent to the payment of debts, there cannot be a final decree against infant defendants without proof of the averments of the bill.—*Bryer v. Chase*, 8 Blackf. 508.

## [e] (Sup. 1849)

The written consent of a *prochein ami* required by Rev. St. p. 879, to be given before process issues, need not be averred in the declaration, but, if the statute has not been complied with in that particular, the defendant may move to dismiss the suit.—*Lumpkins v. Justice*, 1 Ind. 557, *Smith*, 322.

## [f] (Sup. 1856)

Where plaintiffs sue as infants, a plea denying their infancy, and all other matters alleged in the declaration, is a general issue, and the infancy is admitted.—*Rising-Sun & V. Turnpike Co. v. McCollum*, 7 Ind. 677.

## [g] (Sup. 1856)

Under the old practice, the infancy of the plaintiff was available in abatement only. Under the new, the fact that the plaintiff had not legal capacity to sue must be taken by answer, or the objection is waived.—*Hollingsworth v. State ex rel. Harvey*, 8 Ind. 257.

## [h] (Sup. 1857)

It is the duty of the court to see that a formal answer is filed by the guardian ad litem for his infant defendant.—*Alexander v. Frary*, 9 Ind. 481.

## [i] (Sup. 1865)

A suit in behalf of minors cannot be maintained by a person who is not a party in interest, but who describes himself as guardian of the parties who are interested, when there is no averment that they are minors. The law in such case presumes them to be adults.—*Maxedon v. State ex rel. Simpson*, 24 Ind. 370.

## [j] (Sup. 1870)

In an action, by the administrator of an infant who died before majority, to foreclose a mortgage given during infancy, the complaint need not allege that the minor assented to or ratified the contract.—*Nolte v. Libbert*, 34 Ind. 163.

## [k] (Sup. 1871)

Under the statute requiring the verification of pleadings, pleadings by infant parties need not be verified by the infants, but verification

by the next friend is sufficient.—*Turner v. Cook*, 36 Ind. 129.

## [l] (Sup. 1874)

The fact that a complaint does not show that parties for whom one assumes to sue as next friend are infants is not ground for a demurrer, since, assuming that they are of age, the name of next friend is unnecessary, and may be struck out on motion.—*Lancaster v. Gould*, 46 Ind. 397.

## [m] (Sup. 1877)

The ratification by an infant, after attaining majority, of a contract for services during infancy, is sufficiently alleged by the answer of defendant stating that such services had been rendered pursuant to the contract, that defendant had fully paid for them in accordance with the terms thereof, and that plaintiff, after attaining majority and with full knowledge of the facts, had ratified such contract.—*Voiles v. Beard*, 58 Ind. 510.

## [n] (Sup. 1879)

The fact that a guardian ad litem appointed in partition proceedings for an infant defendant failed to file any answer as such guardian is no ground for review by an adult defendant.—*McCarthy v. McCarthy*, 66 Ind. 128.

## [o] (Sup. 1880)

In an action against a partnership, which was answered by one of the partners that during the entire continuance of the partnership he was an infant, and that after attaining his majority the other partner had executed the note in suit without his knowledge, *held*, that this answer is not a plea of infancy, and amounted only to an argumentative denial of the execution of the note.—*King v. Barbour*, 70 Ind. 35.

## [p] (Sup. 1882)

In an action by an infant feme covert, after attaining majority, to recover land conveyed during infancy, a cross complaint by defendant to quiet title thereto on account of delay should allege the lapse of time and circumstances, and that the delay had been unreasonable.—*Stringer v. Northwestern Mut. Life Ins. Co.*, 82 Ind. 100.

## [q] (Sup. 1883)

In an action by a widow to disaffirm a conveyance by her husband of his lands, in which she had joined while a minor, an answer alleging that the defendants were purchasers for value and without notice; that the husband, with the proceeds of the sale, had purchased other lands, of which the plaintiff had received one-third as her dower; and that the defendants had made valuable improvements on the land, the nature and value of such improvements not being stated,—was bad on demurrer.—*Richardson v. Pate*, 93 Ind. 423, 47 Am. Rep. 374.

[r] (Sup. 1884)

In order to sue by his next friend, the pleadings need not show plaintiff's disability.—*Dodd v. Moore*, 92 Ind. 397.

[s] (Sup. 1884)

A written notice of disaffirmance of a deed executed by a minor may be given in evidence under a pleading which alleges disaffirmance either in general terms or by setting out such notice specially.—*George v. Brooks*, 94 Ind. 274.

[t] (Sup. 1885)

A caption to a pleading, describing certain of the parties as minors, is not a sufficient averment of their minority.—*Funk v. Davis*, 103 Ind. 281, 2 N. E. 739.

[u] (App. 1891)

In an action by an infant by his next friend to recover for work and labor done for defendant, where it is averred that plaintiff, though an infant, had been manumitted and set free by his father, the further averment that plaintiff was living with his father during the entire time the work was being performed did not vitiate the other averment as to manumission.—*Haugh, Ketcham & Co. Iron-Works v. Duncan*, 28 N. E. 334, 2 Ind. App. 264.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, §§ 277-281, 285, 288; 30 CENT. DIG. Plead. § 101.

See, also, 22 Cyc. pp. 683-689.

### § 93. — Defense of infancy.

[a] Infancy is never presumed, and, as a ground of relief, must be pleaded and proved.—(Sup. 1856) *Pitcher v. Laycock*, 7 Ind. 398; (1880) *Boyd v. Fitch*, 71 Ind. 306.

[b] (Sup. 1878)

Infancy must be specially pleaded whether it is set up as a direct defense or is interposed collaterally.—*Board of Trustees of La Grange Collegiate Institute v. Anderson*, 63 Ind. 367, 30 Am. Rep. 224.

[c] (Sup. 1884)

In a suit against a husband and wife to foreclose a mortgage, the wife answered that when she executed the mortgage she was an infant, without alleging that the land was her separate property, or that her husband was an infant. Held, that the answer was insufficient, since, under Rev. St. 1881, § 2943, one of these averments, in addition to that of the wife's interest, was necessary.—*Bakes v. Gilbert*, 93 Ind. 70.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, §§ 282-284, 286, 287.

See, also, 22 Cyc. pp. 685, 688.

### § 94. — Failure to plead infancy.

[a] (Sup. 1853)

Where the declaration in a suit brought by an infant did not show that the next friend

named therein was admitted by the court, nor that he filed his consent to act as such, according to Rev. St. 1843, p. 679, §§ 58-60, and no objection was made to the declaration on that account before verdict, the objection must be considered as waived.—*Wortman v. Ash*, 4 Ind. 74.

[b] (Sup. 1856)

Under 2 Rev. St. pp. 38, 39, the fact that plaintiff is an infant, and without legal capacity to sue, must be taken by answer or is waived.—*Hollingsworth v. State ex rel. Harvey*, 8 Ind. 257.

[c] By failure to interpose the plea of infancy such defense is waived.—(Sup. 1866) *Blake v. Douglass*, 27 Ind. 416; (1893) *Cohee v. Baer*, 134 Ind. 375, 32 N. E. 920, 39 Am. St. Rep. 270.

[d] (Sup. 1885)

Failure of infants suing to make a proper averment of their minority could not be reached by demurrer.—*Funk v. Davis*, 2 N. E. 739, 103 Ind. 281.

[e] (App. 1901)

Where, after a minor has been duly served with process, he appears in person and by counsel, files an answer, goes to trial, and awaits the result of the verdict, without setting up his infancy as a defense, he cannot interpose his minority as a ground for setting aside the verdict.—*Watson v. Wrightsman*, 59 N. E. 1064, 26 Ind. App. 437.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, §§ 289, 290.

### § 95. — Effect of admissions as against infant.

[a] A guardian ad litem of an infant respondent in a bill in equity cannot affect the infant's rights by admissions in his answer; but all allegations in the bill must, as to him, be proved.—(Sup. 1846) *Hough v. Doyle*, 8 Blackf. 300; (1846) *Same v. Canby*, Id. 301; (1849) *Crain v. Parker*, 1 Ind. 374.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, § 291.

### § 97. Evidence.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, §§ 293-295.

See, also, 22 Cyc. pp. 689-691.

### § 98. — In general.

[a] (Sup. 1848)

The answer of complainant to the cross bill of adult defendants, stating the consideration of a note, cannot be taken as proof against the infant defendants.—*Campbell v. Campbell*, 1 Ind. 220.

[b] (Sup. 1860)

A court of chancery trying a cause against infants cannot admit oral evidence against them

unless such evidence is preserved in the record.  
—Bennett v. Welch, 15 Ind. 332.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Infants, § 293.

See, also, 22 Cyc. p. 689.

**§ 99. — Proof of infancy.**

[a] (Sup. 1882)

In an action to recover the possession of an undivided interest in certain lands which defendant claimed under a deed executed by the plaintiff when she was an infant feme covert, the burden was on plaintiff to show her infancy when the deed was made.—Stringer v. Northwestern Mut. Life Ins. Co., 82 Ind. 100.

[b] (Sup. 1885)

When nothing appears to the contrary, persons entering into an agreement will be presumed to be adults, and competent to contract.—Foltz v. Wert, 103 Ind. 404, 2 N. E. 950.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Infants, § 294.

See, also, 22 Cyc. p. 690.

**§ 100. — Sufficiency as against infant.**

[a] (Sup. 1884)

Evidence of a father of an alleged infant that such infant "will be 21 years old the first day of August next" was sufficient to show that he was not 21 years of age at the time of the trial.—Dolke v. State, 99 Ind. 229.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Infants, § 295.

**§ 102. Trial.**

[a] (Sup. 1881)

What is a reasonable time for an infant, after coming of age, to disaffirm a deed, is a question for the jury.—Wiley v. Wilson, 77 Ind. 596.

[b] (Sup. 1882)

Whether an infant feme covert has delayed unreasonably, after reaching her majority, to disaffirm a deed, is a question of fact.—Stringer v. Northwestern Mut. Life Ins. Co., 82 Ind. 100.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Infants, §§ 296-300.

See, also, 22 Cyc. p. 692.

**§ 104. Judgment.**

Actions or proceedings to review, see JUDGMENT, § 335.

Equitable relief against, see JUDGMENT, §§ 426, 442.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Infants, §§ 302-323.

See, also, 22 Cyc. pp. 693-704; note, 13 Am. Dec. 159.

**§ 105. — In general.**

[a] (Sup. 1860)

A. filed a bill in chancery against B. and C., which was served on them, and the bill taken as confessed. The defendant C. answered by guardian. The decree was for the complainant. Held that, as one of the defendants was an infant, this decree, without any proof, must be erroneous.—Knox v. Coffey, 2 Ind. 161.

[b] (Sup. 1866)

Where there are infant defendants, it must, on error, affirmatively appear that process was duly served upon them, and that a guardian ad litem was appointed to appear and answer for them, or the proceedings will be reversed.—Abdil v. Abdil, 26 Ind. 287.

[c] (Sup. 1881)

An objection that the record fails to show that the infant defendants were served with process is unavailing where the record recites that they were served with process, that a guardian ad litem was appointed for them, and that he filed an answer.—Hawkins v. Heinzman, 126 Ind. 551, 25 N. E. 708; Id., 126 Ind. 600, 25 N. E. 709.

[d] (App. 1904)

Though an infant owner of real estate may maintain partition and procure the appointment of a commissioner to sell if the land is not divisible, the use, without authority, of the name of an infant owner, in partition proceedings, does not confer jurisdiction over the infant, so as to bind him by the decree rendered.—Underwood v. Deckard, 70 N. E. 333, 34 Ind. App. 198.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Infants, §§ 302-305, 307, 311-313, 322.

See, also, note, 3 L. R. A. (N. S.) 72.

**§ 107. — On consent, offer, or admission.**

[a] (Sup. 1849)

The decree of a probate court ordering a sale of land, against infants, is erroneous without proof of the necessity of the sale, although it be admitted by the guardian ad litem of such infants.—Crain v. Parker, 1 Ind. 374.

[b] (Sup. 1865)

Where a guardian ad litem for infant defendants, in proceedings by an administrator to sell real estate under Rev. St. 1838, waived service of process, and consented to the sale of the land without answer, it was error to grant the order without proof of the allegations in the petition in the same manner as if they had been denied.—Martin v. Starr, 7 Ind. 224.

[c] (Sup. 1859)

Where the record contains nothing which would seem to empower a guardian ad litem to admit a case against his ward, a decree founded upon such admission will not be sustained.—McEndree v. McEndree, 12 Ind. 97.

**[d] (Sup. 1898)**

A life tenant obtained a judgment quieting title in himself against the remainder-men, who were his children, by securing the appointment of a guardian ad litem for them without their knowledge, and inducing him to consent to the decree under a belief that it was a mere matter of form. The children were in his custody, and the age of the eldest was five years. *Held*, that the judgment was void.—*Cotterell v. Koon*, 51 N. E. 235, 151 Ind. 182.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Infants, § 308.

See, also, 22 Cyc. p. 695.

**§ 108. — By default.****[a] (Sup. 1864)**

Omission to default infant defendants who fail to appear, and to take judgment against them for want of plea, is merely a defect in form, and cannot be assigned for error.—*Kirby v. Holmes*, 6 Ind. 33.

**[b] (Sup. 1865)**

A decree in chancery against an infant for want of answer, and without proof of the statements of the bill, is erroneous.—*Driver v. Driver*, 6 Ind. 286; *Wells v. Wells*, Id. 447.

**[c] (Sup. 1857)**

There can be no valid decree against an infant, by default, nor on the answer of a guardian ad litem.—*Pugh v. Pugh*, 9 Ind. 132.

**[d] (Sup. 1862)**

Where the guardian ad litem for infant defendants fails to answer, judgment cannot be rendered without proof; and the court may compel the guardian to answer or, in default thereof, remove him.—*Richards v. Richards*, 17 Ind. 636.

**[e] (Sup. 1866)**

A judgment against an infant by default, without the appointment of a guardian ad litem, is erroneous, but not void.—*Blake v. Douglass*, 27 Ind. 416.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Infants, § 309.

See, also, 22 Cyc. p. 694.

**§ 109. — Reservation to infant of day in court.****[a] (Sup. 1842)**

Where a decree against infants saves the right to them to have the decree opened within a certain time, they will not be prevented from having the decree set aside within that time by the fact that the subject-matter of the contract has been sold by the complainant, while the decree was in force against the infants, to bona fide purchasers.—*Stanley v. Brannon*, 6 Blackf. 193.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Infants, § 310.

See, also, 22 Cyc. p. 697.

**§ 110. — Opening and vacating in general.****[a] (Sup. 1877)**

An infant defendant in a proceeding for partition, whose guardian has failed to attend the partition, though represented therein by a guardian ad litem, cannot, during his minority, maintain an action to review the proceeding.—*Bundy v. Hall*, 60 Ind. 177.

**[b] (Sup. 1909)**

If, without any fraud on the part of plaintiff in an action to foreclose a mortgage, or his attorney, a return is made by a sheriff showing service of summons regular on its face, on a nonresident infant, without knowledge of the plaintiff that there was in fact no service, and nothing is done to mislead the sheriff, the infant is bound by the judgment obtained and cannot maintain an action to set it aside.—*Miedreich v. Lauenstein*, 172 Ind. 140, 86 N. E. 963, 87 N. E. 1029.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Infants, § 314.

See, also, 22 Cyc. pp. 699-703.

**§ 111. — Opening and vacating after attaining majority.**

Sale of ancestors property, see EXECUTORS AND ADMINISTRATORS, § 376.

**[a] (Sup. 1865)**

In proceedings under Prob. Act 1838, for the benefit of an infant, the infant is concluded thereby, unless the proceedings were tainted with fraud. He shall not, for any other cause, be allowed to open them, after arriving at full age; but, if the proceedings were against him, he may, on arriving at full age, open them by petition for review in the court where they were had. In all other cases he is entitled to his writ of error at any time within five years after the disability is removed.—*Bennet v. East*, 7 Ind. 174.

**[b] (Sup. 1876)**

An infant defendant in a proceeding for the partition of real estate, who is not served with summons notifying him of its pendency, and whose guardian does not attend and approve the partition, he and his guardian having no actual knowledge of the proceeding until after its determination, may not have a review of the partition within one year after the removal of his disability, without showing sufficient cause.—*Brown v. Keyser*, 53 Ind. 85.

**[c] (Sup. 1879)**

An infant defendant appeared by guardian, in a proceeding by an administrator to sell real estate to pay debts. The guardian assented to the sale. *Held*, that the infant's remedy for fraud or mistake was by suit begun within three years after his majority.—*Seward v. Clark*, 67 Ind. 289.

**[d] (Sup. 1882)**

Where defendant might have pleaded infancy to an action against him, on which judg-

ment was obtained without notice, he is clearly entitled to come in within two years, under the statute, and have the judgment set aside and be allowed to defend.—*Zerger v. Flattery*, 83 Ind. 399.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, §§ 315-319.

See, also, 22 Cyc. pp. 699-703; note, 89 Am. Dec. 185; note, 112 Am. St. Rep. 198.

#### § 112. — Collateral attack.

On order of sale of ancestors lands, see EXECUTORS AND ADMINISTRATORS, § 349.

[a] (Sup. 1856)

A record in proceedings affecting the right of infant heirs showed that process was ordered against them, and a guardian ad litem appointed. *Held*, that it was to be presumed, in a collateral proceeding, that they were brought regularly before the court.—*Brackenridge v. Dawson*, 7 Ind. 383.

[b] (Sup. 1890)

A judgment in favor of plaintiff in an action to correct an erroneous description in a deed will not be held void on a collateral attack because of the minority of defendant when the suit was commenced, where he was of age when the judgment was rendered, and the court had jurisdiction of the action, and proper notice was given defendant.—*Thain v. Rudisill*, 126 Ind. 272, 26 N. E. 46.

Where an action was brought to reform a deed against a minor, and proper notice was given, but judgment was not rendered against him until after he became of age, he was bound thereby, unless by direct proceedings he procured the same to be set aside.—*Id.*

[c] (Sup. 1891)

A judgment in ejectment cannot be collaterally attacked in an injunction suit to restrain defendants in the ejectment suit from interfering with the execution of the writ of possession, on account of errors and defects not jurisdictional, though some of the defendants are infants.—*Hawkins v. McDougal*, 126 Ind. 539, 25 N. E. 820.

[d] (Sup. 1893)

Where the fact that defendant was an infant when the judgment was rendered against her does not appear on the record, an attempt to prove infancy by matter dehors the record is a collateral attack on the judgment, which cannot be made by a party thereto.—*Cohee v. Baer*, 134 Ind. 375, 32 N. E. 920, 39 Am. St. Rep. 270.

[e] (Sup. 1894)

The action of a court in defaulting certain minor defendants in an action to foreclose a mortgage, after the appointment of a guardian ad litem, and an answer by him, is a mere irregularity, and cannot be attacked in a pro-

ceeding to set aside the decree.—*Cosby v. Powers*, 137 Ind. 694, 37 N. E. 321.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, § 320; 30

CENT. DIG. Judgm. §§ 941, 961, 962.

See, also, 22 Cyc. p. 704.

#### § 113. — Operation and effect.

[a] (Sup. 1866)

Since an infant may waive the defense of infancy, a judgment against him is binding.—*Blake v. Douglass*, 27 Ind. 416.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, § 321.

See, also, 22 Cyc. p. 698; note, 89 Am. Dec. 185.

#### § 114. Execution and enforcement of judgment.

[a] (Sup. 1850)

Judgment against an infant defendant represented by prochein ami should be rendered in such manner that it should be collectible by execution from the prochein ami.—*Clark v. Watson*, 2 Ind. 399.

[b] (Sup. 1871)

Lands of an infant may be sold on execution against him.—*Shaffner v. Briggs*, 36 Ind. 55, 10 Am. Rep. 1.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, §§ 323, 325.

See, also, 22 Cyc. p. 705.

#### § 115. Appeal and error.

[a] (Sup. 1855)

Where the record on appeal fails to show that minor defendants were notified of the pendency of the suit, or that they were present in court, it must be presumed that they did not receive notice of the suit, and they did not appear in court.—*Martin v. Starr*, 7 Ind. 224.

[b] (Sup. 1856)

Where in a suit to foreclose a mortgage given to secure the payment of notes, it was not shown that the notes were produced or their execution or even their existence proved on the trial, the defendants being infants, the court below, in the exercise of a discretionary power, might have withheld its decree until the notes were produced or their absence accounted for, but the nonexercise of such power is no ground for reversal.—*Arnold v. Stanfield*, 8 Ind. 323.

[c] (Sup. 1859)

A decree against an infant will not be reversed simply because the evidence is not in the record.—*McEndree v. McEndree*, 12 Ind. 97.

[d] (Sup. 1860)

Under our present Code the practice is different, and a decree against an infant will not be reversed because the evidence is not in the record.—*Beunett v. Welch*, 15 Ind. 332.

[e] (*Sup.* 1872)

A guardian ad litem cannot appeal in his own name.—*Harlan v. Watson*, 39 Ind. 393.

[f] (*Sup.* 1877)

Where no objection is made in the court below to the failure of the court to appoint a guardian ad litem, and no assignment thereof as error is made on appeal, no question relating thereto is presented to the Supreme Court.—*Evans v. State ex rel. Rinert*, 58 Ind. 587.

[g] (*Sup.* 1878)

As against infant defendants, nothing can be presumed, and the record must show that they have been duly served with process.—*Carver v. Carver*, 64 Ind. 194.

[h] (*Sup.* 1879)

An infant plaintiff may prosecute his appeal as a poor person without a next friend.—*Hood v. Pearson*, 67 Ind. 368.

[i] (*Sup.* 1879)

Objection cannot be made on appeal that no guardian ad litem had been appointed for an infant defendant in a bastardy suit.—*De Priest v. State ex rel. Harris*, 68 Ind. 569.

[j] (*Sup.* 1883)

Where in proceedings the next friend of a minor was removed and her attorney was appointed next friend on the condition that he should not be liable for costs, and thereafter he sustained such relation to the case as if he had been named as an attorney instead of next friend, it did not constitute available error to permit such person to prosecute without the appointment of an attorney as the object of the statute requiring the court to assign such person an attorney to prosecute the case was reached, and defendant was in no manner injured by the mode adopted.—*Wright v. McLarinan*, 92 Ind. 103.

[k] (*Sup.* 1891)

A defective indorsement on a complaint of the time for the return of the summons having secured a proper and due service, and no objection having been made in the trial court, none can be made in this court, though some of the defendants are infants.—*Hawkins v. McDougal*, 126 Ind. 539, 25 N. E. 820.

[l] (*App.* 1892)

In an action against a decedent's estate for services rendered, it appeared that decedent and her brother had agreed to live as one family on decedent's farm, the brother to look after the farm, and supply the food and clothing, and decedent to do the household work; that plaintiff, their niece, at the request of her uncle, entered the family, and, decedent's health being poor, the household work was thereafter done by plaintiff and her sister; that her food and clothing were furnished by her uncle; that plaintiff was treated in all respects as a member of the family; and that there was no agreement as to compensation. *Held* that the court, after charging that where persons stood in such

relation as plaintiff and decedent, and were members of a common family, there was no obligation to pay for services rendered on the one side or for maintenance on the other, without express promise to that effect or under such circumstances as would imply a promise, erred in adding "that this rule does not apply to infants, for they cannot be bound by the implied contract growing out of such relation."—*James v. Gillen*, 3 Ind. App. 472, 30 N. E. 7.

[m] (*Sup.* 1897)

Under Rev. St. 1894, § 647 (Rev. St. 1881, § 635), providing that a part of several co-parties may appeal, but must serve notice of appeal on all the other co-parties, and that until such co-parties appear and decline to join they shall be regarded as having joined; and section 646 (634), providing that, where an appeal has been barred by limitations as to part of the appellants, the supreme court may strike their names from the record; and section 645 (633), providing that, where appellant is under legal disabilities at the time judgment is rendered, he may appeal within one year after the disability is removed,—an appeal taken more than two years after judgment, by parties some of whom were then infants, and some of whom were under no disability, will be considered as to the parties who were then under disability, if brought within one year after the removal of the disability, and will be dismissed as to the other parties.—*Vordermark v. Wilkinson*, 147 Ind. 56, 46 N. E. 336.

Under Burns' Rev. St. 1894, § 645, providing that, where the appellant is under legal disabilities at the time the judgment is rendered, he may have his appeal at any time within one year after the disability is removed, the right so reserved to minors cannot be defeated by the conclusion that other parties to the judgment of the circuit court may have lost their right of appeal, if they have complied with the requirements of the statute.—*Id.*

Under Rev. St. 1894, § 645 (Rev. St. 1881, § 633), providing that, where appellant is under disability when the judgment is rendered, he may appeal within one year after the disability is removed, an appeal brought by infants more than two years after the rendition of the decree will not be dismissed if brought within a year after they became of age.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Infants, §§ 305, 326-332; 2 CENT. DIG. App. & E. § 1911.

See, also, 22 Cyc. pp. 706-709.

#### § 116. Costs and fees.

[a] (*Sup.* 1850)

An infant plaintiff is not liable for costs, but the *prochein ami* is.—*Holmes v. Adkins*, 2 Ind. 398.

As Rev. St. p. 679, § 58, provides that a *prochein ami* shall be liable for costs, but does not determine the manner in which he shall be made so, the judgment should be rendered so

as to be collected in the first instance from him.—Id.

[b] (Sup. 1865)

In a suit by next friend, if the finding is for the defendant, a judgment against the next friend for costs is right under the statute.—Tague v. Hayward, 25 Ind. 427.

[c] (Sup. 1879)

An affidavit constituting the showing of the right of an infant plaintiff to prosecute his action as a poor person without a next friend is accepted as prima facie true, and need not aver that all of the evidence adduced in support of the truth of its allegations is contained in the affidavit.—Hood v. Pearson, 67 Ind. 368.

[d] (Sup. 1883)

Rev. St. 1881, § 260, requiring that the court shall assign an attorney to act for one suing as a poor person, is complied with by appointing the person who had been acting as attorney for an infant suing as a poor person his next friend, without liability for costs.—Wright v. McLarinan, 92 Ind. 103.

[e] (Sup. 1888)

Under Rev. St. 1881, § 255, empowering an infant having a cause of action to sue thereon, such suit not to be delayed or deferred on account of such infant not being of full age, section 256, providing that suits by infants must be brought by next friend, who shall be liable for costs, does not apply to a suit by a minor whom the court has admitted to sue as a poor person.—Britton v. State ex rel. Rowe, 115 Ind. 55, 17 N. E. 254.

FOR CASES FROM OTHER STATES,  
SEE 27 CENT. DIG. Infants, §§ 333-336.  
See, also, 22 Cyc. pp. 709-711.

## INFATUATION.

With third person and desire to be rid of spouse as motive for homicide, see HOMICIDE, § 106.

## INFECTIOUS DISEASES.

See—

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## INFERENCES.

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From collective facts. EVIDENCE, § 473.

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## INFERIOR COURTS.

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## INFIRMARY.

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## INFLUENCE.

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Contracts to influence legislation. CONTRACTS, § 126.

Undue influence affecting validity of contracts.

CONTRACTS, § 96.

Affecting validity of deed. DEEDS, §§ 72, 196.

Affecting validity of gift. GIFTS, § 38.

Affecting validity of trust. TRUSTS, § 49.

Affecting validity of will. WILLS, §§ 154-158.

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## INFORMATION.

Criminal accusation, see INDICTMENT AND INFORMATION.

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See—

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Dissolution of municipal corporation. MUNICIPAL CORPORATIONS, § 51.

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## INFORMATION AND BELIEF.

See—

Affidavits on information and belief. AFFIDAVITS, § 3.

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## INFRINGEMENT.

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Ferry franchise. **FERRIES**, § 19.  
 Personal rights, illegality of contracts. **CONTRACTS**, § 110.  
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**TRADE-MARKS AND TRADE-NAMES**, §§ 56-60, 83-92.

### INGRESS.

Right of action by abutting owner for obstruction of ingress and egress to and from street, see **MUNICIPAL CORPORATIONS**, § 671.

### IN GROSS.

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### INHERITANCE.

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**DESCENT AND DISTRIBUTION**.  
 Omission of words of instrument creating trust. **TRUSTS**, § 130½.

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See—

Adopted children. **ADOPTION**, §§ 21, 22.  
**ALIENS**, § 9.  
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### INITIALS.

See—

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 Signatures to petition for drain. **DRAINS**, § 23.  
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### INITIATIVE AND REFERENDUM.

See—

**MUNICIPAL CORPORATIONS**, § 108.  
**STATUTES**, § 35½.

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

# INJUNCTION.

## *Scope-Note.*

[INCLUDES judicial prohibitions to parties in civil actions, by writ, order, or judgment therein, against doing or refraining from doing particular acts or things, granted as provisional, interlocutory, or final relief; nature and scope of the remedy in general; in what cases and for what purposes it is allowed; grounds of injunction and jurisdiction over and proceedings to obtain injunctions; issuance, requisites, and validity of preliminary or temporary injunctions or restraining orders; service and notice thereof; quashing, vacating, or setting aside such writs, orders, etc., and dissolution or discharge thereof, on giving security or bonds for indemnity or otherwise; final or permanent injunctions; award of damages, etc., incident to relief by injunction; violation of injunctions and punishment thereof; liabilities on and enforcement of securities given to obtain, dissolve, discharge, etc., injunctions; and liability of persons other than officers for wrongful procuring, issuance, enforcement, etc., of injunctions.]

[EXCLUDES jurisdiction of and proceedings in equity in general (see *Equity*); injunctions in actions involving particular subjects of equitable jurisdiction (see *Partnership*; *Trusts*; and other specific heads), or in actions affecting particular kinds of property (see *Mines and Minerals*; *Waters and Water Courses*; *Patents*; and other specific heads); injunctions merely incident to other remedies (see specific heads), or restraining enforcement of judgments (see *Judgment*); jurisdiction in regard to injunctions of particular courts (see *Courts*); review of decisions relating to injunctions (see *Appeal and Error*); and proceedings in cases of contempt in general (see *Contempt*). For complete list of matters excluded, see cross-references, post.]

## *Analysis.*

### I. Nature and Grounds in General.

#### (A) NATURE AND FORM OF REMEDY.

- § 3. Actions and proceedings in aid of which injunction is authorized.
- § 4. Preventive and protective remedy.
- § 5. Mandatory injunction.
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## I. NATURE AND GROUNDS IN GENERAL.

### (A) NATURE AND FORM OF REMEDY.

#### § 3. Actions and proceedings in aid of which injunction is authorized.

[a] (**Sup.** 1891)

After judgment for possession in ejectment, plaintiff may enjoin defendants therein from unlawfully interfering with the execution of the writ of possession.—*Hawkins v. McDougal*, 126 Ind. 539, 25 N. E. 820.

[b] (**App.** 1891)

A stonecutter sued an administratrix for work done under an alleged contract with deceased. She denied the contract, and after judgment against her appealed. *Held*, that Acts 1891, p. 42, § 12, authorizing the appellate court to issue injunctions "in aid of the exercise of its jurisdiction or to enforce its judgments," does not authorize it to enjoin the stonecutter from completing the work.—*Lewis v. Fillion*, 4 Ind. App. 105, 29 N. E. 443.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 3.

#### § 4. Preventive and protective remedy.

Trespass or other injury to real property, see post, §§ 45-52.

[a] (**Sup.** 1895)

The Supreme Court has original jurisdiction to restrain that which will impede or render fruitless any disposition that such court may make of a pending case.—*Mode v. Board of Com'rs of Crawford County*, 40 N. E. 1089, 141 Ind. 574.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 4.

See, also, 22 Cyc. p. 741.

#### § 5. Mandatory injunction.

Preliminary and interlocutory injunctions, see post, § 133.

To compel delivery of appurtenances of office, see **OFFICERS**, § 85.

To restrain obstruction of easement, see **EASEMENTS**, § 61.

[a] (**Sup.** 1892)

Where there is an unlawful invasion of a party's right, irreparable and continuing in its nature, the court may issue a mandatory injunction, and this it may do in an extreme case in the first instance, as well as upon final hearing.—*Brauns v. Glesige*, 20 N. E. 1061, 130 Ind. 167.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 4.

See, also, 22 Cyc. pp. 742, 743; note, 20 L. R. A. 161; note, 20 Am. Dec. 389.

#### § 7. Existence of other remedy in general.

[a] (**Sup.** 1881)

When a remedy by appeal is afforded, errors or irregularities which can be corrected by pursuing that remedy cannot be made the basis for an injunction.—*Marshall v. Gill*, 77 Ind. 402.

[b] (**Sup.** 1881)

Injunction will not lie when there is an adequate remedy by appeal.—*Sims v. City of Frankfort*, 79 Ind. 446.

[c] (**Sup.** 1897)

If the remedy at law is sufficient and adequate, equity cannot give relief by way of injunction, but the legal remedy must be as applicable and efficient to the ends of justice as the remedy in equity in order to prevent the granting of an injunction.—*Carmel Natural Gas & Improvement Co. v. Small*, 47 N. E. 11, 50 N. E. 476, 150 Ind. 427.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 6, 34.

See, also, 22 Cyc. p. 769.

### (B) GROUNDS OF RELIEF.

Temporary injunction, see post, §§ 136, 137, 163.

#### § 11. Actual or anticipated violation of right.

[a] (**Sup.** 1851)

A threatened injury will support an injunction.—*White Water Val. Canal Co. v. Comegys*, 2 Ind. 469.

**[b] (Super. 1871)**

A party asking for an injunction must show some wrong about to be done him. He cannot invoke the aid of equity by showing damage to one not a party to the proceedings.—*Williams v. Little White Lick Gravel Road Co.*, Wils. 7.

**[c] (Sup. 1881)**

An instruction, in a suit for injunction, that "an injunction is never granted in a case of doubt, but only upon a case clearly made out," is erroneous.—*Owen v. Phillips*, 73 Ind. 284.

**[d] (Sup. 1882)**

An injunction will not be granted where the apprehended injury is merely contingent, and courts of equity will not, in advance, enjoin the erection and use of a building when such use may not prove essentially injurious to others.—*Keiser v. Lovett*, 85 Ind. 240, 44 Am. Rep. 10.

**[e] (Sup. 1893)**

An injunction to restrain a gas company from laying its pipes in the highway is properly denied, where it does not appear that defendant at the commencement of the suit was attempting or threatening to use the highway for the laying of pipe lines or for other purposes.—*Board of Com'rs of Hamilton County v. Indianapolis Nat. Gas Co.*, 33 N. E. 972, 134 Ind. 209.

**[f] (Sup. 1900)**

A complaint for an injunction to restrain defendant from transporting natural gas at a pressure exceeding 300 pounds per square inch, prohibited by Act March 4, 1891 (Acts 1891, p. 89; *Burns' Rev. St.* 1894, §§ 7507-7509), which failed to allege that the property or gas wells of complainants were near defendant's pipe line, or that their lives, lives of their servants and employes, and their property were endangered by the excessive pressure, was demurrable, since it failed to allege injury threatened or apprehended.—*Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co.*, 58 N. E. 851, 155 Ind. 500.

**[g] (Sup. 1906)**

The mere apprehensions or fears of a complainant unsustained by fact do not constitute sufficient ground for injunction.—*Spurgeon v. Rhodes*, 167 Ind. 1, 78 N. E. 228.

**[h] (App. 1910)**

A threatened disturbance to an owner's right of possession authorizes an injunction.—*Brenner v. Heiler*, 91 N. E. 744.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Inj. §§ 9-11.

See, also, 22 Cyc. p. 757; note, 73 Am. Dec. 113.

**§ 12. Injury sustained or anticipated.****[a] (Sup. 1873)**

Injunctions are granted to restrain the commission of acts threatened or anticipated, injurious to the plaintiff pending litigation, and

not where the matter complained of has been consummated either before or after the action is commenced and before judgment.—*McGoldrick v. Slevin*, 43 Ind. 522.

**[b] (Sup. 1881)**

Where an injunction is sought for an act which the answer shows to have already been committed, it is no reply that, before suit, plaintiff notified defendant that proceedings were to be taken; for after an act has been committed it cannot be enjoined.—*Cole v. Duke*, 79 Ind. 107.

[c] Injunction will not issue to restrain an act already committed.—(Sup. 1903) *Heinl v. City of Terre Haute*, 66 N. E. 450, 161 Ind. 44; (1905) *Shafor v. Fry*, 73 N. E. 698, 164 Ind. 315.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Inj. § 12.

See, also, 22 Cyc. pp. 757-760.

**§ 13. Substantial character of right or of injury.**

[a] An injunction will not be granted where complainant suffers no substantial injury from the wrongful act.—(Sup. 1891) *Whitlock v. Consumers' Gas Trust Co.*, 127 Ind. 62, 26 N. E. 570; (App. 1904) *Stauffer v. Cincinnati, R. & M. R. Co.*, 70 N. E. 543, 33 Ind. App. 356; (App. 1905) *American Plate Glass Co. v. Nicolson*, 34 Ind. App. 643, 73 N. E. 625.

**[b] (Sup. 1892)**

Where a corporation having no especial interest in or ownership of a wharf and no corporate power to condemn or take property entered on a strip of land used for wharf purposes directly in front of plaintiff's residence and proposed to erect thereon a logway, it was not necessary that the proposed way and its use should injure plaintiff's property, in order to entitle him to an injunction, but he was entitled thereto if the comfortable enjoyment of his premises would be essentially interfered with by dust, smoke, and offensive odors.—*Adams v. Ohio Falls Car Co.*, 31 N. E. 57, 131 Ind. 375.

**[c] (Sup. 1903)**

A railroad company, having granted a license to a natural gas company to lay its mains in its right of way, is not entitled to an injunction to restrain the laying of a fourth line of pipe on such right of way under a cross-complaint which entirely fails to show that the danger to the property of the railroad company had or would be increased in the slightest degree or that it was likely to sustain any special injury different from that of the public at large by defendant's alleged unlawful acts in using artificial means to increase the flow of gas through its pipes.—*Chicago, I. & E. R. Co. v. Indiana Natural Gas & Oil Co.*, 68 N. E. 1008, 161 Ind. 445.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Inj. § 13.

See, also, 22 Cyc. pp. 749, 760.

**§ 14. Irreparable injury.**

Restraining trespass to property, see post, §§ 46, 48.

**[a] (Sup. 1853)**

Courts will not interfere to prevent injury by injunction unless the harm will be great or the loss irreparable.—*Bolster v. Catterlin*, 10 Ind. 117.

**[b] (Sup. 1897)**

In an action for injunction plaintiff need not plead or prove that he will suffer irreparable injury if the same be not granted, but it is sufficient, under Rev. St. 1894, § 1162 (Rev. St. 1881, § 1148), if plaintiff would suffer great injury and had no other adequate remedy.—*Xenia Real-Estate Co. v. Macy*, 147 Ind. 568, 47 N. E. 147.

**[c] (App. 1901)**

*Burns'* Rev. St. 1894, § 1162, authorizing an injunction where great injury will result to plaintiff if it is not issued, authorizes an injunction though the injury is not irreparable.—*Covert v. Bray*, 60 N. E. 709, 26 Ind. App. 671.

**[d] (App. 1906)**

It is not necessary that irreparable injury should be threatened before equity will grant relief by injunction, if it is shown that complainant will suffer great injury.—*Brugh v. Denman*, 78 N. E. 349, 38 Ind. App. 486.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 14.

See, also, 22 Cyc. pp. 762-764; note, 1 Am. St. Rep. 374.

**§ 15. Inadequacy of remedy at law.**

Ground for relief against execution, see EXECUTION, § 171.

Ground for restraining wrongful enforcement of taxes, see TAXATION, § 608.

Right of landlord to restrain solvent tenant from cutting and removing fodder, see LANDLORD AND TENANT, § 139.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 15-17.

See, also, 22 Cyc. pp. 769-774.

**§ 16. — In general.**

[a] Injunction will not lie when there is an adequate remedy at law.—(Sup. 1877) *Brown v. Herron*, 59 Ind. 61; (1881) *Hendricks v. Gilchrist*, 76 Ind. 369; (1881) *Ricketts v. Spraker*, 77 Ind. 371; (1893) *Perry v. Hamilton*, 35 N. E. 836, 138 Ind. 271.

**[b] (Sup. 1897)**

Where from the facts alleged in the complaint it is apparent that plaintiff has no very complete or adequate remedy, it is sufficient to entitle him to an injunction.—*Xenia Real Estate Co. v. Macy*, 47 N. E. 147, 147 Ind. 568.

**[c] (Sup. 1898)**

On a bill for injunction the court will determine, in view of circumstances and conduct of the parties, whether the legal remedies are adequate to the administration of complete justice.—*Drew v. Incorporated Town of Geneva*, 50 N. E. 871, 150 Ind. 662, 42 L. R. A. 814.

**[d] (Sup. 1904)**

The remedy at law to defeat an injunction must be as plain, complete, and adequate, or as practical and efficient to the ends of justice and its prompt administration, as the remedy in equity.—*Meyer v. Town of Boonville*, 70 N. E. 146, 162 Ind. 165; *Stauffer v. Cincinnati, R. & M. R. Co.*, 70 N. E. 543, 33 Ind. App. 356.

**[e] (App. 1907)**

Where it is clear, from the character of the case as disclosed in the pleadings, that the remedy at law is insufficient and does not afford the parties adequate means to settle their controversy, that equity could alone afford proper and adequate relief, and that the ends of justice required it, equity will intervene by way of injunction.—*Hatfield v. Mahoney*, 79 N. E. 408, 1086, 39 Ind. App. 499.

**[f] (App. 1910)**

If money of plaintiff deposited in a bank in another's name can only be preserved and recovered by injunction, such proceedings are proper.—*Campbell v. Brackett*, 90 N. E. 777.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 15.

See, also, 22 Cyc. p. 769.

**§ 17. — Recovery of damages.****[a] (Sup. 1855)**

Injunction will not lie when there is an adequate remedy by an action for damages.—*Laughlin v. Lamasco City*, 6 Ind. 223.

**[b] (Sup. 1903)**

*Burns'* Rev. St. 1901, § 1162, authorizes the granting of an injunction where plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission of some act, the commission or continuance of which will produce great injury to the plaintiff. *Held*, that such section did not warrant an injunction where the commission of the act can be fully compensated for in damages, and where there is no reason to apprehend a multiplicity of suits on account of the wrong threatened.—*Wabash R. Co. v. Engleman*, 66 N. E. 892, 160 Ind. 329.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 16.

See, also, 22 Cyc. p. 771.

**§ 18. — Insolvency of defendant.**

Restraining trespass to property, see post, §§ 46, 48.

[a] (Sup. 1864)

A writ of injunction will not issue to restrain a grantee of land from taking possession and cutting timber on the ground that the deed of conveyance was obtained by fraud on his part, where it is not alleged that he is insolvent.—*McQuarrie v. Hildebrand*, 23 Ind. 122.

[b] (Sup. 1893)

The insolvency of defendant will support an injunction restraining interference with trade or business.—*Shoemaker v. South Bend Spark-Arrester Co.*, 135 Ind. 471, 35 N. E. 280, 22 L. R. A. 332.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. INJ. § 17.

See, also, 22 Cyc. p. 773.

### § 19. Prevention of multiplicity of suits.

Ground for restraining wrongful enforcement of taxes, see **TAXATION**, § 608.

Injunction to prevent increase in assessment, see **TAXATION**, § 450.

[a] (Sup. 1881)

Injunction will lie to prevent a multiplicity of actions, although the only injury resulting from the wrongful acts is pecuniary loss.—*Owen v. Phillips*, 73 Ind. 284.

[b] (App. 1909)

Equity has jurisdiction where plaintiff desires to restrain continuing injuries which would result in the bringing of several actions at law.—*Vandalia Coal Co. v. Lawson*, 43 Ind. App. 226, 87 N. E. 47.

Equity will not restrain the bringing of several suits merely to prevent costs.—*Id.*

Where several persons are injured because of an alleged negligent act, they cannot be deprived of their right to a jury trial by a suit by the alleged negligent person to restrain the bringing of separate actions on the ground that the negligence did not exist, that the multiplicity of actions would be ruinous, and that the injured persons were insolvent.—*Id.*

[c] (Sup. 1909)

If an ordinance regulating the business of junk dealers is void, a number of interested parties may enjoin its enforcement in order to prevent a multiplicity of actions.—*Grossman v. City of Indianapolis*, 88 N. E. 945.

[d] (App. 1910)

The prevention of multiplicity of suits is a ground in a proper case for injunctive relief.—*Gray v. Foster*, 92 N. E. 7.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. INJ. § 18.

See, also, 22 Cyc. pp. 766-768.

### § 20. Defenses or objections to relief.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. INJ. §§ 19-23.

See, also, 22 Cyc. pp. 781-784.

### § 22. — Injunction ineffectual or not beneficial.

Acts already committed, see ante, § 12.

[a] (App. 1909)

Plaintiff having a cause of action for injunction at commencement of action, he is entitled to nominal damages and costs, notwithstanding changes in situation before trial.—*Majenica Tel. Co. v. Rogers*, 43 Ind. App. 306, 87 N. E. 165.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. INJ. §§ 20, 21.

See, also, 22 Cyc. p. 781.

## II. SUBJECTS OF PROTECTION AND RELIEF.

Maintenance of proceedings by church officials, see **RELIGIOUS SOCIETIES**, § 25.

### (A) ACTIONS AND OTHER LEGAL PROCEEDINGS.

### § 26. Commencement and prosecution of civil actions.

Dismissal of suit, see post, § 130.

[a] (Sup. 1843)

The purchaser of real estate by general warranty, incumbered by a mortgage, if the incumbrance exceeds the money due for the purchase price, may have the collection of the same enjoined until the incumbrance is reduced to an amount not exceeding the debt.—*Buell v. Tate*, 7 Blackf. 55.

[b] (Sup. 1847)

H. sold M. a lot, giving him a title bond, and M. took possession and made valuable improvements. Prior to the sale H., to defraud creditors, mortgaged the lot to S. without consideration. Thereafter M. sold to complainant, agreeing to assign to him the title bond, but to deceive his creditors assigned it to G. without objection from complainant, and G. agreed to assign to complainant on delivery of the purchase-money notes, but he failed to do so, and, combining with M., H., and S. to cheat complainant, delivered the bond to H. and S., who had notice of complainant's equity. S. foreclosed and bid in the lot for H., paying nothing therefor. *Held*, that complainant could not enjoin an action of ejectment brought on the demise of S.—*Hopkins v. Myers*, 8 Blackf. 498.

[c] (Sup. 1850)

Where, after an agreement to give a quitclaim deed, the grantor by mistake executes a warranty deed, equity will enjoin the grantee from enforcing the warranty upon failure of title.—*Bush v. Keller*, 2 Ind. 69.

[d] (Sup. 1854)

A. sued B. on a promissory note for \$170. It appeared that the consideration for the

note was an undertaking on the part of A. that C. should convey a certain tract of land to B., which A. alleged that C. owned, and for which, on the conveyance being made, B. made to A. a cash payment, in addition to the note, fully covering the value of all C.'s interest in the land, which was but three-fifths of what A. had represented it to be. *Held*, that proceedings in the suit should be enjoined, and that, without any offer on the part of B. to rescind the contract of sale.—*Warren v. Carey*, 5 Ind. 319.

[e] (*Sup.* 1860)

It seems that the courts may, on proper application, enjoin the collection of the purchase money of land until a valid title is procured by the vendor.—*Wiley v. Howard*, 15 Ind. 169.

[f] (*Sup.* 1862)

If, in a foreclosure suit on a mortgage to secure purchase money, it appears that at the time of purchase there were liens on the premises sold, against the mortgagee, and exceeding in amount the purchase money sued for, the mortgagor may have an injunction against the collection of the mortgage debt until the mortgagor shall reduce the incumbrance to a sum not exceeding that of the purchase money due.—*Arnold v. Curl*, 18 Ind. 339.

[g] (*Sup.* 1865)

A judgment debtor, whose land has been illegally sold by a sheriff on execution, cannot maintain an action to enjoin the purchaser from prosecuting an action to recover possession of the premises.—*Patten v. Stewart*, 24 Ind. 332.

[h] (*Sup.* 1866)

In a suit by A. against B. on a promissory note, it was answered that the note was given for the last payment due upon a purchase of real estate, which was conveyed with full covenants of warranty by A. to B.; that there yet remained some purchase money due from A. to his vendor, for which the latter claimed a lien on the land; that A. had removed from the county; and that the defendant did not know of any property belonging to him out of which the debt could be made. Prayer that A. be restrained from collecting the note sued on until he indemnified B. against the lien claimed by A.'s vendor. *Held*, that as the answer did not aver that A. was insolvent, or that he had left the state, no cause was shown for restraining the collection of the note sued on.—*Crowfoot v. Zink*, 26 Ind. 187.

[i] (*Sup.* 1870)

An application for an injunction to restrain a suit upon a note, and to foreclose a mortgage on real estate executed to secure said note, alleged the note and mortgage were given for an unpaid balance of the purchase money of the land mortgaged; that a suit was pending in the proper court, brought by third per-

sons by the procurement of the vendor, who was actively prosecuting the same, to set aside the title of the vendor's grantor as to part of the land, and to recover said part from the grantee, between whom and the persons prosecuting said suit there is no collusion; that said vendor is a resident of another state, and has no property in this state except said mortgage, and is reputed to be insolvent; and that the vendee in taking the conveyance relied more on the validity of the title than on the covenants of the deed, and had no knowledge of the alleged defect, nor of the facts upon which such defect could be predicated. *Held*, that in the absence of anything to show that there was fraud on the part of the vendor in reference to the title, or that he was solvent at the time of making the deed, or that the vendee did not know he was insolvent and a nonresident at that time, the complaint was not sufficient to warrant the issue of an injunction.—*Strong v. Downing*, 34 Ind. 300.

[j] (*Sup.* 1875)

Where a vendor fraudulently represents that he has a good and perfect title to the real estate sold, and the vendee, relying on such representation, is induced to purchase, the collection of the purchase money may be enjoined until the title shall have been made good as represented.—*Hinkle v. Margerum*, 50 Ind. 240.

[k] (*Sup.* 1875)

The purchaser of the business and good will of a printing establishment gave his notes, secured by a mortgage on the property, in payment of the purchase price, under an agreement by the seller that he would not engage in the same business for a definite length of time, and that, in case he did so, he would pay the purchaser a specified sum, greater than the amount of the notes, as liquidated damages, which should be allowed as a set-off against the notes. *Held* that, upon violation of the agreement by the seller, injunction would lie against him or the assignee of the notes to prevent the prosecution of an action to obtain possession of the mortgaged property, on failure of the purchaser to pay the notes.—*Spicer v. Hoop*, 51 Ind. 365.

[l] Equity will not enjoin an action at law, when the party seeking the injunction has a good defense at law.—(*Sup.* 1877) *Hartman v. Heady*, 57 Ind. 545; (1884) *Palmer v. Hayes*, 93 Ind. 189; (1884) *Martin v. Orr*, 96 Ind. 27.

[m] (*Sup.* 1877)

Threats made by the plaintiff in an action that he will bring other actions against the defendant afford ground to the latter to enjoin the further prosecution of such action.—*Hartman v. Heady*, 57 Ind. 545.

[n] (*Sup.* 1879)

Fraudulent representations by the vendor of land are sufficient to entitle the vendee to enjoin personal judgment for the purchase price.—*Reed v. Tioga Mfg. Co.*, 66 Ind. 21.

[c] (Sup. 1881)

The vendee of land is entitled to restrain the enforcement of the purchase price, on the ground that the title of the grantor was defective.—*Fehrle v. Turner*, 77 Ind. 530.

[d] (Sup. 1884)

To maintain an injunction to restrain the collection of the purchase money for land, it must at least be shown that the grantor is insolvent.—*Wimberg v. Schwegeman*, 97 Ind. 528.

[e] (Sup. 1885)

Where letters patent were assigned by the patentee, with a guaranty of validity, but they were afterwards declared to be void, the assignee is entitled to an injunction restraining the patentee from bringing suits in a foreign jurisdiction to recover the unpaid installment of the purchase price.—*Sandage v. Studabaker Bros Mfg. Co.*, 41 N. E. 380, 142 Ind. 148, 34 L. R. A. 363, 51 Am. St. Rep. 165.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 24-49, 54-61;  
32 CENT. DIG. Land. & Ten. § 1185; 38  
CENT. DIG. Partit. § 146.

See, also, 22 Cyc. pp. 786-809; note, 131  
Am. St. Rep. 30.

#### § 28. Special proceedings other than actions.

[a] (Sup. 1881)

Error in appointing a referee must be taken advantage of by appeal, and is no ground for an injunction to restrain the referee from proceeding to the discharge of his duties.—*Shoemaker v. Axtell*, 78 Ind. 561.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 62-65.

#### § 32. Actions or proceedings in other courts.

Concurrent and conflicting jurisdiction of courts of different states or countries, see COURTS, § 516.

Concurrent and conflicting jurisdiction of state courts, see COURTS, § 480.

[a] (Sup. 1908)

Under the act of 1852 relating to the organization of circuit courts (2 Rev. St. 1852, pp. 6, 7, §§ 8, 9; Burns' Ann. St. 1908, §§ 1437, 1438), providing that when the subject-matter of any suit in such court shall be situated in two or more counties, the court first taking cognizance shall retain the same, and that such court shall have power to make all proper judgments, etc., and to issue all process, and to do other acts proper to carry into effect the same, injunction will not lie in one county to enjoin the destruction of a highway bridge, in the construction of a public drain, under a drainage proceeding brought in an adjoining county; any one affected by the proceeding and not a party to it having an adequate remedy by being made a party to the proceeding.—*Karr*

*v. Board of Com'rs of Putnam County*, 170 Ind. 571, 85 N. E. 1.

FOR CASES FROM OTHER STATES,  
SEE 27 CENT. DIG. Inj. § 69.  
See, also, 22 Cyc. p. 813.

#### § 33. Actions or proceedings in other states or countries.

[a] (Sup. 1886)

A debtor may enjoin a resident creditor from attempting to enforce a claim in a foreign jurisdiction, where the attempt, if successful, would deprive the debtor of his exemption under the laws of Indiana (Rev. St. 1881, § 2162).—*Wilson v. Joseph*, 107 Ind. 490, 8 N. E. 616.

[b] (Sup. 1895)

A citizen of Indiana may be enjoined from commencing or prosecuting a suit against a fellow citizen in the courts of another state for the purpose of obviating the application of an Indiana statute precluding relief; and this though the complainant has other defenses to the suit available in the state where the action is brought.—*Sandage v. Studabaker Bros. Mfg. Co.*, 41 N. E. 380, 142 Ind. 148, 34 L. R. A. 363, 51 Am. St. Rep. 165.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 70, 71.

See, also, 22 Cyc. pp. 813, 814; note, 21  
L. R. A. 71; note, 56 Am. Rep. 663;  
note, 59 Am. St. Rep. 880.

#### (B) PROPERTY, CONVEYANCES, AND INCUMBRANCES.

Pleading, see post, § 118.

#### § 34. Property and rights protected in general.

Violation of writ, see post, § 228.

[a] (Sup. 1884)

Upon a sale conditioned not to pass title till the money is paid, injunction may be maintained to prevent removal of property till the condition has been performed.—*Coe v. Johnson*, 93 Ind. 418.

[b] (Sup. 1903)

A lessee of a coal mine has no complete and adequate remedy at law for the lessor's interference with his construction of a switch track to the mine, reasonably necessary for its operation, so that injunction will lie.—*Ingle v. Bottoms*, 66 N. E. 160, 160 Ind. 73.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 74-81.

See, also, 22 Cyc. p. 817; note, 49 Am.  
Dec. 180.

#### § 35. Title or possession to support suit.

[a] (Sup. 1899)

One laying gas pipes through the land of another without obtaining permission is not

entitled to maintain a suit to enjoin such other from removing the pipes.—*Windfall Natural Gas, Mining & Oil Co. v. Terwilliger*, 53 N. E. 284, 152 Ind. 364.

[b] (App. 1903)

Where plaintiff had an unexpired lease on certain oil lands when defendant contracted with the owner, and attempted to bore for oil thereon, plaintiff's remedy by injunction was more practicable and efficient; and he was not, therefore, barred therefrom on the ground that he had an adequate remedy at law.—*Chappell v. Jasper County Oil & Gas Co.*, 66 N. E. 515, 31 Ind. App. 170.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 77.

See, also, 22 Cyc. p. 817.

**§ 36. Title or right in doubt or dispute.**  
Trespass under claim of right, see post, § 47.

[a] (Sup. 1891)

In an action to enjoin defendant from an alleged trespass on land, an answer which denies plaintiff's ownership and asserts title in a third person is good.—*Whitlock v. Consumers' Gas Trust Co.*, 127 Ind. 62, 28 N. E. 570.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 82-84; 10 CENT. DIG. Equity, § 40.

See, also, 22 Cyc. p. 818.

**§ 38. Protection pending litigation as to title or right.**

[a] (Sup. 1843)

A summons was served on S. as garnishee in attachment on the 30th of September, 1839, who answered that on the 25th of that month he gave his obligation to the defendant in attachment for a certain sum of money; that he had been informed by a letter from the obligee, dated 2d of October, 1839, and received a day or two afterwards, that the obligation was assigned to D.; that he had since received notice of its assignment by D. to P. and G.; that the obligation had been presented for payment; and that the assignment to D. was dated the 26th of September, 1839. *Held* that, if the assignment was fraudulent and void as to the obligee's creditors, they might have it set aside by a suit in chancery, and might, until that suit was determined, have the payment of the amount due by the garnishee enjoined.—*Smith v. Wright*, 6 Blackf. 550.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 86-90.

See, also, 22 Cyc. pp. 821-825; note, 1 L. R. A. (N. S.) 333.

**§ 39. Conveyance or disposition in general.**

Service of writ or order, see post, § 213.

[a] (Sup. 1827)

The owner of a land-office certificate gave bond for title to a part of the land to A., and afterwards assigned the certificate to B., with notice of the bond to A. The assignee of A.'s bond, having reason to fear that B. would sell to a purchaser without notice and disturb his possession, filed his bill to restrain B. from so doing; and it was so decreed.—*Cupps v. Irvin*, 2 Blackf. 112, 18 Am. Dec. 136.

[b] (Sup. 1894)

Junior chattel mortgagees, whose debt is not yet due, may restrain the mortgagor and his assignee for the benefit of creditors from selling the mortgaged property, as they have advertised, for one-third of its value, where the proceeds of such a sale would not pay the senior mortgages.—*Ades v. Levi*, 137 Ind. 506, 37 N. E. 388.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 91, 93

See, also, 22 Cyc. pp. 840, 841; note, 23 L. R. A. 577.

**§ 41. Transfer or pledge of instruments or securities for payment of money.**

Answer, see post, § 119.

[a] (Sup. 1893)

Where an insolvent nonresident, owning a life estate only in land, fraudulently represents to her grantee that she owns it in fee simple, and receives in cash the full value of her life estate, a court of equity will enjoin the transfer by the grantor of unmatured purchase money notes in possession of a resident of this state, though plaintiff is in possession of such real estate, since he is entitled to possession during the life of the grantor, and the same is not adverse.—*Burns v. Weesner*, 134 Ind. 442, 34 N. E. 10.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 95.

See, also, 22 Cyc. pp. 840, 841.

**§ 43. Collection or payment of money.**

[a] (Sup. 1869)

In an action by a deputy clerk against his principal to recover his share of fees, an injunction may be granted, pending the cause, restraining the clerk from collecting or transferring such fees yet unpaid, and the sheriff from paying such fees collected by him to the clerk; and a receiver may be appointed.—*Cheek v. Tilley*, 31 Ind. 121.

[b] (Sup. 1877)

The complaint in an action to enjoin the collection of a note charged that plaintiff paid a debt for defendant B., who then pretended to be insolvent, and that theretofore B. was the equitable owner of certain real estate, but, for the purpose of preventing plaintiff from collecting his claim, B. fraudulently kept the title to the real estate in C. and D., two other defend-

ants; that afterward B. sold the real estate to E., from whom he took the note in suit for the purchase money, which note he transferred to F., also a defendant, and that D. and F. both knew the title to the real estate was fraudulently in C. and D., but that the estate was beneficially owned by B. The defendants had judgment from which plaintiff appealed to the Supreme Court. Counsel for plaintiff did not claim that B. had any interest in the property, or that there was any arrangement fraudulent or otherwise between B. on the one hand and C. and D. on the other, by which they held the title for him. It was not claimed but that C. and D. were the bona fide owners of the real estate. *Held* that, under such circumstances, no case was left against E. and F., and, as the fact was conceded that no fraud existed, the charge against C. and D. must fall, and the injunction was properly denied.—*Hollingsworth v. Crawford*, 60 Ind. 70.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 96, 97.

See, also, 22 Cyc. p. 841.

§ 44. **Fraudulent conveyances and transactions.**

Restraining conveyance by fraudulent grantee, see FRAUDULENT CONVEYANCES, § 304.

Temporary injunction, see post, § 133.

[a] (Sup. 1873)

Where a debtor is in the open and visible possession of property, and it is not shown that there has been a fraudulent disposition of any of it, or that he threatens so to dispose of it, an injunction will not be granted restraining him from selling or disposing thereof.—*McGoldrick v. Slevin*, 43 Ind. 522.

[b] (Sup. 1883)

2 Rev. St. 1876, p. 93, § 137, provides that, where it appears in a complaint at the commencement of an action, or during its pendency, by affidavit, that defendant threatens or is about to remove or dispose of his property with intent to defraud his creditors, a temporary injunction may be granted to restrain the removal or disposition of such property. *Held*, that a general creditor before judgment may enjoin his debtor from disposing of his property.—*Morey v. Ball*, 90 Ind. 450.

[c] (Sup. 1884)

Creditors may unite in a suit to enjoin a debtor from fraudulently conveying his property, though their claim was several, and not in judgment.—*Field v. Holzman*, 93 Ind. 205.

A complaint alleged that a debtor of complainant had conspired with other defendants whereby the debtor was to acquire a large amount of merchandise on credit, and the same was then to be seized by the others on fabricated demands, and that an execution had been issued and levied on the stock in pursuance of the conspiracy, and an injunction was prayed for, restraining the sale or removal of the goods

and for a judgment for the amount due the plaintiffs, respectively. *Held*, that the complaint showed a right to injunction.—*Id.*

[d] (Sup. 1886)

One to whom chattels are mortgaged is entitled to equitable relief against a subsequent fraudulent mortgage on the chattels, and a judgment foreclosing the same, without regard to whether the mortgagor may be solvent or insolvent when his debt becomes due.—*McCormick v. Hartley*, 107 Ind. 248, 6 N. E. 357.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 92; 24 CENT. DIG. Fraud. Conv. § 304.

§ 45. **Trespass or other injury to real property.**

Admissibility of evidence, see post, § 127.

Construction of public improvement, see MUNICIPAL CORPORATIONS, § 323.

Waste by mortgagor, see MORTGAGES, § 205.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 98–107.

See, also, 22 Cyc. pp. 825–839; note, 11 Am. Dec. 497; note, 53 Am. Rep. 346; note, 99 Am. St. Rep. 731.

§ 46. — **Trespasses in general.**

Variance, see post, § 123.

[a] (Sup. 1847)

On a bill for an injunction to restrain a stranger from taking rails from the owner's land, and for an account, etc., it was *held* that this was a case of an ordinary trespass, and that the bill could not be sustained.—*Cooper v. Hamilton*, 8 Blackf. 377.

[b] Injunction will not lie to restrain a mere trespass unless irreparable injury would be done thereby.—(Sup. 1851) *Centreville & A. Turnpike Co. v. Barnett*, 2 Ind. 536; (1867) *Indianapolis Rolling Mill Co. v. City of Indianapolis*, 29 Ind. 245; (1882) *Anthony v. Sturgis*, 86 Ind. 479.

[c] (Sup. 1851)

The mere fact that a trespasser is insolvent will not give chancery jurisdiction to enjoin the trespass, where the other circumstances of the case do not warrant such relief.—*Centreville & A. Turnpike Co. v. Barnett*, 2 Ind. 536.

[d] (Sup. 1873)

It is not essential that the threatened injury should be irreparable to justify an injunction to restrain the commission of a trespass upon real property; it is sufficient to show that the remedy at law is not as practical and efficient as that in equity. Therefore, when, owing to the peculiar character of the property, the injury cannot be fully compensated in damages, an injunction will be granted.—*Clark v. Jeffersonville, M. & I. R. Co.*, 44 Ind. 248.

[e] (Sup. 1884)

A suit in equity will not lie to enjoin a mere threatened trespass, without elements of damage which could not be redressed by an action at law.—*Erwin v. Fulk*, 94 Ind. 235.

[f] (Sup. 1892)

Where the owner of a double apartment house, the water for domestic purposes in both parts of which is supplied by a single water pipe, sells or leases one-half of the house, an injunction lies to restrain him from removing such pipe.—*Brauns v. Glesige*, 29 N. E. 1061, 130 Ind. 167.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 98, 99, 107.

See, also, 22 Cyc. p. 830.

#### § 47. — Claim of right.

[a] (Sup. 1904)

Where plaintiff leased real estate for oil and gas purposes, agreeing to furnish to the lessor a certain quantity of gas and pay a certain sum annually until gas or oil was found or the lease otherwise terminated, furnished the gas, and paid the amounts, and the defendant lessor without notice refused longer to receive the sums paid or to use the gas furnished, but contracted with defendant company to give it the exclusive right to operate for gas and oil on the premises, and the defendant company is placing its machinery preparatory to boring and denies plaintiff title to operate on the land, injunction will lie to restrain defendant from operating on the premises.—*Consumers' Gas Trust Co. v. Crystal Window Glass Co.*, 163 Ind. 190, 70 N. E. 366; *Same v. Moore*, 163 Ind. 701, 72 N. E. 1153.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 100.

See, also, 22 Cyc. p. 826.

#### § 48. — Repeated or continuing trespasses.

[a] (Sup. 1874)

Injunction will lie to prevent repeated trespasses.—*Cox v. Louisville, N. A. & C. R. Co.*, 48 Ind. 178.

Though injunctions, being designed to prevent the doing of acts, are not granted after the acts are done, yet where a railroad company was guilty of a continuing injury by the occupation of a street without authority, against which, before such occupation, an injunction might have been granted, and a right to continue the injury is claimed by the railroad company, an injunction may be granted, on a proper showing, to restrain such continuance.—*Id.*

[b] (Sup. 1892)

An averment that "defendants unlawfully claim the right at all times, and from day to day, to tear down the fences and to enter plaintiff's premises," made in a complaint referring alone to a claimed right to enter and

cut certain wheat thereon, and not to the assertion of any other right, threatening continuous disturbance, and made also without any averment of insolvency on the part of defendants, or of irreparable injury, is not sufficient to justify an injunction.—*Miller v. Burket*, 32 N. E. 309, 132 Ind. 469.

[c] (Sup. 1893)

Where a railroad company has begun the construction of an embankment across a natural stream, with a culvert insufficient to permit the passage of the water in times of rain and melting snow, an injunction will issue at the suit of a landowner whose land will be flooded from year to year, and who would otherwise be compelled to bring numerous suits for damages for the continuous injuries.—*Lake Erie & W. R. Co. v. Young*, 135 Ind. 426, 35 N. E. 177, 41 Am. St. Rep. 430.

[d] (App. 1903)

A complaint to enjoin defendant from using plaintiff's private alley alleged that defendant's wrongful use had extended for 8 years, and was based on the theory that, if defendant was permitted to continue the use for a period of 20 years, he would acquire an easement. *Held*, that it was insufficient to justify an injunction, since the threatened injury was remote and contingent. Plaintiff, by serving the notice authorized by Burns' Rev. St. 1901. §§ 5746, 5747, that he will dispute such right, could at any time interrupt defendant's adverse use, and prevent the injury complained of.—*Hart v. Hildebrandt*, 66 N. E. 173, 30 Ind. App. 415.

[e] (Sup. 1904)

Where plaintiff, who was the owner of a lot, and of the basement and first story of a building thereon, the upper story of which was owned by defendants, who also held a perpetual easement to maintain a stairway from the street to the second story, sued to enjoin defendants from erecting or maintaining under the stairs certain sewer, water and gas pipes for use in the second story of the building, on the theory that such pipes constituted a continuing trespass, but the real purpose of the action was to settle a disputed question of title to the real estate between the parties under the contract for the erection of the building, an injunction was properly denied; the evidence showing that the acts to be enjoined had been committed before the suit was tried, and as plaintiff had a complete and adequate remedy at law to recover damages, which would afford complete redress for the injury.—*Christman v. Howe*, 70 N. E. 809, 163 Ind. 330.

[f] (App. 1906)

Where plaintiff's property was damaged during every recurring ordinary rainfall by surface water accumulated by defendant's street improvements for which no proper outlet had been provided, plaintiff was entitled to an injunction to restrain the future recurrence of

such injury.—*Cromer v. City of Logansport*, 78 N. E. 1045, 38 Ind. App. 661.

[g] (App. 1910)

Plaintiffs claimed to be the owners of a strip of land and fenced it, which fence defendant forcibly destroyed without plaintiffs' knowledge, supposing that the strip was a public alley which he had a right to use, and, when plaintiffs rebuilt it, threatened to again remove the fence as often as it might be replaced and to use the strip at will. *Held*, that defendant was guilty of a continuing trespass, which equity would enjoin to prevent a multiplicity of suits.—*Wirrick v. Boyles*, 91 N. E. 621.

FOR CASES FROM OTHER STATES,  
SEE 27 CENT. DIG. Inj. § 101.  
See, also, 22 Cyc. p. 836.

§ 49. — Permanent occupation or injury.

[a] (Sup. 1864)

Injunction is the proper remedy to prevent a railroad corporation from making a permanent location of its road on the land of an individual, under color and claim of right, before proceedings for the condemnation thereof.—*Sidener v. Norristown, H. & St. L. Turnpike Co.*, 23 Ind. 623.

[b] (Sup. 1881)

Defendant entered into an agreement with plaintiff and his codefendant on the transfer by him to them of certain ice houses in Logansport binding himself to give to them the preference of renting all the ice houses owned by him, or which he at any time might own, and binding himself to them or either of them not to again engage within such city in the business of selling or delivering ice except for his own family use. After such agreement, the codefendant transferred his interest in the property described in the agreement to plaintiff. Plaintiff sought an injunction against defendant and the codefendant, alleging that they were colluding together in derogation of plaintiff's rights and were engaged in the carrying on of such ice business in the name of the codefendant, and that defendant was not only interested, but was a partner in the business. *Held*, that plaintiff was not entitled to an injunction against the codefendant on the ground that defendant had forcibly dispossessed the plaintiff for the purpose of turning a certain ice house over to the codefendant, as an action for forcible entry and detainer would have afforded the plaintiff appropriate as well as prompt relief.—*Baker v. Pottmeyer*, 75 Ind. 451.

[c] (Sup. 1883)

Where public or corporate authorities are threatening to do an act which may by lapse of time create a title which will deprive the owner of his land, he may maintain injunction, even though he shows no actual damages.—*Faust v. City of Huntington*, 91 Ind. 493.

[d] (Sup. 1892)

A will provided that the devisee of a life estate should not sell his interest in the land, or hold the same in any other manner than by renting it out, and appointed a trustee, who, in case the devisee should either fail to keep the taxes paid, or attempt to sell, should take possession of the lands, and rent out the same, and, after paying the delinquent taxes and expenses, turn over the residue to the devisee. *Held*, that a complaint which alleges that plaintiff is the trustee; that the devisee has attempted to sell the land, has failed to keep the taxes paid, and has permitted the land to be sold for taxes; that the lands have not been redeemed; that plaintiff had no funds, as trustee, with which to pay taxes, and no means of acquiring such funds, except by renting out the land as provided in the will; that defendant intends to take possession of the land; and that defendant is insolvent—states facts sufficient to entitle plaintiff to have defendant enjoined from entering and taking possession of the land.—*Champ v. Kendrick*, 30 N. E. 787, 130 Ind. 549.

[e] (Sup. 1900)

Where a railroad company claimed to have purchased a canal for a right of way and another company erected a bridge over the canal, the original company was entitled to enjoin the latter from appropriating the towpath under the bridge on a complaint alleging that plaintiff was the owner and in possession of the land and space under the bridge, and that defendants forcibly and without right were attempting to appropriate the same permanently to their own use, to the exclusion of the plaintiff.—*Peoria & E. R. Co. v. Attica, C. & S. R. Co.*, 56 N. E. 210, 154 Ind. 218.

[f] (App. 1906)

Where a city is about to take land of a property owner for street purposes without complying with the statutory provisions governing such proceedings, which taking will result in the excluding of plaintiff from the enjoyment of a portion of the property, the threatened trespass is of a permanent character, to restrain which injunction will lie.—*Town of Syracuse v. Weyrick*, 76 N. E. 559, 37 Ind. App. 56.

FOR CASES FROM OTHER STATES,  
SEE 27 CENT. DIG. Inj. § 102.  
See, also, 22 Cyc. p. 831.

§ 50. — Encroachments by buildings or other structures.

[a] (Sup. 1889)

Injunction will lie to prevent a railroad company from making excavations, laying tracks, and placing switches without right over the land of another.—*Lake Erie & W. R. Co. v. Michener*, 117 Ind. 465, 20 N. E. 254.

[b] (Sup. 1903)

Plaintiff claimed title to land including a gravel pit of which defendant was the legal

owner, unless its title had been barred by plaintiff's adverse possession. Defendant caused its surveyor to drive stakes on certain of the land claimed by plaintiff, and plaintiff alleged that defendant's employes were about to build a fence around the land and deprive him of possession. No posts had been placed on the ground in dispute, or other trespass committed, except the acts of the surveyor; and plaintiff, in his prayer for relief, asked that his title be quieted against defendant, and that defendant be enjoined from constructing such fence. *Held*, that plaintiff had an adequate remedy at law for any injury he might sustain by such threatened trespass, and an injunction was improperly granted.—*Wabash R. Co. v. Engleman*, 66 N. E. 892, 160 Ind. 329.

[c] (Sup. 1904)

An averment that a line fence erected by an adjacent owner was partly on plaintiff's land did not entitle plaintiff to relief on a bill to enjoin the maintenance of the fence.—*Giller v. West*, 69 N. E. 548, 162 Ind. 17.

An allegation that an adjacent lot owner was about to build a fence across the end of plaintiff's lot did not entitle her to an injunction, as the act would amount merely to a trespass.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 103.

See, also, 22 Cyc. p. 834.

#### § 52. — Cutting or removal of timber.

Amendment of pleading, see post, § 121.

Answer, see post, § 119.

Issues, proof and variance, see post, § 123.

Right of administrator to sue, see EXECUTORS AND ADMINISTRATORS, § 129.

[a] (Sup. 1874)

The owner of real property is entitled to an injunction to restrain the cutting of timber thereon.—*Owens v. Lewis*, 46 Ind. 488, 15 Am. Rep. 295.

A complaint alleging the commission of a trespass upon real estate by cutting and carrying away timber, and alleging that an additional trespass is threatened and apprehended, an asking an injunction is good on demurrer.—*Id.*

[b] (Sup. 1879)

Injunction will lie, under 2 Rev. St. 1876, p. 93, to restrain the cutting down and removing of walnut timber trees from land reserved by a landowner as a timber lot.—*Thatcher v. Humble*, 67 Ind. 444.

[c] (Sup. 1881)

Injunction will not lie to prevent the cutting of timber on plaintiff's land in order to open a highway, when the damage can be accurately determined.—*Smith v. Weldon*, 73 Ind. 454.

[d] (Sup. 1889)

A complaint alleging that plaintiff is the owner of land described, on which is a large

quantity of growing trees suitable for a sugar orchard; that defendant is now cutting and destroying said trees and threatens to continue so doing, to plaintiff's irreparable damage; that defendant is insolvent; and praying for a temporary restraining order, and on final hearing a perpetual injunction,—states a good cause of action.—*Clendenen v. Ohl*, 118 Ind. 46, 20 N. E. 639.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 105.

See, also, 22 Cyc. p. 832; note, 22 L. R. A. 233.

#### § 56. Disclosure or use of trade secrets.

Demurrer, see post, § 120.

[a] (Sup. 1900)

A paper-bag company employed a bag maker who had partially perfected a paper-bag making machine, and it was agreed between them that the employé should be retained in the employ of the company, and receive more than usual wages, and that the employer should furnish money to perfect the machine, which should belong to the company as a trade secret, which the employé agreed not to divulge. *Held* that, the machine having been perfected, the employer could maintain an injunction against the employé to prevent the latter from manufacturing the machine for other parties.—*Wetervelt v. National Paper & Supply Co.*, 57 N. E. 552, 154 Ind. 673.

A paper-bag company contracted with a bag maker, who had partially perfected a bag-making machine, to give the latter permanent employment in consideration of his turning the machine over to the company and perfecting it at its cost; the machine to be a trade secret of the employer, which the employé agreed not to divulge. *Held*, that persons who had knowledge of the contract between the company and its employé could be enjoined by such employer from reproducing such machines from plans and information furnished them by such employé.—*Id.*

A paper-bag company gave permanent employment to one who had partially perfected a machine designed to so fold and paste one end of a paper tube as to form a complete paper bag, in consideration of such employé conveying such machine to the company, to be perfected at its expense, and to be its trade secret, which the employé agreed not to divulge. *Held* that, in an action by the employer to enjoin the employé, and other persons colluding with him, from reproducing such machine after it was perfected, an allegation that at the time of such employment there were in existence machines which would fold and paste a paper tube so as to form a complete bag, but that such machines were trade secrets not known to plaintiff, did not make the petition demurrable, as showing that the machine was not a secret, or raise a presumption that it was the same kind of a machine, where it was further alleged

that there were no other machines like the one so purchased.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Inj. § 110; 40 CENT. DIG. Prop. § 2.

See, also, 22 Cyc. pp. 842, 843; note, 58 C. O. A. 8; note, 133 Am. St. Rep. 759.

**(C) CONTRACTS.**

**§ 57. Contracts enforceable in general.**

[a] (Sup. 1892)

The tenant of an apartment, by consent of the owner of the house, put in water pipes, to connect with the main pipes, to furnish water to his apartment. *Held*, that the right to receive water through the main pipes was not a mere license, revocable at will of the owner of the premises; and a mandatory injunction would issue to compel the owner to permit the water to flow through the main pipes, which he had stopped up.—*Brauns v. Glesige*, 130 Ind. 167, 29 N. E. 1061.

[b] (Sup. 1894)

Defendant city, by special ordinance, had contracted with plaintiff for lighting its streets with gas, and subsequently, by another ordinance, extended the terms thereof for 25 years, under conditions which plaintiff accepted. Under its terms, as the contract then stood, the city might at any time determine upon the substitution of electricity for gas, such change to be made by plaintiff, but leaving the number and price of the lights thus furnished to be fixed by an equitable agreement to be afterwards made. It appeared that the common council did so determine, notifying plaintiff that it would receive its competitive bid for the contract, whereupon plaintiff replied that it was ready to make the substitution, and that it was ready to agree upon the "equitable" terms. Plaintiff declined to bid for the contract. It nowhere appeared in the complaint that plaintiff ever offered to furnish electric lights for their reasonable value. *Held*, that the fact that the terms of the whole agreement had not been definitely settled between the parties precluded the issuance of an injunction restraining the city from contracting with any one else to furnish it with electric light.—*Gaslight & Coke Co. of New Albany v. City of New Albany*, 139 Ind. 600, 39 N. E. 462.

[c] (Sup. 1897)

A contract providing that, if defendant should not be prohibited from using natural gas from a well, it would continue to furnish plaintiff with gas sufficient for the purpose of operating a certain electric light plant so long as the well should supply gas, is sufficiently definite to entitle plaintiff to maintain an action of injunction when defendant threatens to refuse to supply the gas.—*Xenia Real-Estate Co. v. Macy*, 47 N. E. 147, 147 Ind. 568.

Plaintiff, in the complaint for an injunction, alleged that defendant had agreed to fur-

nish him with natural gas for his electric light plant and power house; that under such agreement plaintiff had built his plant, and relied on it to comply with his contracts to furnish light to a certain town and its private consumers; that defendant was threatening to disconnect the plant from defendant's gas well,—and prayed for an injunction and damages. *Held*, that the complaint stated facts sufficient to entitle plaintiff to an injunction.—Id.

[d] (Sup. 1905)

Where a gas company agreed to furnish gas for three stoves to plaintiff's grantor as long as certain pipe lines over the grantor's farm were in operation, if the use of pipe lines has been abandoned as a means of conveyance even though the company has not abandoned its business, plaintiff cannot maintain injunction to compel the furnishing of gas under the contract.—*Connersville Natural Gas Co. v. Moffett*, 104 Ind. 585, 73 N. E. 894.

[e] (Sup. 1907)

An injunction will not lie to prevent the breach of a contract to supply heat for a building at a specified rate per year as long as desired by the owner, as the contract is not binding for want of mutuality.—*Fowler Utilities Co. v. Gray*, 168 Ind. 1, 79 N. E. 807, 7 L. R. A. (N. S.) 726, 120 Am. St. Rep. 344.

An apprehended injury, resulting from a breach of contract, will not be restrained, unless the petitioner is without adequate remedy at law, and the contract be free from doubt, and not uncertain or vague in its terms.—Id.

An injunction will not be granted to restrain a breach of contract, when complainant's promises are of such a nature that they cannot be specifically enforced, unless they have been already performed.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Inj. §§ 111-113.

See, also, 22 Cyc. p. 844; note, 48 L. R. A. 842.

**§ 59. Breaches of contract which may be restrained in general.**

Answer, see post, § 119.

[a] (Sup. 1881)

Defendant entered into an agreement with plaintiff and his codefendant on the transfer by him to them of certain icehouses in Logansport binding himself to give to them the preference of renting all the icehouses owned by him or which he at any time might own and binding himself to them, or either of them, not to again engage within such city in the business of selling or delivering ice except for his own family use. After such agreement, the codefendant transferred his interest in the property described in the agreement to plaintiff. Plaintiff sought an injunction against defendant and the codefendant, alleging that they were colluding together in derogation of plaintiff's rights, and were engaged in the carrying on of

such ice business in the name of the codefendant, and that defendant was not only interested, but was a partner, in the business. *Held*, that plaintiff was not entitled to relief by injunction against the codefendant on the ground that he took a lease of an icehouse, to the use of which, under the contract and assignment thereof, the plaintiff had a preference; it appearing that defendant offered to renew the lease to plaintiff for a price named, but the plaintiff refused the terms, and then the lease was made to the codefendant.—*Baker v. Pottmeyer*, 75 Ind. 451.

[b] (Sup. 1882)

A court of equity may decline to enjoin the breach of a restrictive clause in a contract where the disproportion between the restriction and the consideration is so great as to render the agreement oppressive.—*Thayer v. Younge*, 86 Ind. 259.

[c] (Sup. 1891)

Where a party to a contract, which stipulates the damages for its breach, practices medicine in a certain locality, contrary to the terms of the contract, the party injured has an adequate legal remedy by an action for the stipulated damages, and injunction to restrain the breach will not lie.—*Martin v. Murphy*, 129 Ind. 464, 28 N. E. 1118.

[d] (Sup. 1894)

Injunction will not issue to restrain a city which is solvent from committing a breach of an agreement existing between itself and plaintiff, by the terms of which plaintiff is to furnish defendant with lights for a stated period of time, and to prevent its contracting with another than plaintiff therefor.—*Gaslight & Coke Co. of New Albany v. City of New Albany*, 139 Ind. 660, 39 N. E. 462.

[e] (Sup. 1900)

Where a gas company furnishing complainants gas under a contract to furnish each of them gas for use in their dwellings so long as a sufficient amount would flow from the well, gave notice that it would cut off the gas, claiming that the flow had so diminished that there was no longer sufficient to supply plaintiffs, plaintiffs were not entitled to an injunction restraining the cutting off of the gas on the ground of irreparable injury, there being no evidence that they had no other means of heating and lighting their houses, or that they could not have procured such means subsequent to the company's notice.—*Loy v. Madison & H. Gas Co.*, 58 N. E. 844, 156 Ind. 332.

[f] (App. 1902)

Injunction will lie to restrain a lessee under a natural gas lease from cutting off the supply of natural gas which he has agreed to furnish the lessor and his assigns, where great injury will result from the cutting off of the gas, and there is no adequate remedy at law.—*Simpson v. Pittsburgh Plate Glass Co.*, 62 N. E. 753, 28 Ind. App. 343.

[g] (App. 1902)

Where a contractor had agreed with the board of supervisors to use certain limestone in the macadamizing of a road, and was using and threatening to use worthless shale and slate, the right to sue on the contractor's bond for damages thereby inflicted was not such an adequate remedy at law as to preclude injunction by a taxpayer.—*Miller v. Bowers*, 65 N. E. 559, 30 Ind. App. 116.

[h] (App. 1903)

Equity will interfere to prevent irreparable injury through the revocation of an oral executed license respecting real property.—*Dodge v. Johnson*, 67 N. E. 560, 32 Ind. App. 471.

[i] (App. 1905)

Where a contract to purchase electric current for a period of five years provided that, in consideration of the rate fixed, the consumer should not use any electric current on the premises not furnished by complainant, complainant was entitled to an injunction to restrain the consumer from so using current furnished by others, though the contract was not one that a court of equity could compel defendant to specifically perform.—*Beck v. Indianapolis Light & Power Co.*, 76 N. E. 312, 36 Ind. App. 600.

Complainant, a public service corporation, supplying electricity and bound to supply applicants on certain conditions, contracted to supply defendant at a special price per 10,000 watts used for a period of five years; defendant agreeing that during such period no current furnished by any other company should be used on the premises, and that he would pay at least a dollar a month. *Held*, that for a breach of such contract by defendant in disconnecting complainant's wires, and using electricity furnished by another, complainant had no adequate remedy at law.—*Id.*

As the law favors the performance of valid contracts, it is not against good conscience to restrain conduct which is contrary to a contract.—*Id.*

[j] (Sup. 1907)

Suits in equity for an injunction to prevent the breach of a contract are governed by the rules of law applicable in suits for specific performance.—*Fowler Utilities Co. v. Gray*, 168 Ind. 1, 79 N. E. 897, 7 L. R. A. (N. S.) 726, 120 Am. St. Rep. 344.

[k] (App. 1910)

Plaintiff is not entitled to an injunction under an agreement which he has violated, presumptively to the injury of the adverse party, because the adverse party may bring successive actions for damages for the various breaches.—*Barth v. Pittsburgh, C., C. & St. L. R. Co.*, 96 N. E. 488.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. INJ. §§ 114-116, 128  
See, also, 22 Cyc. pp. 848-852; note. 45  
L. R. A. 842.

**§ 61. Contracts in restraint of trade.**

Pleading, see post, § 118.

[a] (Sup. 1855)

B. & S. sold out their stock to D. & Co., who were in the same business, and agreed not to resume business in that place. Afterwards B. & S. took in an additional partner and resumed the business there. *Held*, that the court of common pleas had jurisdiction of a suit for an injunction.—*Beard v. Dennis*, 6 Ind. 200, 63 Am. Dec. 330.

[b] (Sup. 1881)

Defendant entered into an agreement with plaintiff and his codefendant on the transfer by him to them of certain icehouses in Logansport binding himself to give to them the preference of renting all the icehouses owned by him or which he at any time might own and binding himself to them, or either of them, not to again engage within such city in the business of selling or delivering ice, except for his own family use. After such agreement, the codefendant transferred his interest in the property described in the agreement to plaintiff. Plaintiff sought an injunction against defendant and the codefendant, alleging that they were colluding together in derogation of plaintiff's rights and were engaged in the carrying on of such ice business in the name of the codefendant and that defendant was not only interested, but was a partner in the business. *Held*, that the plaintiff was entitled on proof that the codefendant was receiving aid from the defendant in prosecuting the business in violation of the agreement to an injunction against them.—*Baker v. Pottmeyer*, 75 Ind. 451.

[c] (Sup. 1882)

One physician, who alleged that he had paid to another \$150 to relinquish a practice worth \$5,000 per annum, and that the latter had resumed practice, asked for an injunction. *Held*, that it should be refused, and the parties left to assert their rights at law.—*Thayer v. Younge*, 86 Ind. 259.

[d] (Sup. 1889)

Where it appears that defendant has violated his agreement to sell his good will in the practice of medicine and not to practice in a certain district for a number of years, and the breach of the contract has caused, and is likely to cause, plaintiffs damage, and defendant is insolvent, plaintiffs are entitled to an injunction.—*Pickett v. Green*, 120 Ind. 584, 22 N. E. 737.

[e] (Sup. 1895)

Where one contracts not to engage in a certain business in a certain town, he and others, acting as his representatives, will be enjoined from carrying on such business in such place.—*Eisel v. Hayes*, 141 Ind. 41, 40 N. E. 119.

[f] (Sup. 1895)

Where a physician contracts with another physician to "retire from the practice of medicine and surgery" in a certain city, and ceases to practice for several months, injunction will lie to restrain subsequent practice by him in such city, though the contract contains no express provision against a resumption of practice, or any provision as to the length of the retirement.—*Beatty v. Coble*, 142 Ind. 329, 41 N. E. 590.

[g] (Sup. 1896)

On breach of a contract not to engage in a certain business in a certain locality, no sum being provided as liquidated damages for breach of the contract, an injunction will lie to restrain the offending party from engaging in such business.—*O'Neal v. Hines*, 145 Ind. 32, 43 N. E. 946.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 120-123.

See, also, 22 Cyc. pp. 865-869.

**§ 62. Covenants as to use of premises.**

[a] (Sup. 1900)

Where a lessee violates a covenant in the lease that he will sell no beer on the premises except that manufactured by a named brewing company, an injunction will lie against him; the remedy at law being inadequate.—*Ferris v. American Brewing Co.*, 58 N. E. 701, 155 Ind. 539, 52 L. R. A. 305.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 124-127, 129;

16 CENT. DIG. Deeds, § 546; 32 CENT.

DIG. Land. & Ten. § 486.

See, also, 22 Cyc. pp. 859-864; note, 59 Am. Dec. 70.

**(D) CORPORATE FRANCHISES, MANAGEMENT, AND DEALINGS.****§ 66. Exercise or misuse of corporate franchise or powers.**

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 135.

See, also, 10 Cyc. p. 984, 22 Cyc. pp. 873-878.

**§ 67. — In general.**

[a] (Sup. 1873)

One who is about to be damaged by an act of a company, assuming to act as a corporation but never legally organized as such, may bring an action for injunction against the company in its corporate name.—*Newton County Draining Co. v. Nofsinger*, 43 Ind. 566.

[b] (Sup. 1877)

Injunction will not lie to prevent the construction of a railroad by a legally organized company on the ground that the company fraudulently intends to build only a part of the line.

—Aurora & C. R. Co. v. City of Lawrenceburgh, 56 Ind. 80.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Inj. § 135.

See, also, 22 Cyc. pp. 873-878.

**§ 69. Management of corporate affairs or business.**

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Inj. §§ 136, 137.

See, also, 10 Cyc. p. 984, 22 Cyc. pp. 875-878.

**§ 70. — In general.**

[a] (Sup. 1897)

A complaint by policy holders in a mutual insurance company alleging that the company has accepted proofs of loss on a fraudulent policy, and is about to pay the same from the funds of the company, though the officers know that the policy is fraudulent; that the officers have refused to contest said claim, though requested by plaintiffs, and will not defend suit thereon,—sufficiently shows that plaintiffs have no adequate remedy at law, and are entitled to an injunction.—Carmien v. Cornell, 148 Ind. 83, 47 N. E. 216.

[b] (Sup. 1897)

Where the stockholders of a corporation have divided into two factions, have held rival meetings, and each meeting has elected directors, an injunction will not be issued at the suit of one set of directors to restrain the other from interfering with them in the business of the corporation, since a proper and adequate remedy at law, to contest their election, is given by the common law and by Rev. St. 1894, § 1145 (Rev. St. 1881, § 1131), providing that "an information may be filed against any person or corporation \* \* \* when any person shall usurp, intrude into, or unlawfully hold or exercise any \* \* \* office in any corporation created by authority of this state."—Carmel Natural Gas & Improvement Co. v. Small, 47 N. E. 11, 50 N. E. 476, 150 Ind. 427.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Inj. §§ 136, 137.

See, also, note, 1 L. R. A. (N. S.) 571.

**§ 72. Disposition of or dealings with corporate property.**

[a] (Sup. 1875)

An injunction will not lie to prevent the board of directors of a corporation from allowing a fraudulent account against it, since the allowance of claims rests in the discretion of such board.—Rogers v. La Fayette Agricultural Works, 52 Ind. 296.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Inj. § 138.

See, also, 22 Cyc. p. 875.

**§ 73. Infringement or denial of rights of stockholders.**

[a] (App. 1901)

Injunction is the proper remedy for a stockholder, where his rights will be prejudiced by a proposed unauthorized action of the corporation or its directors.—Redkey Citizens' Natural Gas, Light, Fuel & Petroleum Co. v. Orr, 60 N. E. 716, 27 Ind. App. 1.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Inj. §§ 139, 140.

See, also, 22 Cyc. pp. 875-878.

**(E) PUBLIC OFFICERS AND BOARDS AND MUNICIPALITIES.**

**§ 74. Officers and official acts which may be restrained in general.**

[a] (Sup. 1888)

A ministerial officer who is engaged in executing an order of court and obeys the order cannot be enjoined, nor can an officer who does what the law commands be restrained by injunction.—Montgomery v. Wasem, 15 N. E. 795, 19 N. E. 184, 116 Ind. 343.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Inj. §§ 142, 150.

See, also, 22 Cyc. pp. 879-884; notes, 15

L. R. A. 64, 3 L. R. A. (N. S.) 382.

**§ 76. County or town boards and officers.**  
Finding of jury, see post, § 130.

[a] (Sup. 1876)

Fraud may be a ground for enjoining the carrying out of an order of commissioners for relocating a county seat, if it enters into the order itself, but not so of fraud practiced upon the commissioners in procuring petitions, or any other matter which might be contested during the proceedings.—Markle v. Board of Com'n of Clay County, 55 Ind. 185.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Inj. §§ 145, 150, 151.

See, also, 22 Cyc. p. 882.

**§ 77. Municipalities and municipal officers in general.**

Answer, see post, § 119.

[a] (Sup. 1884)

Where the petition for the annexation of territory is sufficient on its face to confer jurisdiction of the subject-matter, the proceedings based on it, though erroneous, cannot be overthrown by injunction, as the appropriate remedy is by appeal.—City of Terre Haute v. Beach, 96 Ind. 143.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Inj. §§ 146, 147.

See, also, 22 Cyc. pp. 888-892; notes, 23

L. R. A. 301, 2 L. R. A. (N. S.) 678, 683.

**§ 79. Highway boards and officers.**

[a] (Sup. 1884)

An injunction will not lie to restrain the execution of an order of a board of county commissioners laying out a highway unless the order is void; for, if the proceedings are merely irregular or erroneous, the remedy is by appeal.—*Erwin v. Fulk*, 94 Ind. 235.

[b] (Sup. 1884)

A complaint against county commissioners, that by proceedings under the law the superintendent of roads had, in constructing a highway, cut down a ridge, so that a stream flowing by plaintiff's land and crossing the road, and which had from time immemorial been prevented from flowing onto his land by said ridge, was allowed to flow thereon, *held* to show no cause for mandamus or injunction; it not appearing but what the officers did their duty, and that damages were properly assessed.—*State ex rel. Robinson v. Hanna*, 97 Ind. 469.

[c] (Sup. 1901)

*Burns' Rev. St. 1894*, §§ 6924–6934, as amended by *Burns' Supp. 1897*, §§ 6924, 6925, 6928, provide that the county commissioners on petition may submit the question of improving designated roads to a vote of the township, and authorize the commissioners to build the road, and to hear and determine all complaints in regard to such improvements and taxes levied therefor, and that any taxpayer of the county may appeal from any order of the board to the circuit court. *Held*, that an action cannot be maintained by a taxpayer to enjoin the commissioners from constructing a road, since the commissioners had full and complete jurisdiction of the subject-matter, and an appeal from their decision afforded an adequate remedy at law.—*Lowe v. Board of Com'rs of White County*, 59 N. E. 406, 156 Ind. 163.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. INJ. § 149.

See, also, 22 Cyc. p. 883.

**§ 80. Elections and election officers.**

[a] (Sup. 1862)

An election having been improperly held for the filling of a vacancy in the office of common pleas judge, the court refused to issue an injunction by which it was sought to restrain the governor from commissioning the party claiming to be elected and the latter from accepting the office.—*Beal v. Ray*, 17 Ind. 554.

[b] (Sup. 1896)

A suit to enjoin the holding of an election for members of the legislature under a certain apportionment act, on the ground that it was unconstitutional, should not be entertained, there being no other act under which it could be held.—*Fesler v. Brayton*, 145 Ind. 71, 44 N. E. 37, 32 L. R. A. 578.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. INJ. § 151.

See, also, 22 Cyc. pp. 885, 886.

**§ 81. Appointment or removal of officers.**

[a] (Sup. 1898)

Injunction is the proper remedy when one occupying the office of mayor seeks to stay the intrusion of another claimant into the office until title thereto should be determined by proper legal remedy.—*Parsons v. Durand*, 49 N. E. 1047, 150 Ind. 203.

A common council assumes a judicial function in deciding the legal rights of adverse claimants to a mayor's office, and enforcing its decision by a short method of ejecting the incumbent, and is liable to be enjoined therefrom.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. INJ. § 152.

See, also, 22 Cyc. pp. 885, 886.

**§ 83. Meetings and proceedings of boards or other bodies.**

[a] (Sup. 1906)

Where, in a suit by a physician to restrain the state board of medical examiners from hearing and determining charges against him and revoking his license to practice medicine, the complaint alleged that the board had conspired with a third person to deprive plaintiff of his license, the fact that the third person was not in the state and could not be compelled to attend the hearing of the charges, and that the board would try the charges without his presence or testimony, furnished no ground for enjoining the board from hearing and determining the charges.—*Spurgeon v. Rhodes*, 78 N. E. 228, 167 Ind. 1.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. INJ. § 153.

**§ 85. Enforcement of statutes, ordinances, or other regulations.**

[a] (Sup. 1873)

Injunction will lie to restrain action under a void city ordinance.—*Spiegel v. Gansberg*, 44 Ind. 418.

[b] (Sup. 1891)

Though a court of equity may in a proper case enjoin the enforcement of city ordinances to prevent a multiplicity of actions, yet, where the ordinance whose enforcement is sought to be enjoined is not void, a court of equity cannot determine whether the plaintiff is guilty of its violation.—*Davis v. Fasig*, 27 N. E. 726, 128 Ind. 271.

Where all the provisions of an ordinance are not void, its enforcement cannot be enjoined.—*Id.*

[c] (Sup. 1907)

The enforcement of an ordinance prohibiting the establishment and maintenance of a

skating rink will not be enjoined, where plaintiff, who contemplated erecting one, was proceeding upon the mistaken theory that the ordinance prohibited the mere erection of the rink without obtaining the city's permit, since prosecution for violation of the ordinance was not impending or imminent.—*Princess Amusement Co. v. Metzger*, 169 Ind. 376, 82 N. E. 758.

That a city ordinance is void is not alone sufficient ground for enjoining its enforcement.—*Id.*

[d] (Sup. 1907)

Though courts will arrest an unreasonable exercise of the police power, where there is an attempt thereby to lay a burden on a subject in the enjoyment of his property, the courts recognize that there is authority within the field of legislative discretion wherein the law-making power is absolute.—*Pittsburgh, C., C. & St. L. R. Co. v. Hartford City*, 170 Ind. 674, 82 N. E. 787, 85 N. E. 362, 20 L. R. A. (N. S.) 461.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 155, 156.

See, also, 22 Cyc. pp. 891, 892; note, 115 Am. St. Rep. 372.

**§ 86. Unauthorized or fraudulent improvements or contracts.**

Remedies of taxpayers, see COUNTIES, § 196; MUNICIPAL CORPORATIONS, § 993; SCHOOLS AND SCHOOL DISTRICTS, § 111; TOWNS, § 61.

[a] (Sup. 1858)

Injunction is the proper remedy to prevent township trustees from erecting a school house on a site irregularly selected.—*State ex rel. Elliott v. Custer*, 11 Ind. 210.

[b] (Sup. 1875)

Under Acts 1872-73 (Sp. Sess.) p. 17, the board of county commissioners cannot let a contract for the building of a court house at any other time than that fixed in the advertisement for bids. *Held*, that where the commissioners were prevented by injunction from receiving bids and letting the work at the time specified in the advertisement, and the injunction was afterwards dissolved, and the work was let at a subsequent time, an injunction would issue to restrain the building of the court house under such contract.—*Board of Com'rs of Benton County v. Templeton*, 51 Ind. 266.

[c] (Sup. 1878)

Injunction, and not a writ of prohibition, is the proper remedy to prevent a municipality from executing a contract to construct a sidewalk along the plaintiff's land.—*Corporation of Bluffton v. Silver*, 63 Ind. 262.

[d] (Sup. 1886)

Township trustees who are about to enter into a forbidden contract may be enjoined at the suit of a taxpayer, whether or not such

contract would be void if made.—*Middleton v. Greeson*, 106 Ind. 18, 5 N. E. 755.

[e] (Sup. 1895)

The action of the county commissioners in contracting for the erection of a courthouse, pending an appeal from a judgment ordering the removal of the county seat to the place where such courthouse is sought to be built, does not affect the jurisdiction of the appellate court, or in any manner frustrate any decree which may be made on the appeal; and therefore the appellate court cannot, as a court of original jurisdiction, restrain the commissioners, who were not parties to the action for the removal of the county seat from making such a contract.—*Mode v. Board of Com'rs of Crawford County*, 141 Ind. 574, 40 N. E. 1089.

[f] (Sup. 1895)

Injunction will lie to restrain a school board from executing a contract with one of its own members to furnish supplies after the board has passed a resolution to purchase from said member; and it is not necessary to wait until the contract is executed.—*Alexander v. Johnson*, 144 Ind. 82, 41 N. E. 811.

Injunction will lie to restrain a public officer from entering into a contract with himself individually to furnish supplies to a public institution, as a suit on his bond would not be an adequate remedy.—*Id.*

[g] (Sup. 1896)

In an action by taxpayers to enjoin a contract by county commissioners providing for an unauthorized expenditure of public money, a bond given by the contractor for faithful performance of the contract is not, as supplying an adequate remedy at law, available as a defense.—*Deweese v. Hutton*, 144 Ind. 114, 43 N. E. 13.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 158.

See, also, 22 Cyc. pp. 893-897.

**§ 87. Issue of bonds or other securities.**

Remedies of taxpayers, see COUNTIES, § 196; MUNICIPAL CORPORATIONS, § 993; TOWNS, § 61.

[a] (Sup. 1875)

Where a county, without express legislative authority, has voted an appropriation to aid in the construction of a railroad, injunction will lie at the suit of a citizen and taxpayer of the county, in his own right, to prevent the issuance and sale of bonds in payment for such appropriation.—*Board of Com'rs of Delaware County v. McClintock*, 51 Ind. 323.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 159.

See, also, 22 Cyc. p. 894.

**§ 88. Payment or other disposition of public money.**

Remedies of taxpayers, see COUNTIES, § 196; SCHOOLS AND SCHOOL DISTRICTS, § 111; TOWNS, § 61.

## [a] (Sup. 1876)

An injunction will issue against the fraudulent or unlawful appropriation of public moneys.—Warren County Agricultural Joint Stock Co. v. Barr, 55 Ind. 30; Rothrock v. Carr, Id. 334.

## FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 160.

See, also, 22 Cyc. pp. 895–897.

## (F) PUBLIC WELFARE, PROPERTY, AND RIGHTS.

## § 89. Protection of public in general.

## [a] (App. 1902)

A suit in which it is sought to prevent contractors from constructing a macadam road with worthless shale and slate, when they had agreed to use certain limestone, and to prevent the board of supervisors from paying for such work, was an action to prevent the violation of the law for the protection of the public funds, rather than one seeking to enforce the performance of a contract, and hence was a proper case for injunction.—Miller v. Bowers, 65 N. E. 559, 30 Ind. App. 118.

## [b] (Sup. 1903)

A bill in equity for an injunction to protect public rights will not lie at the suit of an individual, where no special injury to complainant is shown.—Landes v. Walls, 66 N. E. 679, 160 Ind. 216.

## FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 161, 163.

See, also, 22 Cyc. p. 897.

## § 90. Public safety and convenience.

## [a] (Sup. 1892)

An injunction will lie to restrain the owners of a gas well in the center of a thickly populated city from collecting the necessary quantity of nitroglycerine to "shoot" it.—People's Gas Co. v. Tyner, 31 N. E. 59, 131 Ind. 277, 31 Am. St. Rep. 433, 16 L. R. A. 443; Greenfield Gas Co. v. People's Gas Co., 31 N. E. 61, 131 Ind. 599.

## FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 162.

See, also, 22 Cyc. p. 898.

## § 91. Disposition of public property.

## [a] (Sup. 1881)

In the absence of good faith on the part of county commissioners in the management and disposition of the county's property, or in case of a fraudulent sale or attempt to sell property belonging to the county, every taxpayer thereof has an ample remedy by injunction, not only against the county commissioners, but against all the persons in collusion with them.—O'Boyle v. Shannon, 80 Ind. 159.

## FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 164.

See, also, 22 Cyc. p. 898.

## (G) PERSONAL RIGHTS AND DUTIES.

## § 98. Libel and slander.

## [a] (Sup. 1893)

Although the owner of a patent may not be able to enjoin a person from publishing statements denying the validity of his patent, or his title thereto, yet, if such person is insolvent, and he threatens all who deal in the goods of the former with suits for infringement, thereby intimidating his customers, injunction is the proper remedy.—Shoemaker v. South Bend Spark-Arrester Co., 135 Ind. 471, 35 N. E. 280, 22 L. R. A. 332.

## FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 169–171.

See, also, 22 Cyc. p. 900; note, 16 L. R. A. 243.

## § 99. Interference with occupation in general.

Pleading matters of fact or conclusions relating to, see PLEADING, § 8.

## [a] (App. 1908)

If the legitimate business of a person is unlawfully interfered with by one acting either in private or official capacity, the courts will upon a proper showing enjoin the commission of such wrong.—Ex parte Sherwood, 84 N. E. 783, 41 Ind. App. 642.

## FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 172.

## § 101. Boycotts and other combinations.

Violation of writ, see post, § 228.

## [a] (Sup. 1905)

Where a labor union, consisting of 600 members, voted to strike, and expressly voted that under no circumstances should any striker endeavor, by any form of violence, threats, or intimidation, to influence the acts of any one engaged or about to engage at work in the various factories affected, including complainant's, the fact that 14 members of the union were guilty of acts of intimidation and violence during the strike, while lounging in the street and not while serving as pickets, did not entitle complainants to an injunction against the union.—Karges Furniture Co. v. Amalgamated Woodworkers Local Union No. 131, 75 N. E. 877, 165 Ind. 421, 2 L. R. A. (N. S.) 788.

## FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 174, 175.

See, also, notes, 28 L. R. A. 464, 5 L. R. A. (N. S.) 1096; note, 103 Am. St. Rep. 488.

## (H) CRIMINAL ACTS, CONSPIRACIES, AND PROSECUTIONS.

Restraining boycotts and other combinations, see ante, § 101.

### § 103. Criminal acts affecting rights of property.

[a] (Sup. 1892)

The fact that the accumulation of nitro-glycerin within the corporate limits of a city is made a crime does not prevent a private citizen from having it enjoined, where in case of explosion he would suffer an injury in life or property not sustained by the public in general.—*People's Gas Co. v. Tyner*, 131 Ind. 277, 31 N. E. 59, 31 Am. St. Rep. 433, 16 L. R. A. 443; *Greenfield Gas Co. v. People's Gas Co.*, 131 Ind. 599, 31 N. E. 61.

[b] (Sup. 1894)

Injunction lies to prevent the removal of a wooden building to a place within the fire limits in violation of a municipal ordinance, and the location of it within 10 feet of plaintiff's house, making the danger thereto from fire imminent, and increasing the cost of insurance.—*Kaufman v. Stein*, 138 Ind. 49, 37 N. E. 333, 46 Am. St. Rep. 368.

[c] (App. 1901)

Injunction does not lie at the suit of a municipality to restrain the erection of a wooden building in violation of a penal ordinance prescribing limits within which such a building may not be erected.—*Incorporated Town of Rochester v. Walters*, 60 N. E. 1101, 27 Ind. App. 194.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 176, 177.

See, also, 22 Cyc. p. 902; note, 3 L. R. A. (N. S.) 622.

### § 105. Criminal prosecutions.

[a] (Sup. 1874)

A party cannot enjoin the collection of a fine and costs, assessed for the violation of a city ordinance, on the ground that there was no offense charged or cause of action filed before the mayor; the remedy in such case being by appeal.—*Schwab v. City of Madison*, 49 Ind. 329.

[b] (Sup. 1892)

Where an ordinance prohibiting a gas company from carrying on its business except on certain conditions is void as to such company, its attempted enforcement by repeated prosecutions of the company's employes will be enjoined.—*City of Rushville v. Rushville Natural Gas Co.*, 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 178, 179.

See, also, 22 Cyc. pp. 903-905; note, 51 C. A. 133; notes, 21 L. R. A. 84, 2 L. R. A. (N. S.) 631.

## III. ACTIONS FOR INJUNCTIONS.

Appellate jurisdiction as between particular courts, see COURTS, § 220 (2, 10).

Practice of appellate court in issuing temporary injunction, see COURTS, § 207.

Right to trial by jury, see JURY, § 14.

Statutory provisions affecting appeal, see APPEAL AND ERROR, § 2.

### § 107. Rights of action.

[a] (Sup. 1871)

Where plaintiff has appeared in proceedings by a railroad company to condemn a right of way across his land, and filed his exceptions, and taken an appeal from the proceedings, he cannot, while such appeal is pending, seek a remedy by injunction.—*Ney v. Swinney*, 36 Ind. 454.

[b] (Sup. 1901)

Where an ordinance required a permit for the alteration of buildings, and the owner of a building began altering the same after the refusal of a permit, a party not sustaining any special damage from the proposed alteration, nor showing that the permit was refused on proper legal ground, is not entitled to an injunction restraining the alteration.—*O'Brien v. Louer*, 61 N. E. 1004, 158 Ind. 211.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 181-183.

### § 108. Conditions precedent.

[a] (Sup. 1843)

A vendee of real estate filed a bill in chancery to restrain the vendor from the collection of the purchase money until the latter should pay off a mortgage on the land according to his agreement. *Held*, that it was not essential to the success of the suit that the complainant should have tendered back to the defendant a deed for the land, nor that he should have offered to account for the rents and profits.—*Addleman v. Mormon*, 7 Blackf. 31.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 184-186.

See, also, 22 Cyc. pp. 918-920.

### § 109. Defenses.

Objections to relief by injunction, see ante, §§ 20-22.

[a] (App. 1902)

In a suit for injunction to prevent contractors from using worthless shale and slate in the construction of a macadam road, when they had agreed with the board of supervisors to use blue limestone from a certain quarry, and to prevent the board from paying for such work, it was immaterial whether the board had a right to require the use of material from a certain quarry, since the suit was not for specific performance, but only went to the misappropriation of the public funds for worthless work.—*Miller v. Bowers*, 65 N. E. 559, 30 Ind. App. 116.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 187.

**§ 110. Jurisdiction.**

Application of equitable maxims, see EQUITY, § 66.

Jurisdiction as dependent on whether title to real property is involved, see COURTS, § 163.  
Original jurisdiction of appellate courts, see COURTS, § 207.

[a] (Sup. 1847)

The associate judges of one county have no authority in vacation to restrain by injunction the execution of a writ of habere facias possessionem directed to the sheriff of another county.—*State ex rel. v. Michaels*, 8 Blackf. 436.

[b] (Sup. 1857)

Where, in proceedings for divorce, alimony was granted, and a decree entered that, if not paid within the time specified, execution should issue against defendant's land therefor, the court had jurisdiction to enjoin defendant from selling his land in the meantime, though it lay in another county.—*Rourke v. Rourke*, 8 Ind. 427.

[c] (Sup. 1873)

Jurisdiction to grant injunctions being expressly conferred on the courts of common pleas by 2 Gav. & H. Rev. St. 1870, p. 25, § 21, they had jurisdiction to try all merely incidental questions arising in the case.—*Sipe v. Holliday*, 62 Ind. 4.

[d] (Sup. 1896)

Where the complaint to enjoin the annexation of certain territory to a city does not raise the question of the circuit court's jurisdiction of plaintiff's person on appeal from the county commissioners in the annexation proceedings, it cannot be objected that the answer failed to show jurisdiction by not alleging that plaintiff was notified of such appeal.—*Wilcox v. City of Tipton*, 42 N. E. 614, 143 Ind. 241.

[e] (Sup. 1900)

Acts 1875, p. 55, creates a superior court of Tippecanoe county, and provides that it shall have such power to grant injunctions, restraining orders, writs of mandate, etc., as is now or may hereafter be conferred on circuit courts. Acts 1881, p. 379 (*Burns' Rev. St.* 1894, § 1181; *Rev. St.* 1881, § 1167; *Horner's Rev. St.* 1897, § 1167), provides that writs of mandate and prohibition may issue from the supreme and circuit courts of the state. *Held*, that the superior court of such county has jurisdiction of a suit for a mandatory injunction to compel the removal of an obstruction to a highway.—*Martin v. Marks*, 57 N. E. 249, 154 Ind. 549.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 188-194.

See, also, 22 Cyc. pp. 906-909.

**§ 111. Venue.**

[a] (Sup. 1872)

In a proceeding to enjoin the collection of turnpike assessments on the ground of failure

to assess all the lands within the limits provided by statute, if it appears that the turnpike extends into two or more counties, it must be shown that the omitted lands are situated in the county where the injunction is sought and are liable to assessment.—*Pendleton & E. Turnpike Co. v. Barnard*, 40 Ind. 146.

[b] (Sup. 1887)

Although a complaint alleges that one of the defendants fraudulently conveyed certain real estate to the other to prevent collection of plaintiff's judgment, yet where it appears from the prayer and entire scope of the pleading, that the conveyance is not sought to be avoided, and that no question of title is involved, but an injunction is sought in order to prevent the disposal of the notes and mortgage taken on the land when the transfer was made, it is not a local action, and need not be brought in the county where the land lies.—*Becknell v. Becknell*, 110 Ind. 42, 10 N. E. 414.

[c] (Sup. 1894)

Where plaintiff purchased land from defendant under false representations that the land was free from incumbrances, and gave in exchange purchase-money notes secured by a mortgage which he had obtained on the sale of other land, P., who assumed the payment of said notes, was a necessary party to plaintiff's petition for an injunction to restrain his payment of the notes to defendant, who was insolvent, or to persons to whom the defendant had pledged the notes, and to compel the latter to turn over to plaintiff, from the proceeds of the notes, enough to cover the incumbrances found to be due on the property purchased by plaintiff, and hence the suit was properly brought in the county of the residence of P.—*Urmston v. Evans*, 138 Ind. 285, 37 N. E. 792.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 195, 196.

See, also, 22 Cyc. pp. 909, 910.

**§ 113. Limitations and laches.**

[a] (Sup. 1885)

Where the owner of a water power stands by and without objection permits a city to erect works for a water supply by drawing water from the stream, thus diminishing his power, he estops himself from claiming an injunction against such acts.—*City of Logansport v. Uhl*, 99 Ind. 531, 49 Am. Rep. 109.

[b] (Sup. 1890)

Where an abutting owner makes no objections to the use of the road for the purpose of laying gas pipes until after the company has laid its main pipes and expended a great deal of money in its undertaking to supply the citizens of a large city with gas, who consequently have an interest in the success of the enterprise, which would be frustrated, and the company ruined, if the work were suspended, an injunction against laying the pipes in accordance with the license on which the company acted will not be granted, but plaintiff will be

left to his remedy at law for damages.—*Kincaid v. Indianapolis Natural Gas Co.*, 124 Ind. 577, 24 N. E. 1066, 19 Am. St. Rep. 113, 8 L. R. A. 602.

[c] (Sup. 1893)

Under certain circumstances, a person by remaining silent and allowing acts to be done and expenses to be incurred may lose his remedy by injunction, and be compelled to assert his rights at law.—*Barnard v. Sherley*, 34 N. E. 600, 135 Ind. 547, 24 L. R. A. 568, 41 Am. St. Rep. 454.

[d] (Sup. 1899)

An unexcused delay of five months in assailing a contract made by county commissioners, during which time services were rendered, and the person rendering was preparing to present his claim, will prevent a taxpayer from maintaining a suit to annul the contract and enjoin payment.—*Board of Com'rs of Wayne County v. Dickinson*, 53 N. E. 929, 153 Ind. 682.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. INJ. §§ 198-201.

See, also, 22 Cyc. p. 777; note, 50 Am. Rep. 117.

§ 114. Parties.

[a, b] (Sup. 1855)

Where one firm have sold out to another and agreed with them not to resume the same business in the same place, and afterwards do so resume, a mere prayer for an injunction will be granted on the application of a single member of the injured firm; the injunction being equally for the benefit of his partners.—*Beard v. Dennis*, 6 Ind. 200, 63 Am. Dec. 380.

Aliter, where damages are sought.—Id.

[c] (Sup. 1870)

Where different parties were severally the owners of separate adjoining tracts of land, on which separate assessments for the construction of a road had been made, and had no joint interest in the lands, but were alike affected by the assessment, *held*, that they might all unite in a complaint for an injunction.—*Robbins v. Sand Creek Turnpike Co.*, 34 Ind. 461.

[d, e] (Sup. 1874)

Any taxpayer of a county may maintain an action to enjoin county commissioners from doing illegal acts and transcending their lawful powers, when the effect thereof would be to impose upon such taxpayer an unlawful tax.—*Board of Com'rs of Clay County v. Markle*, 46 Ind. 96.

[f] (Sup. 1883)

Where each of several landowners would be irreparably injured by acts of a supervisor attempting to open a road under a void order of the county commissioners, such landowners may join in a proceeding to enjoin the supervisor, and thus avoid a multiplicity of suits.—*Heagy v. Black*, 90 Ind. 534.

[g] (Sup. 1883)

An injunction to restrain the collection of tolls upon a road claimed to be unfinished and out of repair will not be granted at the instance of one who has no greater interest than that of the public in general.—*Sidener v. Haw Creek Turnpike Co.*, 91 Ind. 186.

[h] (Sup. 1884)

Creditors who sought to be relieved against a fraudulent claim to defraud them were entitled to unite as plaintiffs under Rev. St. 1881, § 262, in a suit for an injunction; they being jointly interested in the relief demanded.—*Field v. Holzman*, 93 Ind. 205.

[i] (Sup. 1884)

The owners of separate tracts of land cannot join in one proceeding to enjoin the collection of drainage assessment against their lands.—*Jones v. Cardwell*, 98 Ind. 331.

[j] (Sup. 1891)

Where the owners of separate and distinct tenements would each be injured by the erection of a building prohibited by ordinance, they may join in an action to restrain the erection of such building.—*First Nat. Bank of Mt. Vernon v. Sarlls*, 129 Ind. 201, 28 N. E. 434, 23 Am. St. Rep. 185, 13 L. R. A. 481.

[k] (Sup. 1892)

A complaint questioning the validity of acts of the Legislature and seeking to enjoin the officers of the county from acting under them, and to compel them to proceed under an earlier act of the Legislature relating to the same subject, is properly brought in the name of the state on the relation of one showing an interest entitling him to invoke the aid of the court, and who is sincere in his intention, notwithstanding the defendants and the relator all entertain the same opinion as to the validity of the acts.—*Parker v. State ex rel. Powell*, 31 N. E. 1114, 132 Ind. 419.

Where an action is brought in the name of the state on relation to enjoin officers of the county from acting under invalid acts of the Legislature, it is immaterial at whose suggestion or expense the suit is instituted or carried on, where the relator is sincere in his contention and all the parties file affidavits denying collusion.—Id.

[l] (Sup. 1896)

In a suit to restrain the performance of a contract for the repair of a county bridge on the ground that such contract is illegal, the contractor for the repairs may be joined with the board of county commissioners.—*Deweese v. Hutton*, 43 N. E. 13, 144 Ind. 114.

[m] (Sup. 1897)

Two persons having independent policies in a mutual insurance company can join as plaintiffs to restrain the company from paying a fraudulent claim.—*Carmien v. Cornell*, 47 N. E. 216, 148 Ind. 83.

[n] (App. 1901)

Burns' Rev. St. 1894, § 269, provides that any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to the complete determination of the questions involved. *Held* that, where plaintiff alleged that W. had been guilty of leaving open certain gates erected across a right of way, and threatened to continue to leave them open, and that M. was owner of the real estate over which the road way extended, and claimed an interest in the controversy, M. was a proper party to an action to restrain the continuance of leaving the gates open.—*Brandis v. Grissom*, 60 N. E. 455, 26 Ind. App. 661.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 202-220.

See, also, 22 Cyc. pp. 910-917; note, 3 L. R. A. (N. S.) 493.

#### § 115. Process and appearance.

[a] (App. 1893)

An injunction to restrain the prosecution of an appeal will be denied where no notice of the application was given to appellant.—*State ex rel. Danforth v. Ruff*, 6 Ind. App. 38, 33 N. E. 124.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 221, 222.

See, also, 22 Cyc. pp. 917, 918.

#### § 116. Pleading.

Aider by verdict or judgment, see PLEADING, § 433.

Cross-complaint, see PLEADING, § 147.

Exhibits annexed to pleading, see PLEADING, § 307.

Filing written instruments with pleading, see PLEADING, § 308.

Pleading matters of fact or conclusions, see PLEADING, § 8.

Pleading ownership of property, see PLEADING, § 33.

Pleadings as evidence, see post, § 125.

Separate counts on same cause of action, see PLEADING, § 53.

Surplusage, see PLEADING, § 35.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 223-271.

See, also, 22 Cyc. pp. 924-937.

#### § 118. — Bill, complaint, or petition.

Use and effect on application for temporary injunction, see post, § 144.

[a] (Sup. 1845)

A bill in chancery, filed by the obligee of a title bond in possession of the premises, to enjoin an action of ejectment, brought on the demise of the obligor's grantee, should allege that possession of the premises had been demanded of the complainant before the action of ejectment was brought; and, as the complainant was to have the title when he paid the

purchase money, the bill should aver that the purchase money had been paid.—*Newhouse v. Hill*, 7 Blackf. 584.

[b] (Sup. 1851)

An injunction will not ordinarily be granted under a prayer for general relief, but must be expressly prayed.—*Leforge v. West*, 2 Ind. 514.

[c] (Sup. 1859)

A complaint for an injunction need not disclose whether a bond is filed or not.—*Smith v. Chandler*, 13 Ind. 513.

[d] (Sup. 1871)

A complaint for an injunction, which fails to allege that defendant is doing, threatening, or about to do the things asked to be enjoined, is bad on demurrer.—*Ploughe v. Boyer*, 38 Ind. 113.

[e] (Sup. 1875)

A complaint against a railroad company, alleging that plaintiffs are owners of lots abutting on certain streets in a city, and that defendant has taken possession of said streets in front of plaintiff's lots, and has laid down its track thereon and used the same, but not alleging that defendant intends or threatens to continue such use to the injury of plaintiffs, or at all, is not sufficient to justify the granting of an injunction to prevent defendant from continuing to maintain and use such railway.—*Roelker v. St. Louis & S. E. R. Co.*, 50 Ind. 127.

[f] (Sup. 1875)

Where a vendor fraudulently represents that he has a good title to land sold, in seeking to enjoin the collection of the purchase money the action is based on the fraud, and not on the covenants in the deed from the vendor to the vendee, and such deed need not be made a part of the pleading.—*Hinkle v. Margerum*, 50 Ind. 240.

[g] (Sup. 1876)

A bill for injunction, describing certain lands, and alleging a fee-simple title thereto in plaintiff, and averring specific and lasting injuries by the unlawful construction of a railroad bed thereon by defendant, is good on demurrer.—*Anderson, L. & St. L. R. Co. v. Kernodle*, 54 Ind. 314.

[h] (Sup. 1876)

In an action to obtain an injunction against the relocation of a county courthouse and jail, the complaint must allege that such courthouse and jail, the building of which is sought to be enjoined, have not already been erected.—*Markle v. Board of Com'rs of Clay County*, 55 Ind. 185.

[i] (Sup. 1881)

An injunction should not be granted where there is no prayer therefor in the complaint.—*College Corner & R. Gravel Road Co. v. Moss*, 77 Ind. 139.

An injunction should not be granted where there is no statement of facts in the complaint entitling plaintiff to such relief.—*Id.*

[j] (Sup. 1882)

In a suit for money had and received by one defendant, in which it is sought to enjoin another from asserting any claim thereto, the complaint is bad if it fails to show that the latter claimed the money.—*Belknap v. Caldwell*, 83 Ind. 14.

[k] (Sup. 1883)

In an action by a husband and wife to enjoin the sale of land on an execution against the husband, a deed referred to in the replies under which plaintiffs claim title, but which was not executed by either of defendants, need not be filed with the reply.—*Sedgwick v. Tuck-er*, 90 Ind. 271.

[l] (Sup. 1883)

Under Rev. St. 1881, § 5001, providing that the petition for location or change of highway shall state the names of the owners and occupants "or agents" of the lands through which the same may pass, a complaint to enjoin a location, alleging that the petition did not set out the full names of all the "parties and owners," was insufficient.—*Heagy v. Black*, 90 Ind. 534.

[m] (Sup. 1884)

Where a complaint to enjoin the laying out of a highway showed that in the petition for the establishment thereof the beginning, course, and termination of the highway were correctly stated, such fact not being controverted, it might be presumed that it also contained the names of the owners, occupants, or agents of all lands affected by the highway, and that the notice of the highway contained all the facts stated in the petition.—*McIntyre v. Marine*, 93 Ind. 193.

[n] (Sup. 1887)

In an injunction suit to restrain the sale of property under a judgment, because of liens upon the judgment for attorney's services held by and assigned to the judgment debtor, the assignments of the liens do not constitute the foundation of the suit, and no copies thereof need be filed with the complaint.—*Day v. Bowman*, 109 Ind. 383, 10 N. E. 126.

[nn] (Sup. 1887)

Plaintiff sought to enjoin the executors of her husband's will from selling certain grain which she had selected under the provisions of Rev. St. 1881, § 2269, giving the widow the right to select property of certain value of her husband's estate. Her complaint alleged her ownership, and that the grain was needed to sustain her live stock; that she would be unable to procure other grain if this was sold. *Held*, that this complaint made it apparent that plaintiff had no adequate remedy at law, and was entitled to an injunction as prayed.—*Denny v. Denny*, 113 Ind. 22, 14 N. E. 593.

[o] (Sup. 1889)

The gravamen of an action being to annul a judgment, and restrain the levying of an execution, a written agreement of compromise, a copy of which is filed with the complaint as an exhibit, but is not counted on, is not the foundation of the action, and is not part of the complaint, and cannot be considered in aid of it; Rev. St. 1881, § 362, providing that, when "any pleading is founded on a written instrument," the instrument or a copy must be filed with it, and shall be taken as a part of the record.—*Plunkett v. Black*, 117 Ind. 14, 19 N. E. 537.

[oo] (Sup. 1889)

Where several specifications of cause for injunction are assigned in a complaint, each specification is considered a separate paragraph, and one specification cannot aid another.—*Hill v. Probst*, 120 Ind. 528, 22 N. E. 664.

[p] (Sup. 1890)

In injunction proceedings to restrain the erection of a new courthouse, the complaint averred that the old courthouse was in all respects sufficient, and that the object of the county commissioners in proceeding to erect a new one was merely to promote the interests of the architects who were to receive a specified percentage of the contract price. *Held*, that these averments did not tender an issue of fraud or corruption or bad faith.—*Kitchel v. Board of Com'rs of Union County*, 24 N. E. 366, 123 Ind. 540.

[pp] (Sup. 1891)

The complaint, in an action to enjoin the repairing of a wooden building within the fire limits of a city in violation of an ordinance prohibiting repairs in excess of \$300, is demurrable when it fails to show the value of the building sought to be repaired.—*First Nat. Bank of Mt. Vernon v. Sarlis*, 129 Ind. 201, 28 N. E. 434, 28 Am. St. Rep. 185, 13 L. R. A. 481.

[q] (Sup. 1892)

Where complaint of a property owner against a township for overflowing his lands shows that he is entitled to an injunction for which he prays, the complaint is not bad by reason of a prayer for relief to which plaintiff is not entitled.—*Patoka Tp. v. Hopkins*, 131 Ind. 142, 30 N. E. 896, 31 Am. St. Rep. 417.

The facts stated in the complaint of a property owner against a township for overflowing his lands showing that he is entitled to an injunction for which he prays, the complaint is not bad by reason of the characterization of the culvert which causes the overflow as a nuisance, even if it is not such.—*Id.*

[qq] (Sup. 1892)

Where a complaint to enjoin a trespass alleged that while the plaintiff was in the quiet and peaceable possession of certain land, and while he was engaged in threshing wheat thereon, the defendants without right and with force and arms tore down the plaintiff's fences, and

entered upon the premises unlawfully, and interfered with the plaintiff and the men whom he had employed and his teams engaged in harvesting and cutting the wheat, and the defendants commenced cutting the wheat down, denying the right of the plaintiff so to do, and with threats of personal violence and force drove into the field, it showed that the injunction was sought to restrain the commission of a mere trespass, and was insufficient, notwithstanding an averment that the defendants unlawfully claim the right at all times and from day to day to tear down the fences and to enter the plaintiff's premises, which, standing alone, would entitle plaintiff to the injunction, as his pleading must be construed in accordance with its general scope and tenor, regardless of the isolated averments.—*Miller v. Burket*, 32 N. E. 309, 132 Ind. 469.

[r] (Sup. 1893)

A prayer for the recovery of the possession of real estate, and to quiet title to the same, and for damages, may properly be united with a prayer for an injunction.—*Richwine v. Presbyterian Church of Noblesville*, 34 N. E. 737 135 Ind. 80.

[rr] (Sup. 1895)

The complaint in an action to enjoin violation by a physician of a contract not to practice medicine within certain territory need not show that the contract was based on adequate consideration.—*Beatty v. Coble*, 142 Ind. 329, 41 N. E. 590.

[s] (Sup. 1897)

A complaint for injunction, first attacked on appeal from a refusal to dissolve a temporary restraining order, need not make a case entitling plaintiff to relief at all events at the final hearing, it being sufficient if, in connection with the other pleadings and the evidence on the motion to dissolve, it makes a proper subject for an investigation in equity.—*Home Electric Light & Power Co. v. Globe Tissue Paper Co.*, 45 N. E. 1108, 146 Ind. 673.

[ss] (Sup. 1899)

A complaint to restrain an adjoining owner from encroaching on land alleged that plaintiff and her grantor had openly occupied the tract west of a division fence for more than 20 years; that the fence was established as the boundary by agreement between the grantors of plaintiff and defendant; and that defendant had wrongfully entered on plaintiff's land at a point west of the east line thereof, for the purpose of relocating the division line. *Held*, that it was sufficiently alleged that plaintiff was the owner of the land to the fence.—*Burr v. Smith*, 53 N. E. 469, 152 Ind. 469.

[t] (Sup. 1900)

An allegation that plaintiff purchased certain described property of the former owner, and has ever since owned and occupied the same, is a sufficient averment of title to enable the plaintiff to maintain an action to enjoin a trespass on the property referred to, in

the absence of any objection to the insufficiency of the averment until after judgment.—*Peoria & E. R. Co. v. Attica, C. & S. R. Co.*, 56 N. E. 210, 154 Ind. 218.

[tt] (Sup. 1901)

In a suit for an injunction to prevent defendant from transporting natural gas through pipes at a pressure in excess of the natural rock pressure and by means other than the natural pressure of gas flowing from wells, the complaint charged that "in and by so transporting natural gas through the pipes at a pressure in excess of the natural rock pressure, and by such means and appliances other than the natural pressure of the gas flowing from the wells, the defendant has drawn and is drawing so heavily through its said wells upon said reservoir as to seriously diminish the supply and pressure of gas therein." *Held*, that the complaint was insufficient to show that the flow of gas was unnaturally stimulated or increased by machinery or other means.—*Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co.*, 59 N. E. 169, 60 N. E. 1080, 156 Ind. 679.

In a suit to prevent the transportation of natural gas through pipes at a pressure in excess of the natural rock pressure, and by means other than the natural pressure of the gas flowing from the wells, as prohibited by Burns' Rev. St. 1894, § 7507 (Acts 1891, p. 89), a complaint which does not aver that complainants' property is endangered by the defendant's alleged wrongful acts, nor that they are likely to sustain any special injury peculiar to themselves, is demurrable.—*Id.*

[u] (App. 1901)

Where plaintiff alleged that W. had been guilty of leaving open certain gates erected across a right of way, and threatened to continue to leave them open, and that M. was the owner of the real estate over which the road was extended, and claimed an interest in the controversy, the facts did not constitute a cause of action against M., and hence the complaint was insufficient to support a judgment against him.—*Brandis v. Grissom*, 60 N. E. 455, 26 Ind. App. 661.

[uu] An injunction bill need not contain an allegation of irreparable injury, but an allegation that plaintiff will suffer great injury is sufficient.—(App. 1901) *Covert v. Bray*, 60 N. E. 709, 26 Ind. App. 671; (1902) *Miller v. Bowlers*, 65 N. E. 559, 30 Ind. App. 116; (1903) *Chappell v. Jasper County Oil & Gas Co.*, 66 N. E. 515, 31 Ind. App. 170.

[v] (Sup. 1903)

In a suit for an injunction, a mere allegation that irreparable injury will ensue is insufficient, unless facts are stated showing the apprehension to be well founded.—*Wabash R. Co. v. Engleman*, 66 N. E. 892, 160 Ind. 329.

Where a complaint for an injunction to restrain a railroad company from constructing

a fence on certain land claimed by plaintiff alleged that defendant's employes were ready to so fence the land as to exclude plaintiff from possession, but contained no allegation that such servants were acting under defendant's instructions, or other than on their own responsibility, it was insufficient to justify an injunction against the railroad company.—*Id.*

[vv] (Sup. 1903)

An owner attempting to enjoin the construction by a city of a driveway across the sidewalk in front of his lot, and basing his right on his ownership of the fee to the center of the street, must allege such ownership.—*Kelley v. City of Marion*, 68 N. E. 594, 161 Ind. 322.

[w] (App. 1903)

An injunction will not be granted where the complaint fails to allege that the violation of plaintiff's rights is of such a nature that it will be attended with substantial and serious damage.—*Hart v. Hildebrandt*, 66 N. E. 173, 30 Ind. App. 415.

[ww] (App. 1903)

A complaint in a suit by a school superintendent to restrain township trustees from paying a school teacher out of the school revenue, on the ground that the teacher had no license to teach in the public schools, which failed to contain any allegations tending to show that relator had no adequate remedy at law, was demurrable.—*McGregor v. State ex rel. Ballard*, 68 N. E. 315, 31 Ind. App. 483.

[x] (Sup. 1905)

A complaint alleged that plaintiff was the owner of a stock of merchandise located in a building owned by another, and was there conducting a profitable business; that defendants took possession of the stock and building, and threatened to sell the stock; that defendants were unacquainted with plaintiff's customers, and, if they sold the stock, plaintiff would be irreparably damaged, and the good will of his business would be destroyed. There was no allegation as to the value of the merchandise, as to plaintiff's rights in the building as tenant or otherwise, as to the possession or enjoyment by plaintiff of patrons or good will, or as to the insolvency of defendants and their inability to respond in damages for their wrongful acts. *Held*, that the complaint was insufficient to entitle plaintiff to an injunction, and a demurrer thereto should have been sustained.—*Shafor v. Fry*, 73 N. E. 698, 164 Ind. 315.

An allegation of a complaint that great and irreparable damage will result to plaintiff from the act complained of, unsupported by any facts, is insufficient to warrant the issuance of an injunction.—*Id.*

The rule that facts, and not conclusions of law, should be pleaded, should be strictly adhered to in construing applications for injunction.—*Id.*

[xx] (App. 1905)

A complaint for injunction must show a violation of plaintiff's rights, a lack of adequate remedy at law, that the acts complained of constitute more than a temporary trespass, that no unreasonable delay has occurred, that it is not to prevent a past injury, and that it is not a doubtful case.—*American Plate Glass Co. v. Nicoson*, 34 Ind. App. 643, 73 N. E. 625.

[y] (Sup. 1907)

In an action to enjoin the enforcement of a city ordinance, an allegation that a city officer, acting under an ordinance prohibiting the establishment and maintenance of a skating rink, threatens to and will continue to enforce the ordinance by refusing to consider applications and specifications for the construction of the building, does not show an enforcement or an attempt to enforce the ordinance, where the construction of the building would not be a violation of the ordinance.—*Princess Amusement Co. v. Metzger*, 82 N. E. 758, 169 Ind. 376.

[yy] (App. 1908)

A complaint alleged that defendants claimed and exercised a right to pass over complainants' land, and in doing so had torn down gates, fences, etc., and were threatening to continue to exercise such alleged right, and prayed that defendants be enjoined from so doing. *Held* that, though the complaint was insufficient as a complaint to quiet title, the general averments necessary to such a complaint being followed by detailed averments that defendants claimed a right of way over the land, to which they were not legally entitled, such right not being inconsistent with title in plaintiff, it was nevertheless sufficient as a suit for an injunction.—*Small v. Binford*, 41 Ind. App. 440, 83 N. E. 507, 84 N. E. 19.

[z] (App. 1909)

A complaint by a company to prevent its servants, who were injured by its alleged negligence, from bringing separate actions for damages, is insufficient if maintainable in any event, unless it completely negatives every possible liability to any one of the injured parties.—*Vandalia Coal Co. v. Lawson*, 43 Ind. App. 226, 87 N. E. 47.

[zz] (App. 1909)

To warrant the remedy of injunction, a threatened deprivation or invasion of some right must be made to plainly appear, and that the carrying out of such threat will result in irreparable injury; a mere allegation of irreparable injury not being sufficient.—*Smith v. Miller*, 88 N. E. 859.

In a suit to enjoin the defendant from disconnecting defendant's residence from a street sewer, allegations that plaintiff would suffer irreparable injury, in that he would be left without an outlet to dispose of waste water, etc., and that sewer gas would necessarily accumulate in his residence, rendering the same unin-

habitable, did not show an irreparable injury; it not appearing that plaintiff had any right to connect his residence with the sewer, nor any title or interest in the land at the point of connection in said street, or that another outlet might not be made more effective than the one in question.—Id.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. INJ. §§ 223-242.

See, also, 22 Cyc. pp. 924-932.

### § 119. — Plea or answer and subsequent pleadings.

Departure, see PLEADING, § 180.

Pleading counterclaim, see PLEADING, § 146.

Use and effect of answer on application for temporary injunction, see post, § 146.

[a] (Sup. 1859)

To a prayer to enjoin the extension of a street through certain lands, an answer of no title in the plaintiff is material and relevant.—*City of Lamasco v. Brinkmeyer*, 12 Ind. 349.

[b] (Sup. 1831)

In a suit to enjoin a city clerk from issuing an order for the payment of an allowance made by the council, defendant answered that the order was issued and paid before process was issued, and before he had notice of the injunction proceeding. Plaintiff replied that, before the order was issued, he had notified defendant not to issue it; that proceedings would be instituted to enjoin payment; that the complaint was in fact filed before the order was issued; and that it was done with intent to evade the proceedings about to be instituted. *Held*, that the reply averred no facts in avoidance of the answer, and therefore a demurrer thereto was properly sustained.—*Cole v. Duke*, 79 Ind. 107.

[c] (Sup. 1884)

In a suit to restrain the erection of a bridge, the answer set forth an order vacating the highway with which the bridge was to be connected on the performance of certain acts by the persons petitioning for the vacation, and averred that these acts had not been performed, and that there had been no vacation of the highway. *Held*, that the answer did not show a vacation of the highway.—*Kyle v. Board of Com'rs of Kosciusko County*, 94 Ind. 115.

[d] (Sup. 1887)

In a suit to restrain one from transferring a note, the answer alleged that defendant had sold and transferred the note by indorsement in good faith before the filing of the complaint and the granting of a restraining order thereon, and that at the time the complaint was filed and the restraining order was granted he did not own the note. *Held*, that the answer was bad for failing to allege that the transfer was made for a valuable consideration, and that the indorsee became the owner in good faith without notice.—*Becknell v. Becknell*, 10 N. E. 414, 110 Ind. 42.

[e] (Sup. 1889)

An averment, in the answer to a bill to enjoin the breach of a contract whereby defendant sold his good will in the practice of medicine and agreed not to practice in a certain district for a number of years, that the contract was delivered to plaintiff conditionally, does not show that the contract was not executed, as such a contract cannot be delivered to one of the parties thereto as an escrow.—*Pickett v. Green*, 120 Ind. 584, 22 N. E. 737.

[f] (Sup. 1893)

In a suit by one adjoining landowner to restrain another from obstructing a ditch, the answer alleged that the owners of the adjoining farms, by agreement, constructed a tile ditch to drain the water which would naturally flow into it from the farms; that plaintiff, without defendant's knowledge, lowered the ditch on his land, and made lateral drains, and thereby caused water to flow into the ditch which did not naturally belong there; that thereby defendant's land was flooded, and in order to stop the flow defendant dug up a part of the ditch. *Held*, that the court properly overruled a demurrer to the answer, since it showed that plaintiff did not come into equity with clean hands.—*McAllister v. Henderson*, 134 Ind. 453, 34 N. E. 221.

[g] (Sup. 1895)

In an action to enjoin a physician from practicing in a certain city, where the complaint set up a contract not to practice, in consideration of the purchase by plaintiff of defendant's residence for a certain sum, an answer averring that at the time the contract was made defendant was not the owner of such residence, that it belonged to defendant's wife, and that defendant did not receive the consideration paid for the deed, is insufficient as a plea of want of consideration.—*Beatty v. Coble*, 142 Ind. 329, 41 N. E. 590.

[h] (App. 1906)

An answer which alleges that defendants cut and removed only trees which they had purchased of plaintiff, and that they did not cut or threaten to cut any trees other than those sold to them by plaintiff, is an answer to a complaint which alleges that plaintiff sold to defendants certain trees as described in the written contract of sale, and that defendants cut and removed other trees, to plaintiff's damage.—*Doell v. Schrier*, 75 N. E. 600, 36 Ind. App. 253.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. INJ. §§ 243-250.

See, also, 22 Cyc. p. 933.

### § 120. — Demurrer.

Admissions by demurrer, see PLEADING, § 214.

Failure to file or set out written instrument as ground for demurrer, see PLEADING, § 193.

Matter available under general denial as subject to demurrer, see PLEADING, § 194.

## [a] (Sup. 1876)

Where an injunction is sought to be obtained on account of a fraud practiced and consummated three years prior to the commencement of the action, if such delay be unexplained in the complaint, it is insufficient on demurrer.—Markle v. Board of Com'rs of Clay County, 55 Ind. 185.

## [b] (Sup. 1883)

Where a complaint for an injunction in a single paragraph specifies several reasons, a demurrer may be addressed to each of them.—Hilton v. Mason, 92 Ind. 157.

## [c] (Sup. 1884)

Where a complaint for an injunction shows a right to some relief, it is good against a demurrer.—Field v. Holzman, 93 Ind. 205.

## [d] (Sup. 1884)

Where the answer in a suit for injunction consisted of a general denial and a paragraph setting up a special defense, a demurrer to the special defense was sustained, and the court thereupon rendered final judgment, without trial of the issues formed by the general denial. *Held* error.—Coe v. Johnson, 93 Ind. 418.

## [e] (Sup. 1884)

Where the general scope and prayer of a bill shows that its principal purpose is to obtain relief by injunction, it will be held bad on demurrer if not sufficient for that purpose, without considering whether it might be sufficient to warrant other relief.—City of Logansport v. Uhl, 99 Ind. 531, 49 Am. Rep. 109.

## [f] (Sup. 1884)

Where a demurrer to a complaint for injunction and a motion to dissolve a temporary injunction issued thereon are pending at the same time, it is discretionary with the trial court as to which will be first ruled on.—Clark v. Shaw, 101 Ind. 563.

## [g] (Sup. 1897)

Where a complaint for injunction does not state facts sufficient to entitle plaintiff to that relief, it is demurrable, though it state sufficient facts to be good on some other theory.—Carmel Natural Gas & Improvement Co. v. Small, 47 N. E. 11, 50 N. E. 476, 150 Ind. 427.

## [h] (Sup. 1900)

In an action by an employer against an employe, and other persons colluding with him, to enjoin the reproduction of a paper-bag making machine, which was a trade secret of such employer, it was not error to overrule a joint demurrer of defendants to the petition, where such petition showed a cause of action against one or more of them.—Westervelt v. National Paper & Supply Co., 57 N. E. 552, 154 Ind. 673.

## FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 251, 252.

See, also, 22 Cyc. p. 934.

## § 121. — Amended and supplemental pleadings.

Condition of cause and time for amendment, see PLEADING, § 258.

## [a] (Sup. 1865)

The objection that an amended complaint, filed by leave of court after a restraining order has been granted upon a properly verified complaint is not supported by affidavit, cannot be raised by demurrer.—Hall v. Hough, 24 Ind. 273.

## [b] (App. 1904)

Where, in a suit to restrain defendant from cutting timber on plaintiff's land, plaintiff testified to the granting of a *parol* license to defendant, under which the latter was entitled to remove the timber notwithstanding the fact that the time fixed therefor had expired, defendant was entitled, before the examination of the witnesses was concluded, to amend his answer, consisting of a general denial, by setting up the license and claiming the right to remove the timber thereunder.—Watson v. Adams, 69 N. E. 696, 32 Ind. App. 281.

## FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 253-261.

See, also, 22 Cyc. pp. 935, 936.

## § 122. — Verification.

## [a] (Sup. 1855)

A bill for an injunction need not be sworn to. Rev. St. 1843, pp. 851-853.—Laughlin v. Lamasco City, 6 Ind. 223.

## [b] (Sup. 1864)

An application for injunction will not be granted unless the complaint is verified by affidavit.—McQuarrie v. Hildebrand, 23 Ind. 122.

[c] A petition praying an injunction as final relief, but not asking a temporary injunction, need not be verified.—(Sup. 1872) Sand Creek Turnpike Co. v. Robbins, 41 Ind. 79; (1875) Rich v. Dessar, 50 Ind. 309

## [d] (Sup. 1872)

Where the remedy sought is the final judgment enjoining certain acts complained of, it is not necessary that the complaint be verified; for, if the defendant deny the facts, he puts the plaintiff upon proof of them before court or jury, and such proof will not be strengthened by any previous verification, nor will an express admission of the facts, nor an implied admission arising from failure to controvert them, be strengthened by such verification.—Sand Creek Turnpike Co. v. Robbins, 41 Ind. 79.

## [e] (Sup. 1874)

No verification of a complaint is required to enable a court to grant a perpetual injunction on the final hearing of a cause.—Cox v. Louisville, N. A. & C. R. Co., 48 Ind. 178.

## [f] (Sup. 1892)

Where the only relief prayed for is an injunction upon the final hearing, a verification

of the complaint is not required, and on an appeal from a final judgment, and not from an interlocutory order granting a temporary injunction, it is wholly immaterial whether the complaint is verified or not.—*Champ v. Kendrick*, 30 N. E. 787, 130 Ind. 549.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 262-268.

See, also, 22 Cyc. pp. 931-933.

### § 123. — Issues, proof, and variance.

#### [a] (App. 1904)

In a suit to restrain the cutting of timber on plaintiff's land, defendant could not prove a license in justification under a general denial.—*Watson v. Adams*, 69 N. E. 696, 32 Ind. App. 281.

#### [b] (Sup. 1909)

Where, in an action to enjoin the enforcement of an ordinance regulating junk dealers, plaintiffs alleged that they were junk dealers and proprietors of junk stores, and sought to enjoin the enforcement of the ordinance on the ground that it unreasonably interfered with their business, the rights of wagon junk peddlers, as distinctive from the proprietors of junk stores, were not in issue.—*Grossman v. City of Indianapolis*, 88 N. E. 945.

#### [c] (App. 1909)

Though the complaint to enjoin the stretching of telephone wires across plaintiff's premises alleged that the wires had already been stretched, while the evidence showed the work, had progressed only to the erection of the poles, this was not a material variation, or a failure to prove the general scope and meaning of the allegations of the complaint.—*Majenica Tel. Co. v. Rogers*, 43 Ind. App. 306, 87 N. E. 165.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 270.

See, also, 22 Cyc. p. 936.

### § 124. Evidence.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 272-278.

See, also, 22 Cyc. pp. 937-947.

### § 125. — Pleadings as evidence.

On application for temporary injunction, see post, §§ 144, 146.

On motion to vacate or dissolve temporary injunction, see post, § 172

#### [a] (Sup. 1891)

Where a complaint in a suit to enjoin the construction of a railroad track in a street adjacent to plaintiff's property was sufficient, and the cause was submitted to the court for decision on the verified complaint, the affidavit of the superintendent, together with the ordinance of the city council and record of the appropriation proceedings, the verified complaint afforded evidence from which the court may have found the facts entitling the plaintiff to an

injunction.—*Chicago, St. L. & P. R. Co. v. Eisert*, 26 N. E. 759, 127 Ind. 156.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 272-275.

See, also, 22 Cyc. pp. 941-947.

### § 127. — Admissibility.

Dedication of property to public use, see DEDICATION, § 43.

#### [a] (Sup. 1891)

In an action to enjoin defendant from an alleged trespass on land, evidence that plaintiff had acquiesced in the occupancy of the land, that he offered to receive a certain sum in compensation for the alleged trespass, and that his grantor had conveyed an interest in the land to a third person, is admissible in defense as tending to show the nature and extent of the injury.—*Whitlock v. Consumers' Gas Trust Co.*, 127 Ind. 62, 26 N. E. 570.

#### [b] (Sup. 1891)

In a suit to enjoin defendant from interfering with certain land, leased for tile making, evidence was admitted showing that there was no clay in the neighborhood other than a three-cornered piece, which was the land in question, suitable for tile making. *Held*, that the testimony was material in showing the condition in which plaintiffs were left by defendant's interference, and bearing on the question of damage recoverable by them.—*Weaver v. Shipley*, 127 Ind. 526, 27 N. E. 146.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 277.

See, also, 22 Cyc. p. 938.

### § 129. Dismissal before hearing.

#### [a] (Sup. 1846)

Where an injunction is granted in vacation on a valid bill, and it is shown to the court at the next term that the injunction was irregularly granted, though the injunction may be dissolved, the bill should not be dismissed.—*Gray v. Baldwin*, 8 Blackf. 164.

#### [b] (Sup. 1872)

Where an appeal was taken from an order dissolving a temporary injunction, and the judgment below was affirmed, such affirmance did not dispose of the action for a perpetual injunction; and hence it was error to sustain a motion by defendant to dismiss the action for that cause.—*Rayle v. Indianapolis, P. & C. R. Co.*, 40 Ind. 347.

#### [c] (Sup. 1905)

Where the chancellor finds that none of the matters exist which would make a proper case for equity, he may dismiss the bill for an injunction, though the question was not raised by the opposite party under *Burns' Ann. St. 1901*, § 342, providing that defendant may demur to the complaint where the court has no jurisdiction of the person or subject of the action.—*Mc-*

Connell v. Hampton, 73 N. E. 1092, 164 Ind. 547.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 279-287.

See, also, 22 Cyc. pp. 947-951.

### § 130. Trial or hearing.

Conformity of findings and conclusions of court to pleadings, issues and proofs, see TRIAL, § 390.

Construction and operation of findings of court, see TRIAL, § 404.

Right to trial by jury, see JURY, § 14.

[a] (Sup. 1843)

One of two makers of a note entered himself replevin bail for the payee, the latter promising in writing that the note should be of no effect if the bail should have to pay the judgment. The payee assigned the note to a person without notice, and the bail, after notice of the assignment, paid the judgment. The assignee sued the makers on the note at law, and they filed a bill in chancery to enjoin the proceedings on the ground of fraud. *Held*, that the bill was properly dismissed where they failed to prove the charge of fraud.—Hilliard v. Hanna, 6 Blackf. 541.

[b] (App. 1903)

Where a lessor was not a party to a suit by the assignee of an oil lease to restrain another from drilling oil wells on the leased premises during the lease, conclusions of law relating to rights under the lease between the lessor and the assignee of the lease, on which an injunction was granted conditionally, on the performance of certain acts by the assignee, were erroneous.—Chappell v. Jasper County Oil & Gas Co., 66 N. E. 515, 31 Ind. App. 170.

[c] (Sup. 1905)

Where, in a suit to restrain a board of county commissioners from accepting certain public work and making payment therefor, the complaint charged that the board had entered into a corrupt and collusive agreement with the contractors, and that their contemplated and threatened acceptance of the work, while imperfect and deficient, had been and would be done in pursuance of such agreement, to the injury of complainants, a mere finding of negligence and willful disregard of duty on the part of the board, which was so far erroneous as to amount to fraud in law, was not a finding that the board had acted corruptly or in bad faith as alleged, and was insufficient to sustain the bill.—Board of Com'rs of Laporte County v. Wolff, 166 Ind. 325, 76 N. E. 247.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 288-300.

See, also, 22 Cyc. pp. 952-957.

## IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.

In suit for equitable relief against judgment, see JUDGMENT, § 459.

Review of decisions, see APPEAL AND ERROR, §§ 100, 874, 954, 1043.

### (A) GROUNDS AND PROCEEDINGS TO PROCURE

Protection of property pending litigation as ground for relief by injunction, see ante, § 38.  
Statutory provisions affecting appeal from order granting, see APPEAL AND ERROR, § 2.

### § 135. Discretion of court.

[a] (Sup. 1906)

The granting of a temporary or preliminary injunction is not a matter of right, but rests in the sound legal discretion of the trial court.—City of Laporte v. Scott, 76 N. E. 878, 166 Ind. 78.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 304.

See, also, 22 Cyc. p. 746.

### § 136. Grounds for temporary injunction.

[a] (Sup. 1865)

Restraining orders and injunctions may be granted, under our statute, whenever it appears by the complaint that the plaintiff is entitled to the relief demanded, and that relief or any part thereof consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce great injury to the plaintiff.—Smith v. Fitzgerald, 24 Ind. 316.

[b] (Sup. 1906)

A temporary injunction should not be awarded for a tentative purpose, but only in a case where it is shown that there is an impending injury or urgent necessity which demands the immediate interposition of a writ of injunction; but it is not essential that such a case be made out as will entitle the applicant to relief on final hearing.—City of Laporte v. Scott, 76 N. E. 878, 166 Ind. 78.

[c] (Sup. 1906)

The court, before issuing a temporary injunction, must find that a wrong is about to be committed which will be irreparable, and the mere apprehensions of the complainant, unsupported by facts, are not sufficient.—Spurgeon v. Rhodes, 78 N. E. 228, 167 Ind. 1.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 305, 306.

See, also, 22 Cyc. pp. 751, 757.

**§ 137. Grounds for denial of temporary injunction.**

[a] (Sup. 1855)

A preliminary injunction will be denied where complainant's right to the relief asked is doubtful.—*Wallace v. McVey*, 6 Ind. 300.

[b] (App. 1902)

On appeal from a judgment allowing a railroad to cross another at grade, where the controversy was as to the method of such crossing, appellant obtained a restraining order until the hearing of a motion for an injunction pendente lite to prevent the establishment of a grade crossing, and thereafter consented that the injunction, when granted, should be modified to allow appellee to use the crossing for the purposes of its business. *Held* that, inasmuch as such an injunction given under the stipulation of the parties would, in effect, allow a crossing of the same character as that allowed by the lower court, the injunction would not be granted.—*Baltimore & O. R. Co. v. Wabash R. Co.*, 62 N. E. 520, 28 Ind. App. 185.

[c] (App. 1905)

Where, pending suit to restrain the construction of a new courthouse on land belonging to the county, the building was partially constructed before it was held by the Supreme Court that the proceedings were void, and before the officers and contractors engaged in constructing the building were enjoined from proceeding, and such building in its incomplete condition was not a nuisance injurious to the state, it being the intention of the county council to complete the building under other proceedings, the Supreme Court will not grant the state a temporary injunction pending appeal in a suit to restrain the county board of commissioners from issuing bonds and appropriating money to complete the building and to require the unfinished structure to be removed from the county's property.—*State v. Board of Com'rs of Newton County*, 76 N. E. 308, 38 Ind. App. 52.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 307-309.

See, also, 22 Cyc. pp. 751, 757.

**§ 139. Authority of court or judge.**

[a] (Sup. 1861)

A master commissioner has not the power of a master in chancery for granting injunctions.—*Glass v. Board of Com'rs of Ripley County*, 16 Ind. 113.

[b] (Sup. 1870)

The judge of a court of common pleas may grant a restraining order in vacation, without notice, in a cause pending in the circuit court where there is some emergency justifying such action.—*City of Columbus v. Hydraulic Woolen Mills*, 33 Ind. 435.

[c] (Sup. 1879)

Under the provisions of 2 Gav. & H. St. p. 131, § 136, a judge of the court of common pleas could grant in vacation an injunction on a complaint pending in the circuit court.—*Merifield v. Weston*, 68 Ind. 70.

[d] (Sup. 1892)

A judge has no power to grant an injunction when without the boundaries of this state.—*Bayless v. Price*, 131 Ind. 437, 31 N. E. 88.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 311; 29 CENT. DIG. Judges, § 125.

See, also, 22 Cyc. p. 908.

**§ 140. Form and requisites of application in general.**

[a] (Sup. 1854)

When there is no prayer for a temporary injunction in a bill, it should not be granted.—*Southern Plank Road Co. v. Hixon*, 5 Ind. 165.

[b] (Sup. 1867)

On appeal from an order of a judge in vacation granting an injunction to restrain the commission of waste by a mortgagor after a final decree of foreclosure, the order was reversed on the ground that no complaint had ever been filed in any court, and that no summons had issued or publication of notice been made.—*Jerolaman v. Foster*, 28 Ind. 232.

[c] (Sup. 1882)

Code 1852, § 137, providing that where it appears by affidavit, during the pendency of an action, that the defendant threatens or is about to remove or dispose of his property with intent to defraud his creditors, a temporary injunction will be granted to restrain such removal or disposition, is exclusive, and in no other case can a temporary injunction be granted in the absence of a prayer therefor.—*Miller v. Shriner*, 86 Ind. 493.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 312.

**§ 143. Notice of application.**

[a] (Sup. 1846)

A court of chancery will not, where there is no emergency, grant an injunction, unless 10 days' notice of the application has been given to the adverse party, or the application relate to a suit pending in the court.—*Vance v. Workman*, 8 Blackf. 306.

[b] (Sup. 1852)

An injunction should not be granted under the statute until the adverse party has had 10 days' notice of the time and place of making application therefor, unless the bill shows an urgent necessity that it be granted before notice can be given and that an emergency exists which the complainant could not by reasonable

diligence have prevented.—*Indiana Cent. R. Co. v. State*, 3 Ind. 421.

[c] (Sup. 1855)

A temporary injunction, granted without notice to the defendant, is wholly irregular and illegal. The most that a court of chancery can do is to grant a restraining order until notice can be given and a hearing had of the application for injunction. 2 Rev. St. 1852, p. 60, § 139.—*Wallace v. McVey*, 6 Ind. 300.

A temporary injunction should not be granted to restrain the defendant from removing property, the subject of commerce, out of the jurisdiction of the court without notice to the adverse party.—*Id.*

[d] (Sup. 1861)

The granting of an order for a temporary injunction without notice is erroneous.—*Flagg v. Sloan*, 16 Ind. 432.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 315.

See, also, 22 Cyc. pp. 918-920.

### § 144. Use and effect of bill, complaint, or petition.

[a] (Sup. 1853)

Where a party, praying for discovery, seeks in addition to stay proceedings pending in a suit at law, he must support the allegations of the bill by an affidavit of their truth.—*Owsley v. Barbour*, 4 Ind. 585.

[b] (Sup. 1870)

A judgment was rendered for the possession of real estate, and the defendant, having paid the costs, filed a complaint as a motion for a new trial as of right under the statute, and prayed an injunction to restrain the further prosecution of the judgment; and the judge, in vacation having overruled a demurrer to the complaint, granted a temporary injunction. The complaint did not give any description of the premises, was not verified by affidavit, and it did not appear therefrom that a writ of possession had been issued, or that any order or direction had been given therefor, or that the judgment-plaintiff was using any means to obtain possession. *Held*, that the granting of the injunction was error.—*Ross v. Crews*, 33 Ind. 120.

[c] (Sup. 1882)

Code 1852, § 137, providing that, where it appears during the pendency of an action by affidavit that the defendant threatens or is about to remove or dispose of his property with intent to defraud his creditors, a temporary injunction may be granted to restrain the removal or disposition of his property, a temporary injunction cannot be granted in a suit in ejectment upon an affidavit filed during the pendency of the action, where no ground is alleged in the complaint for the appointment of a receiver.—*Miller v. Shriner*, 86 Ind. 493.

In the absence of any statutory provision, it is error to grant a temporary injunction, un-

less there is a prayer therefor in the complaint.—*Id.*

[d] (Sup. 1884)

Where a complaint praying for a temporary injunction was insufficient, the court properly refused to grant a temporary injunction, for, if it had been granted, it would have been dissolved by the final judgment that was rendered.—*De Armond v. Preachers' Aid Soc.*, 94 Ind. 59.

[e] (Sup. 1892)

The sufficiency of a complaint is not involved where a mere temporary injunction is asked, but the court will grant relief where it appears that the case is a proper one for investigation.—*People's Gas Co. v. Tyner*, 131 Ind. 277, 31 N. E. 59, 31 Am. St. Rep. 433, 16 L. R. A. 443; *Greenfield Gas Co. v. People's Gas Co.*, 131 Ind. 599, 31 N. E. 61.

[f] (Sup. 1906)

A temporary injunction may be granted on notice to the adverse party, upon the facts warranting its issuance being proved by averments stated on information and belief, where the adverse party does not deny the averments.—*Spurgeon v. Rhodes*, 78 N. E. 228, 167 Ind. 1.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 316, 317, 321;

17 CENT. DIG. Eject. § 151.

See, also, 22 Cyc. pp. 941-944.

### § 145. Affidavits for injunction.

[a] (Sup. 1870)

A temporary injunction may be granted on the complaint and affidavit of plaintiff, without other evidence.—*Hardy v. Donellan*, 33 Ind. 501.

[b] (Sup. 1903)

Where a complaint fails to state a cause of action for an injunction, the injunction cannot be founded on equities set up in the supporting affidavits.—*Landes v. Walls*, 66 N. E. 679, 160 Ind. 216.

[c] (Sup. 1906)

In a suit by a licensed physician to restrain the state board of medical examiners from hearing and determining charges against him and revoking his license to practice, the affidavit of the attorney of the board is not evidence against the board.—*Spurgeon v. Rhodes*, 78 N. E. 228, 167 Ind. 1.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 318, 321.

See, also, 22 Cyc. p. 941.

### § 146. Use and effect of answer.

[a] (Sup. 1864)

In a suit for rescission of a conveyance of land asking an interlocutory order of injunction, when the answer denies every material averment of the complaint, and is verified by affidavit, the court should not grant the prayer for injunction without additional proof of the

facts stated in the complaint.—*McQuarrie v. Hildebrand*, 23 Ind. 122.

FOR CASES FROM OTHER STATES,  
SEE 27 CENT. DIG. Inj. § 319.  
See, also, 22 Cyc. pp. 945-947.

### § 147. Counter affidavits and other evidence.

[a] (Sup. 1854)

If a party who prays for an injunction that will affect the rights of persons who have not an opportunity to be heard has not personal knowledge of the facts set forth in his application, they must be verified by the affidavit of one who has personal knowledge.—*Southern Plank Road Co. v. Hixon*, 5 Ind. 165.

[b] (Sup. 1875)

On an application for a temporary injunction, it is not necessary that a case should be made out that would entitle the plaintiff to relief at all events at the hearing. It is enough if the court finds, upon the pleadings and the evidence, a case which makes the transaction a proper subject for investigation in a court of equity, or if, from the merits to be gathered from the pleadings and conflicting affidavits, there appears, on the whole, a case proper for the investigation of the court, and a fair question to be reserved till the final hearing.—*Spicer v. Hoop*, 51 Ind. 365.

[c] (Sup. 1906)

On an application by a physician for a temporary injunction to restrain the state board of medical examiners from hearing charges against him and revoking his license, the affidavit of plaintiff was on information and belief only. No affidavit was given of the truth of the facts alleged in the complaint by any person having personal knowledge thereof. The gist of the complaint was that the board had prejudged plaintiff's case and had intended to revoke his license without any evidence and without giving him a hearing. The affidavits of the members of the board and their attorneys denied every wrong charged in the complaint and averred that they would give plaintiff a fair and impartial hearing and determine the charges according to the evidence. *Held*, that plaintiff was not entitled to a preliminary injunction.—*Spurgeon v. Rhodes*, 78 N. E. 228, 167 Ind. 1.

FOR CASES FROM OTHER STATES,  
SEE 27 CENT. DIG. Inj. §§ 320-322.  
See, also, 22 Cyc. p. 945.

### § 148. Bond or undertaking.

Injunction against execution, see EXECUTION, § 171.

Laws dispensing with as denial of due process of law, see CONSTITUTIONAL LAW, § 278.  
Liabilities on bonds or undertakings, see post, §§ 234-254.

[a] (Sup. 1847)

On a bill in chancery for a discovery in aid of a defense to an action at law, the bill

also prayed a stay of the proceedings at law till the discovery should be made. *Held*, that the prayer to stay proceedings could not be granted, except on the condition of a bond being given according to the statute.—*Lemon v. Morehead*, 8 Blackf. 561.

[b] (Sup. 1848)

The clerk of a circuit court cannot take and approve an injunction bond.—*McGragor v. State*, 1 Ind. 232, Smith, 179.

[c] (Sup. 1849)

An administrator who wishes an injunction against a judgment at law against his intestate must give the bond required by statute in cases of applications for injunction.—*Osborn v. Ellis*, 1 Ind. 451, Smith, 338.

[d] (Sup. 1865)

An injunction bond entitled: "State of Indiana, Clinton County. A. v. B.,"—is not void for failure to state the name of the court by which the injunction was issued.—*Winship v. Clendenning*, 24 Ind. 439.

[e] (Sup. 1879)

The fact that an undertaking to secure an injunction was read to the court, and thereon the restraining order was continued, is conclusive evidence that the court approved the bond.—*Griffin v. Wallace*, 66 Ind. 410.

It is not necessary to the maintenance of an action on an injunction bond that in the proceedings to obtain the injunction the approval of the court or judge should be indorsed on the bond, though such indorsement is proper. The fact that the court ordered an injunction to be issued will be considered as conclusive evidence that the court approved such bond.—*Id.*

To maintain an action on an injunction bond, it is not essential that the name of the surety should appear in the body of the bond.—*Id.*

[f] (Sup. 1891)

The fact that the court granting an injunction had no jurisdiction, and that the injunction was absolutely void, does not make the injunction bond void, so as to defeat defendant's right to recover thereon for attorney's fees and other expenses incurred by him in resisting the application for the injunction and procuring its dissolution.—*Robertson v. Smith*, 129 Ind. 422, 28 N. E. 857, 15 L. R. A. 273.

[g] (Sup. 1891)

A decree granting an injunction without the filing of bond is erroneous.—*Lewis v. Rowland*, 29 N. E. 922, 131 Ind. 103.

[h] (App. 1898)

The names of the sureties need not appear in the body of a bond approved by the court when a restraining order is issued.—*Hyatt v. City of Washington*, 50 N. E. 402, 20 Ind. App. 148, 67 Am. St. Rep. 248.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 323-334.

See, also, 22 Cyc. pp. 920-923.

**§ 150. Restraining order pending hearing of application.**

Appealability of, see **APPEAL AND ERROR**, § 71.

**[a] (Sup. 1855)**

The restraining order contemplated in the statute extends only to such reasonable time as may be necessary to notify the adverse party, whereas temporary injunctions, by their terms, continue in force till the further order of the court, which may be several months.—*Wallace v. McVey*, 6 Ind. 300.

**[b] (Sup. 1868)**

Temporary restraining orders may be granted in aid of proceedings at law until notice can be given, but when such order is granted in term time it is unreasonable to extend it until the next term.—*Andrews v. Powell*, 27 Ind. 303.

**[c] (Sup. 1870)**

A restraining order issued without notice and in vacation should only be granted until notice can be given and a hearing had, and an order granted to expire on the second day of the next term of the circuit court which would be a period of six months was for too long a period.—*City of Columbus v. Hydraulic Woolen Mills Co.*, 33 Ind. 435.

**[d] (Sup. 1881)**

The term "restraining order" is limited in its operation, and extends only to such reasonable time as may be necessary to notify the opposite party of an application for an injunction.—*College Corner & R. Gravel Road Co. v. Moss*, 77 Ind. 139.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 335.

**§ 151. Scope of inquiry and questions considered.**

**[a] (Sup. 1877)**

The fact that proceedings in the nature of quo warranto are pending to test the validity of the creation of a corporation—in this case a railroad—should not be allowed to affect the decision of an application to grant or dissolve a temporary injunction in a suit to restrain the company from acquiring lands and proceeding to construct its works.—*Aurora & C. R. Co. v. City of Lawrenceburgh*, 56 Ind. 80.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 336.

See, also, 22 Cyc. pp. 953, 954.

**§ 152. Hearing and determination.**

**[a] (Sup. 1883)**

Where there is a demurrer to a supplemental complaint, in an action in which plaintiff asks that defendant be enjoined from disposing of his property, it is not available error to issue a restraining order without first disposing of the demurrer.—*Morey v. Ball*, 90 Ind. 450.

**[b] (App. 1905)**

Where the special findings fail to show facts sufficient to warrant an injunction as to one of the plaintiffs, a decree granting an injunction is erroneous.—*American Plate Glass Co. v. Nicoson*, 34 Ind. App. 643, 73 N. E. 625.

Where the special findings in an action for an injunction show that one plaintiff was the owner of the business of quarrying stone and that another owned the real estate and failed to show anything in reference to the terms of the plaintiff's interest in the quarry, such findings did not support a decree for injunction.—Id.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 337, 343.

See, also, 22 Cyc. pp. 952-954.

**§ 156. Order on application.**

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 340-343.

See, also, 22 Cyc. pp. 957-964.

**§ 157. — In general.**

**[a] (Sup. 1836)**

A restraining order granted in vacation, to be valid and binding, must be in writing and signed by the judge.—*Kiser v. Lovett*, 106 Ind. 325, 6 N. E. 816.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 340, 342.

See, also, 22 Cyc. pp. 957-962.

**§ 159. Objections and exceptions.**

**[a] (Sup. 1906)**

Where, over defendant's objection, the trial court grants a temporary restraining order "to which the defendants except," the exception is joint.—*City of Laporte v. Scott*, 106 Ind. 78, 76 N. E. 878.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 344.

See, also, 22 Cyc. p. 964.

**(B) CONTINUING, MODIFYING, VACATING, OR DISSOLVING.**

Application for dissolution as cutting off appeal from order granting, see **APPEAL AND ERROR**, § 165.

Effect of appeal or other proceeding for review, see **APPEAL AND ERROR**, § 447.

Effect of supersedeas or stay, see **APPEAL AND ERROR**, § 488.

Liabilities on bonds or undertakings, see post, §§ 234-234.

Record for purpose of review, see **APPEAL AND ERROR**, § 520.

Review of decisions as dependent on presentation of question in record, see **APPEAL AND ERROR**, § 684.

Review of decisions involving questions of fact, see **APPEAL AND ERROR**, § 1024.

Review of order relating to continuance on appeal from final judgment, see **APPEAL AND ERROR**, § 870.

Review of orders relating to dissolution on appeal from final judgment, see **APPEAL AND ERROR**, § 872.

Scope and extent of appeal from orders relating to dissolution, see **APPEAL AND ERROR**, § 874.

### § 161. Discretion of court.

[a] (Sup. 1875)

The rule that where the answer fully denies the equity of the bill the injunction will be dissolved is not inflexible, but the dissolution rests in the discretion of the court.—*Spicer v. Hoop*, 51 Ind. 385.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 347.

See, also, 22 Cyc. p. 982.

### § 163. Grounds for continuing, modifying, vacating or dissolving.

[a] (Sup. 1862)

Want of equity in a bill is ground for the dissolution of a preliminary injunction.—*Sutherland v. Lagro & M. Plank-Road Co.*, 19 Ind. 192.

[b] (Sup. 1873)

Where, in a suit for injunction, a demurrer was sustained to the entire complaint, and the applicant refused to amend, there was nothing left to support an injunction previously granted, and it was properly dissolved.—*Clark v. Town of Noblesville*, 44 Ind. 83.

[c] (Sup. 1873)

It was not error to dissolve an interlocutory order of injunction without issue being formed on the answer or any trial of the merits, where such dissolution was not decisive of the cause, which was left to be tried on its merits at final hearing.—*Applegate v. Edwards*, 45 Ind. 329.

[d] (Sup. 1884)

Refusal to modify an injunction, so as to give the defendant affirmative permission to do what the injunction does not prohibit, is not error.—*Pence v. Garrison*, 93 Ind. 345.

[e] (Sup. 1904)

To sustain an interlocutory injunction it is enough that the evidence shows the act complained of a proper subject for investigation by a court of equity.—*Gagnon v. French Lick Springs Hotel Co.*, 72 N. E. 849, 163 Ind. 687, 68 L. R. A. 175.

[f] (Sup. 1906)

In order to warrant overruling a motion to dissolve an injunction, it is not necessary that a case be made out which would entitle plaintiff to relief at all events at the hearing, but enough if it appears from the pleadings and evidence that the transaction is a proper sub-

ject for investigation in equity.—*McCann v. Trustees of Mt. Gilead Cemetery*, 77 N. E. 1090, 166 Ind. 573.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 357-371.

See, also, 22 Cyc. pp. 974-978.

### § 168. Motion to dissolve or vacate.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 355, 356, 372-389, 395.

See, also, 22 Cyc. pp. 987-1000.

### § 172. — On answer.

[a] Where the answer denies the equity of the bill, the general rule is that the injunction will be dissolved.—(Sup. 1850) *Doolittle v. Jones*, 2 Ind. 21; (1853) *Case v. Green*, 4 Ind. 526; (1869) *Rayle v. Indianapolis, P. & C. Ry. Co.*, 32 Ind. 259; (1877) *Aurora & C. R. Co. v. Miller*, 56 Ind. 88.

[b] (Sup. 1860)

A motion to dissolve an injunction on bill and answer cannot be sustained unless the answer positively, and without qualification, denies the equity of the bill.—*Thompson v. Adams*, 2 Ind. 151.

[c] (Sup. 1869)

Where, on motion to dissolve an injunction, defendant's affidavits did not deny all the equities of the bill, and so much of the complaint essential to the injunction as he denied was supported by other affidavits, equity would not dissolve the injunction, and the same rule would apply under the Code.—*Cheek v. Tilley*, 31 Ind. 121.

[d] (Sup. 1876)

In a suit to enjoin the rebuilding of a dam, a temporary restraining order is properly dissolved where the defendant files an answer showing his absolute right to rebuild.—*Ogle v. Dill*, 55 Ind. 130.

[e] (Sup. 1880)

The filing of verified answers in abatement or in bar does not entitle defendant to a dissolution of a temporary injunction.—*Edwards v. Applegate*, 70 Ind. 323.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 374-384.

See, also, 22 Cyc. pp. 987-996.

### § 173. — Affidavits in support of motion.

[a] (Sup. 1875)

Affidavits may be read in support of a motion to dissolve an injunction.—*Spicer v. Hoop*, 51 Ind. 365.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 385.

See, also, 22 Cyc. p. 996.

### § 174. — Opposing and rebutting affidavits and other evidence.

[a] (Sup. 1875)

Affidavits may be read in opposition to a motion to dissolve an injunction.—*Spicer v. Hoop*, 51 Ind. 365.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 386, 387.

See, also, 22 Cyc. p. 996.

### § 179. Dissolution by causes subsequent to grant of injunction.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 391-393.

See, also, 22 Cyc. pp. 980-982.

### § 180. — Proceedings in action.

[a] (Sup. 1865)

An injunction granted to continue during the pendency of a certain cause exists after the dismissal of an appeal in such cause where such appeal is afterwards reinstated.—*Winship v. Clendenning*, 24 Ind. 439.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 392.

See, also, 22 Cyc. pp. 980-982.

### § 183. Reinstatement.

[a] (Sup. 1876)

A motion to reinstate a temporary restraining order which has been dissolved is in effect a motion for a new order.—*Ogle v. Dill*, 55 Ind. 130.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 394.

See, also, 22 Cyc. p. 1003.

## V. PERMANENT INJUNCTION AND OTHER RELIEF.

In action by owner of property taken for public use, see EMINENT DOMAIN, § 306.

Review of orders relating to temporary injunctions on appeal from decree of perpetual injunction, see APPEAL AND ERROR, § 872.

### § 190. Permanent injunction in general.

[a] (Sup. 1896)

It is not necessary to file a bond, on granting a decree for a perpetual injunction, where no interlocutory injunction was sought or granted.—*Lake Erie & W. R. Co. v. Cluggish*, 143 Ind. 347, 42 N. E. 743.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 409.

See, also, 22 Cyc. pp. 964, 965.

### § 193. Stay or suspension of injunction.

[a] (App. 1906)

Where a city failed to provide an outlet for surface water accumulated through its

street improvements from a large extent of territory, and in a suit for an injunction the court held that complainant was entitled to relief, it was improper to give the city eight months within which to remedy the defect.—*Cromer v. City of Logansport*, 78 N. E. 1045, 38 Ind. App. 661.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 413.

See, also, 22 Cyc. p. 970.

### § 197. Recovery of damages in addition to injunction.

[a] (Sup. 1876)

Under the Code (2 Gav. & H. St. p. 33), where a court may enjoin the commission of an act, it may, as a court of equity might have done before the enactment of the Code, in the same action and at the same time, grant full relief by rendering judgment for damages already accrued from the commission of such act.—*Bonnell v. Allen*, 53 Ind. 130.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 417; 19 CENT. DIG. Equity, § 110.

See, also, 22 Cyc. p. 967.

### § 198. Assessment of damages.

[a] (Sup. 1892)

Nominal damages only may be awarded where there is no proof of damages, though plaintiff be entitled to an injunction.—*Brauns v. Glesige*, 29 N. E. 1061, 130 Ind. 167.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 418.

### § 200. Costs and fees.

[a] (Sup. 1827)

Though a bill to enjoin proceedings at law is taken as confessed, and a decree is rendered enjoining such proceedings, defendant's costs in the suit at law should be decreed in his favor where he had a legal demand for a portion of his claim.—*Harvey v. Crawford*, 2 Blackf. 43.

[b] (Sup. 1875)

In an action for damages, and to enjoin defendant from repeating the injury complained of, where plaintiff recovers a judgment for \$1 damages, and an injunction is granted as prayed, he is entitled to recover full costs.—*Douglass v. Blankenship*, 50 Ind. 160.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 420.

See, also, 22 Cyc. p. 972.

## VI. WRIT, ORDER, OR DECREE, SERVICE, AND ENFORCEMENT.

Conclusiveness, see JUDGMENT, §§ 634-749.

Merger and bar of causes of action and defenses, see JUDGMENT, §§ 540-633.

**§ 207. Final judgment or decree.**

Conformity to verdict and findings, see JUDGMENT, § 256.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Inj. §§ 427-435.

See, also, 22 Cyc. pp. 964-971.

**§ 208. — In general.**

[a] (Sup. 1892)

Where the president and secretary of a natural gas company, with the consent of only one director, and without authority, give a party permission to take gas from a well of the company free of charge, they, the consenting director, and the person to whom such consent was given, are joint wrongdoers, and an injunction against taking the gas was properly granted as to all of them.—*Henshaw v. People's Mut. Natural Gas Co.*, 32 N. E. 318, 132 Ind. 545.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Inj. §§ 427, 431.

See, also, 22 Cyc. pp. 964-971.

**§ 210. — Opening and vacating or modifying.**

[a] (Sup. 1889)

Where a default is taken and final judgment entered, in a suit for an injunction against the defendant, on the first day of the term, the default can be set aside on motion.—*Clegg v. Fithian*, 32 Ind. 90.

[b] (Sup. 1897)

A motion by defendants to modify a decree granting an injunction by adding that they shall not be prohibited and they are not enjoined from using any natural gas from the well for other purposes and such other use of gas shall not be considered as an interference with the complainant's right is properly overruled, where it omits from the words set out a portion asserted in the complaint, but shall continue to furnish plaintiff with sufficient gas for the purpose of operating an electric plant so long as the well should supply gas.—*Xenia Real-Estate Co. v. Macy*, 47 N. E. 147, 147 Ind. 568.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Inj. § 433.

See, also, 22 Cyc. p. 971.

**§ 211. — Operation and effect in general.**

[a] (Sup. 1891)

A decree granting an injunction is not void because no bond was filed therein, and therefore is not subject to collateral attack.—*Lewis v. Rowland*, 131 Ind. 103, 29 N. E. 922.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Inj. § 434.

See, also, 22 Cyc. pp. 966, 970.

**§ 213. Service of writ or order.**

[a] (Sup. 1894)

In a suit in L. county to enjoin a firm and its assignee in V. county from selling, un-

der the assignment, goods mortgaged to plaintiff, the returns of service of a restraining order showed service on one of the partners in L. county, and that a copy was left with him, and that, three days later, it was served on him and the other defendants in V. county. *Held*, that an objection to the overruling of a motion to set aside the returns on the ground that a copy of the order was not left with defendants in V. county was too technical.—*Ades v. Levi*, 137 Ind. 506, 37 N. E. 388.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Inj. § 437.

See, also, 22 Cyc. pp. 961, 962.

**VII. VIOLATION AND PUNISHMENT.**

Power of judges to punish in general, see CONTEMPT, § 36.

**§ 217. Writ or mandate violated.****FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Inj. §§ 439-444.

See, also, 22 Cyc. pp. 1009-1011.

**§ 219. — Validity and regularity.**

[a] (Sup. 1887)

The mere error in granting an injunction cannot be made available, except by a direct attack in a case, where the court granting the injunction had jurisdiction of the subject and of the person.—*Central Union Tel. Co. v. State ex rel. Board of Com'rs of Tippecanoe County*, 10 N. E. 922, 12 N. E. 136, 110 Ind. 203.

Where there is jurisdiction, an order of injunction must be obeyed, although it may have been erroneously granted.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Inj. §§ 439, 441.

See, also, 22 Cyc. p. 1010.

**§ 221. Knowledge or notice.**

[a] (Sup. 1890)

Where an order of injunction forms part of a decree rendered in regular course, upon issue joined by answer, the parties to the suit are bound to take notice thereof, without being served with a certified copy of the decree, and are guilty of contempt if they do not.—*Hawkins v. State*, 126 Ind. 294, 26 N. E. 43.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Inj. §§ 445-447.

See, also, 22 Cyc. p. 1013; note, 55 Am. Dec. 722.

**§ 223. Acts or conduct constituting violation.**

[a] (Sup. 1872)

The arrest of a party for disobeying an injunction within 30 days after appeal from such order, and after the issuing of an ordinary supersedeas, is not an act in disregard of the authority of the Supreme Court.—*State ex rel. Matthews v. Chase*, 41 Ind. 356.

## [b] (Sup. 1895)

Defendant is not guilty of a constructive contempt for disobeying an injunction prohibiting work on a drain, when it is shown that an order was served on a legal holiday, more than 12 miles away from the drain, and that next day he drove to it, and ordered his men to quit work, as required.—*Shirk v. Cox*, 141 Ind. 301, 40 N. E. 750.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 448-473.

See, also, 22 Cyc. pp. 1015-1019; note, 48 L. R. A. 708.

## § 224. Excuse and justification.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 474-483.

See, also, 22 Cyc. pp. 1019-1021.

## § 225. — In general.

## [a] (Sup. 1886)

Where a party who has obtained a restraining order to preserve the status of personal property in his possession pending litigation, abandons such property without providing for its safe-keeping, the party restrained may take possession of it in order to keep it safely until the litigation is determined, without being guilty of contempt.—*Mowrer v. State*, 107 Ind. 539, 8 N. E. 561.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 474-477, 480-483.

See, also, 22 Cyc. p. 1019.

## § 226. — Good faith.

## [a] (Sup. 1895)

Defendants, laboring men, and not familiar with legal proceedings, were guilty of a constructive contempt, who did not at once fully obey an injunction served in the absence of their employer, because they thought the writ meant they should appear and answer with the employer, though they desired to respect the order of the court, and partly obeyed it.—*Shirk v. Cox*, 141 Ind. 301, 40 N. E. 750.

## [b] (Sup. 1895)

Since *Burns' Rev. St. 1894*, § 1026, exempts a contempt proceeding to enforce a civil right and remedy from the operation of sections 1019, 1025, which provide that, in a proceeding for contempt for disobedience of an order of court, defendant shall be discharged if he shows that no contempt was intended, one cannot be relieved from liability for violating an injunction on the ground that he committed the act in good faith, and without any intention of violating an order of court.—*Thistlethwait v. State*, 49 N. E. 156, 149 Ind. 319.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 478.

See, also, 22 Cyc. p. 1020.

## § 228. Persons committing acts of violation and persons liable therefor.

## [a] (App. 1903)

One who has been enjoined from manufacturing and using a machine invented by another's employé cannot escape the effect of the injunction by organizing a corporation, which he controls, for the purpose of making and using the machine.—*Westervelt v. National Mfg. Co.*, 69 N. E. 169, 33 Ind. App. 18.

## [b] (App. 1904)

Pickets for a labor union, although not made defendants in an injunction suit, are amenable to the injunction restraining the union, and all persons confederated or conspiring with it, from obstructing the business of plaintiff and its employes, where they have actual notice of such injunction.—*Anderson v. Indianapolis Drop Forging Co.*, 72 N. E. 277, 34 Ind. App. 100.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 484-495.

See, also, 22 Cyc. pp. 1011-1013.

## § 229. Power to punish.

## [a] (Sup. 1880)

A circuit judge, acting in vacation, has no power to issue an attachment against a person for contempt in disobeying a writ of injunction granted by him; but the person who obtained the injunction must wait until the next term of circuit court before he can obtain process to enforce its obedience or to punish its violation.—*Taylor v. Moffatt*, 2 Blackf. 305.

## [b] (Sup. 1886)

A special judge, having jurisdiction and power to grant a restraining order has also, as incident thereto, the power to punish as a contempt the violation of such order.—*Mowrer v. State*, 107 Ind. 539, 8 N. E. 561.

## [c] (App. 1901)

Under *Burns' Rev. St. 1894*, §§ 1019, 1161, 1374, the violation of a final decree awarding a permanent injunction rendered by a special judge was not a contempt of the judge, so as to give him authority to punish it, but was a contempt of the court of which the judge was, pro tempore, an official.—*Kissel v. Lewis*, 61 N. E. 209, 27 Ind. App. 302.

*Burns' Rev. St. 1894*, § 419, authorizes the appointment of a special judge to try a particular cause, who "shall have power to hear and determine said cause until the same is finally disposed of." Held, that a decree awarding a permanent injunction was such a final disposition of the cause as to terminate the authority of the special judge rendering it, and preclude him from entertaining subsequent contempt proceedings for its violation.—Id.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 496-501

See, also, 22 Cyc. p. 1021.

**§ 230. Proceedings.**

[a] (App. 1904)

Burns' Ann. St. 1901, §§ 1024-1026, relative to contempts of court, prescribing the penalties and the methods of procedure, and authorizing, among other things, an acquittal on a sworn denial of the facts charged as a contempt, but which provides that nothing therein contained shall be construed as affecting proceedings against any party for contempt "for the enforcement of civil rights and remedies," has no application to contempt proceedings in chancery, brought for the violation of the injunctive process of the court, in which the rule has always been that the truth of defendant's answers to interrogatories may be controverted, and the whole matter inquired into and ascertained by the court.—*Anderson v. Indianapolis Drop Forging Co.*, 72 N. E. 277, 34 Ind. App. 100.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Inj. §§ 502-516.

See, also, 22 Cyc. pp. 1021-1024.

**§ 231. Review.**

Decisions reviewable, see **APPEAL AND ERROR**, § 71.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Inj. § 317.

See, also, 22 Cyc. p. 1026.

**§ 232. Punishment.**

[a] (App. 1886)

One from whom money has been collected by garnishment proceedings in a foreign state, in violation of an injunction granted by a court of Indiana, may recover it, though the money was collected on a judgment rendered by a court of the foreign state having jurisdiction of the parties, and though plaintiff defaulted in the foreign court, and failed to notify the garnishee of the existing injunction, and of any intention to claim the money as exempt under the laws of Indiana, no recovery being sought against the garnishee, and it not being a party to the injunction suit.—*Main v. Field*, 13 Ind. App. 401, 40 N. E. 1103, 41 N. E. 829.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Inj. §§ 519-528.

See, also, 22 Cyc. pp. 1024-1026.

**VIII. LIABILITIES ON BONDS OR UNDERTAKINGS.**

Joint or several obligation, see **BONDS**, § 53.

**§ 234. Accrual or release of liability by breach or fulfillment of conditions.****FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Inj. §§ 520-537.

See, also, 22 Cyc. pp. 1026-1032.

**§ 235. — Bonds or undertakings to procure or sustain injunction.**

[a] (Sup. 1822)

An injunction bond recited that, "Whereas A. has obtained an injunction upon B.'s ferry until the court order otherwise, and has sued at law to try B.'s right, if A. shall indemnify B. for damages from the injunction should the right to the ferry be established in B., then the bond to be void." Defendants pleaded that B.'s right to the ferry had not been established, and that the grant to him of the ferry was erroneous. *Held*, that the plea was no bar to the action; the words in the condition of the bond relative to the establishment of B.'s rights being repugnant to the clause of indemnity, and void.—*Conner v. Paxson*, 1 Blackf. 207.

An injunction bond recited that, "Whereas A. has obtained an injunction upon B.'s ferry until the court order otherwise, and has sued at law to try B.'s right, if A. shall indemnify B. for damages from the injunction should the right to the ferry be established in B., then the bond to be void." Defendants pleaded that B.'s right to the ferry had not been established, and that the grant to him of the ferry was erroneous. *Held*, that the words in the condition of the bond relative to the establishment of B.'s right, being repugnant to the clause of indemnity, will be treated as mere surplusage, and the instrument was a good injunction bond under the statute (St. 1817, p. 33; St. 1823, p. 289).—*Id.*

Such obligations as injunction bonds should receive a liberal construction. The intention with which they are executed cannot be mistaken, as they are prescribed by statute (St. 1817, p. 33) for a particular object.—*Id.*

[b] (Sup. 1886)

Where parties agree that work shall be suspended under a restraining order not shown to be in writing and signed by the judge, no suit will lie on the injunction bond, since, there being no injunction, the bond never became binding and no liability could accrue thereon.—*Kiser v. Lovett*, 106 Ind. 325, 6 N. E. 816.

[c] (App. 1892)

Under Rev. St. 1881, § 1153, declaring that no injunction shall be granted until the party asking it shall give bond for damages and costs, and section 1154, providing that when an injunction is granted upon the hearing, after a temporary restraining order, a second bond need not be given unless the former shall be deemed insufficient, but that plaintiff and his sureties shall remain liable upon the original undertaking, where, after the granting of a preliminary restraining order, the same is continued until further order by an order of the court which does not mention the bond, the bond remains in force during the continuance, though the order of continuance was made in accordance with an agreement between the parties, since the agreement amounted to nothing more than a waiver of a formal hearing.—

Stone v. Keller, 4 Ind. App. 436, 30 N. E. 1113.

[d] (Sup. 1905)

Where plaintiffs obtained an injunction against the defendants, and, by consent of the defendants, paid the costs and dismissed the action under an agreement settling all the matters in controversy between them, the defendants were not, because of such dismissal, entitled to maintain an action for breach of the injunction bond.—St. Joseph & E. Power Co. v. Graham, 74 N. E. 498, 165 Ind. 16.

A voluntary dismissal by the plaintiff of an action in which a bond had been given and a temporary order of injunction had been obtained is such a breach of the bond as gives the defendant a right of action thereon.—Id.

[e] (App. 1905)

Injunction bonds should be liberally construed.—Sheets v. Hays, 75 N. E. 20, 36 Ind. App. 106.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 529-537.

See, also, 22 Cyc. pp. 1026-1032.

#### § 242. Actions.

##### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 553-605.

See, also, 22 Cyc. pp. 1039-1048.

#### § 243. — Rights of action.

[a] (Sup. 1881)

Where a suit for an injunction was dismissed because of another suit pending, the fact that complainant subsequently obtained an injunction cannot defeat an action on the injunction bond in the case dismissed.—Swan v. Timmons, 81 Ind. 243.

[b] (App. 1893)

The right to recover attorney's fees alone was sufficient to sustain, as against a demurrer, the complaint in an action on an injunction bond to recover expenses of a dissolution of the injunction.—Midland R. Co. v. Stevenson, 33 N. E. 254, 6 Ind. App. 207.

##### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 553, 554, 556.

#### § 245. — Defenses.

[a] (Sup. 1865)

In a suit on an injunction bond, defendant is not estopped to deny the jurisdiction of the judge granting the order over the subject-matter of the suit.—Jenkins v. Parkhill, 25 Ind. 473.

[b] (Sup. 1878)

In an action on an injunction bond, an answer setting up matter which would have been merely a defense to the action for an injunction is insufficient,—as where the complaint alleges that an action to enjoin completion of a contract for a street improvement has been defeated, and the answer avers that such improve-

ment would work damage to the adjoining real estate.—Sipe v. Holliday, 62 Ind. 4.

The power of a board of county commissioners to make a contract for the improvement of the streets surrounding the public square of the county seat is a question entering into the merits of, and constituting a defense to, an action to enjoin the contractor from completing the contract, and cannot be considered in an action on the injunction bond.—Id.

[c] (Sup. 1881)

In a suit on an injunction bond, it cannot be shown, either in bar or in mitigation of damages, that an injunction was afterwards obtained in another suit.—Swan v. Timmons, 81 Ind. 243.

[d] (Sup. 1891)

Where defendants secured an injunction against plaintiff, and plaintiff, after its dissolution, brought an action on the injunction bond, an answer which alleged that the court which rendered the judgment had no jurisdiction over defendant was bad, since he was estopped from denying the jurisdiction of the court whose aid he had invoked in obtaining the injunction.—Robertson v. Smith, 129 Ind. 422, 28 N. E. 857, 15 L. R. A. 273.

##### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 564-571.

See, also, 22 Cyc. pp. 1040-1042.

#### § 246. — Jurisdiction and venue.

Jurisdiction as dependent on whether title to real property is involved, see COURTS, § 163.

##### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 572.

See, also, 22 Cyc. p. 1040.

#### § 248. — Parties.

[a] (Sup. 1865)

A person who has a right to the possession of land under a title bond is entitled to recover for any injury to the possession or to the land itself, in a suit on a bond given upon the granting of an injunction enjoining him from enjoying such possession.—Winship v. Clendenning, 24 Ind. 439.

[b] (Sup. 1877)

A bond executed by the plaintiffs, in an action against several defendants to obtain a temporary injunction, inures to the benefit of all the defendants, though, in its terms, it is executed to but one of them; and hence all the defendants may unite in an action thereon.—Boden v. Dill, 58 Ind. 273.

[c] (App. 1895)

Where a lessee contracts with a third person to drill a well, a temporary injunction restraining the owners, the lessee, an employé of the contractor, and all persons acting for them from proceeding with the well, does not bind the contractor, and consequently, on a dissolution of the order, he cannot recover on the injunction

bond for damages caused by respecting the order.—*Dunham v. Seiberling*, 12 Ind. App. 210, 39 N. E. 1044.

[d] (App. 1905)

Under Burns' Ann. St. 1901, §§ 269-273, providing that all persons who have an adverse interest to plaintiff, or who are necessary parties to effect a complete settlement of matters in issue, are proper parties defendant, and section 1167, requiring persons seeking an injunction or restraining order to file a written undertaking in favor of the adverse party affected thereby for the payment of all damages and costs which may accrue by reason of the injunction or restraining order, a contractor, who is admitted as a defendant in a suit to enjoin county commissioners from paying him money or completing the contract, and who is the party actually interested adversely to plaintiffs in the injunction suit, is entitled to the benefit of an undertaking, filed by plaintiffs, conditioned to pay "defendant all damages and costs which may accrue to said defendant by reason of the restraining order or injunction in this action," although such undertaking was filed prior to the contractor's admission to defend the suit.—*Sheets v. Hays*, 75 N. E. 20, 36 Ind. App. 106.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 573.

See, also, 22 Cyc. pp. 1043, 1044.

§ 250. — Pleading.

Filing written instruments with pleading, see PLEADING, § 308.

Grounds for demurrer, see PLEADING, § 193.

Pleading matters of fact or conclusions, see PLEADING, § 8.

Statement of cause of action in general, see PLEADING, § 48.

Variance between pleading and instrument annexed, filed, or referred to, see PLEADING, § 312.

[a] (Sup. 1862)

Suit was brought on the following instrument: "D. M. & J. T. v. City of I. and D. T. We undertake that the plaintiffs, D. M. & J. T., shall pay to the defendants, the city, etc., all damages and costs which may accrue by reason of the injunction in this action,"—dated, signed, approved by the judge, and filed. The plaintiff averred that the city had made a contract with D. T. for the grading and graveling of a certain street therein, and that the instrument declared upon was executed upon the granting of an injunction upon the performance of the contract by D. T. *Held*, that it was necessary that the complaint should show that a legal contract for the grading, etc., was entered into by the city with D. T.—*Macey v. Titcombe*, 19 Ind. 135.

[b] (Sup. 1865)

In an action upon an injunction bond, a copy of the proceedings and judgment upon the application for the injunction need not be filed

with the complaint.—*Winship v. Clendenning*, 24 Ind. 439.

[c] (Sup. 1877)

A bond executed in a proceeding to obtain an injunction, providing "for the payment of all damages and costs" sustained by the obligee by reason of such injunction, "should the same be wrongful," has but one condition, which is that the injunction should be wrongful; and the only breach assignable in an action on the bond is that the injunction was wrongful.—*Boden v. Dill*, 58 Ind. 273.

[d] (Sup. 1879)

In a complaint on an injunction bond, it is not necessary to show the ground upon which the injunction was granted. When it is averred that a suit was pending in the proper court, the injunction granted, and the bond given, it will be presumed that the proceedings and judgment are sufficient and regular until the contrary is shown on the part of the defense.—*Merrifield v. Weston*, 68 Ind. 70.

The complaint on an injunction bond need not set out specifically any part of the record of the suit in which the injunction on which the bond is given was granted.—*Id.*

In an action upon an injunction bond, the complaint is good, although it does not show the following facts: That the judge had authority to grant the injunction; that any petition, etc., for such injunction was ever presented to the judge by the plaintiffs in the suit in which the injunction is alleged to have been granted; that there was any cause shown for granting the injunction; that the injunction was granted in vacation, where the date on which it was granted is stated; that the injunction or any copy thereof was ever issued or served, where facts are alleged which necessarily imply such issuance and service.—*Id.*

[e] (Sup. 1880)

Since it is not necessary, in an action on an injunction bond, to file a copy of the record of the injunction suit, when such copy is filed a variance between it and the complaint is immaterial.—*Cress v. Hook*, 73 Ind. 177.

[f] (Sup. 1891)

In an action on an injunction bond given in proceedings to restrain execution, a complaint seeking to recover for attorney's fees and like expenses was not insufficient because it alleged that the petition for injunction also sought other relief.—*Robertson v. Smith*, 129 Ind. 422, 28 N. E. 857, 15 L. R. A. 273.

[g] (App. 1892)

In an action on an undertaking to pay all damages and costs accruing by reason of an injunction, if such injunction should not be sustained, the sufficiency of the complaint cannot be questioned by a demurrer to allegations showing how plaintiff was damaged, as the cause of action accrued on the dissolution of the injunction.—*Boos v. Morgan*, 5 Ind. App. 218, 31 N. E. 39.

[h] (App. 1893)

In an action on a bond given to obtain a temporary injunction against the sale of property levied on under certain judgments, the purpose of which is to recover attorneys' fees and other expenses in obtaining a dissolution of the injunction, it cannot be objected that the validity of the judgments is not alleged, however well their invalidity might have been urged in the previous suit for the injunction.—*Midland R. Co. v. Stevenson*, 6 Ind. App. 207, 33 N. E. 254; *Id.*, 6 Ind. App. 702, 33 N. E. 256.

In an action on a bond given to obtain a temporary injunction against the sale of property levied on under certain judgments, the purpose of which is to recover attorney's fees and other expenses in obtaining a dissolution of the injunction, a complaint, stating that the judgments had been in all things affirmed, and that the claim was then due, sufficiently shows the final disposition of the injunction in some manner in the Supreme Court, and that the action, therefore, was not prematurely brought, although it is not alleged that the time for rehearing has expired.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 574-581.

See, also, 22 Cyc. pp. 1044-1047.

#### § 251. — Evidence.

[a] (Sup. 1864)

Where, in an action on an injunction bond given in proceedings to enjoin enforcement of an execution, it was shown that the obligor on the bond had purchased the property from the debtor after the issuance of execution, evidence was admissible to show that at the time of purchasing the property the obligor had told the debtor that, if he would sell the property and leave the state, he would not need to pay the judgment, as such evidence was a part of the transaction, and tended to throw light on the nature of the obligor's claim to the property.—*Starr v. Cass*, 23 Ind. 458.

[b] (Sup. 1865)

Where, in an action on an injunction bond, it appeared that it did not bear the title of any court, but the execution of the bond was admitted by the pleadings, and corresponded with the copy filed with the complaint, it was properly admitted in evidence.—*Winship v. Clendenning*, 24 Ind. 439.

[c] (Sup. 1865)

In an action on an injunction bond given to procure an order restraining plaintiff from cutting timber on a tract of land, defendant offered to prove, in mitigation of damages, that at the time of suing out the injunction the land and timber belonged to another person, and that the plaintiff had no right to cut the timber. *Held*, that the evidence was admissible.—*Jenkins v. Parkhill*, 25 Ind. 473.

In a suit upon an injunction bond given to procure a restraining order from the judge of the court of common pleas, in a case in the

circuit court, in the vacation of the latter court, it is for the plaintiff to show that the order related to some matter pending in the circuit court.—*Id.*

[d] (App. 1899)

In proof of the averment in the complaint, in an action on an injunction bond, that defendant, after being reversed by the Supreme Court, discontinued his action, it was shown that a judgment in his favor had been reversed on appeal, the temporary injunction dissolved, and costs adjudged against him, etc., and that the entry of judgment on this reversal was the last step taken in the cause, and that the complaint on the bond was not filed until nearly three years had elapsed since its rendition, and not until every obligation which the undertaking sued on was intended to secure had been violated. *Held* sufficient.—*Burket v. Miller*, 55 N. E. 500, 25 Ind. App. 110.

#### FOR CASES FROM OTHER STATES.

SEE 27 CENT. DIG. Inj. §§ 582-585.

See, also, 22 Cyc. pp. 1047, 1048.

#### § 252. — Damages.

[a] (Sup. 1865)

Where an injunction is granted to restrain a party to a suit from having a writ of possession to which he is entitled, he has a right to recover, in a suit upon the injunction bond, for the use and occupation of the land for the time he was kept out of possession by the obligor.—*Rutherford v. Moore*, 24 Ind. 311.

[b] (Sup. 1865)

Where an injunction bond is given to continue through the pendency of a certain case, and the appeal in such case is dismissed and afterwards reinstated, damages accruing after the dismissal may be recovered.—*Winship v. Clendenning*, 24 Ind. 439.

[c] (Sup. 1873)

Where the sole object of a complaint is an injunction, and after a trial, resulting in a disagreement and discharge of the jury, the temporary injunction is dissolved and the action dismissed on motion of the defendant, he is entitled, in a suit upon the injunction bond, to recover, as a part of his damages, reasonable attorney's fees.—*Raupman v. City of Evansville*, 44 Ind. 392.

[d] (Sup. 1877)

On leave granted to withdraw the complaint, and judgment for the defendant, the attorney's fees may be included in the damages upon the complainant's injunction bond.—*Beeson v. Beeson*, 59 Ind. 97.

[e] (Sup. 1881)

In an action on an injunction bond in estimating damages, it is proper to take into consideration such reasonable attorney's fees as may have been necessarily paid or contracted for in making the proper resistance.—*Swan v. Timmons*, 81 Ind. 243.

[c] (App. 1895)

The fact that the judge granted an injunction while the court was in session, when he had no authority to do so, does not defeat the right to recover, on an injunction bond, attorney's fees paid out in procuring the dissolution of the injunction.—*Rhodes-Burford Furniture Co. v. Mattox*, 13 Ind. App. 221, 40 N. E. 545.

[g] (App. 1898)

Attorney's fees for defending an injunction suit at the trial on the merits may be recovered in an action on the bond, although the injunction was not the sole object of the suit, where the court limits the recovery to the amount expended for fees on account of the injunction.—*Hyatt v. City of Washington*, 50 N. E. 402, 20 Ind. App. 148, 67 Am. St. Rep. 248.

[h] (App. 1901)

Attorney's fees are allowable as damages in an action on an injunction bond.—*Binford v. Grimes*, 59 N. E. 1085, 26 Ind. App. 481.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 586-598; 15 CENT. DIG. Damag. § 204.

See, also, 22 Cyc. pp. 1049-1060; note, 18 L. R. A. 275.

## § 253. — Trial.

[a] (Sup. 1862)

In an action on an injunction bond given in proceedings restraining the performance of a street contract with a city, the regularity of all the proceedings to the making of the contract is open to investigation.—*Macey v. Titcombe*, 19 Ind. 135.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. §§ 599-602.

## § 254. — Judgment.

[a] (Sup. 1895)

The fact that a judgment for defendant in a case in which an injunction bond was given

by plaintiff was reversed on appeal does not make a judgment on the bond pending the appeal in the injunction suit subject to collateral attack.—*Boos v. Morgan*, 140 Ind. 206, 39 N. E. 919.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 603.

See, also, 22 Cyc. p. 1061.

## IX. WRONGFUL INJUNCTION.

### § 257. Nature and grounds of liability.

Competency of plaintiff's wife as witness, see WITNESSES, § 53.

[a] (App. 1896)

In the absence of malice and want of probable cause, an action for damages for wrongfully suing out an injunction will not lie; the remedy being on the bond.—*Harless v. Consumers' Gas Trust Co.*, 14 Ind. App. 545, 43 N. E. 456.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Inj. § 606.

See, also, 22 Cyc. p. 1061.

## INJURIES.

See—

DAMAGES.

NEGLIGENCE.

TORTS.

## INJURIOUS WORDS.

See LIBEL AND SLANDER.

## INLAND BILLS OF EXCHANGE.

See BILLS AND NOTES, § 13.

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

# INNKEEPERS.

## *Scope-Note.*

[INCLUDES regulation of inns, hotels, boarding houses, lodging houses, and all houses furnishing for compensation accommodation as a temporary home; and mutual rights, duties, and liabilities of keepers of such houses and their guests, boarders, or lodgers.

[EXCLUDES regulation of sale of intoxicating liquors (see *Intoxicating Liquors*); and discriminations by reason of race, color, etc. (see *Civil Rights*). For complete list of matters excluded, see cross-references, post.]

## *Analysis.*

§ 11. Loss of or injury to property of guest.

§ 16. Offenses by guests, boarders, or lodgers.

## *Cross-References.*

### *See—*

Discrimination as to guests by reason of race, color, or condition. *CIVIL RIGHTS*, § 5.

Mechanic's lien for placing heating plant in hotel. *MECHANICS' LIENS*, § 31.

Regulation of sale of intoxicating liquors. *INTOXICATING LIQUORS*.

### **§ 11. Loss of or injury to property of guest.**

[a] (*Sup.* 1840)

The death of a horse while in the care of an innkeeper, to whom he had been delivered by a guest, is sufficient to charge the innkeeper with the loss, unless he can exculpate himself by showing due care on his part.—*Hill v. Owen*, 5 Blackf. 323, 35 Am. Dec. 124.

[b] (*Sup.* 1847)

The defendant, who was an innkeeper, took the plaintiff's horse to keep. The plaintiff rode out the horse one evening, and, on returning to the stable, tied him to the stall where he had been previously kept. The next morning the horse was found dead in the same stall, with his head fast in the trough. The trough was made of a hollow beech log, having a bulge in the middle which rendered that part of the trough wider than it was at the top. The horse had got his head fast in the trough by the jaws, and, as the witnesses supposed, had killed himself in the attempt to draw it out. *Held*, that the plaintiff was not entitled to recover.—*Thickstun v. Howard*, 8 Blackf. 535.

[c] (*Sup.* 1858)

An innkeeper is only *prima facie* liable for loss to his guest,—a presumption to be repelled by proof that neither he nor his servants caused the loss by negligence.—*Laird v. Eichold*, 10 Ind. 212, 71 Am. Dec. 323.

[d] (*Sup.* 1872)

Hotel rules requiring "money, jewelry, and other valuables" to be deposited in the safe at

the office do not apply to a watch which a guest has on his person for his personal use, and which is essential to his personal comfort and convenience.—*Milford v. Wesley*, Wils. 119.

A lack of ordinary care cannot be imputed to a guest told by an innkeeper or his servant "not to lock the door, for other parties had to come into the room to go to bed, and the door should be left unlocked for them," or "that he could either lock the door and get up and let them in when they come," who, acting in obedience to such instruction, leaves the door unlocked. The innkeeper will be responsible for property stolen from such guest.—*Id.*

[e] (*Sup.* 1873)

In an action to recover the value of a watch and other articles of property lost while a guest at a hotel, *held* that, though an innkeeper may exonerate himself from liability for the loss of goods of his guests by showing that the loss occurred without any fault or neglect of himself, or servants, or by negligent conduct of the plaintiff, he must nevertheless be held to answer, and is responsible for the conduct of another guest placed in a room already occupied without the consent of the occupant, and recovery may be had for the value of property so lost.—*Dessauer v. Baker*, Wils. 429.

[f] (*Sup.* 1874)

In an action to recover on the common-law liability of an innkeeper for the loss of plaintiff's goods and money, stolen from him while he was sleeping in his room at defendant's inn, in which the circumstances tend to

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show that the theft was committed by another guest who was admitted to the room without plaintiff's knowledge, the admission of evidence in chief of an agreement, not stated in the complaint, between plaintiff and defendant's clerk that no one except a person named, then occupying the room, and plaintiff, would be admitted to said room during the night, and also of a like promise made to such person, to which plaintiff was not a party, is error.—*Baker v. Dessauer*, 49 Ind. 28.

An innkeeper may exonerate himself from any liability for loss of goods by his guest by showing that the loss occurred by no fault or neglect of himself or his servants, or by the negligent conduct of the guest.—*Id.*

[s] (App. 1891)

The failure of a guest to inform an innkeeper that his valise, placed by the innkeeper's servant in the cloak or baggage room, contains valuables, is not negligence.—*Bowell v. De Wald*, 2 Ind. App. 303, 28 N. E. 430, 50 Am. St. Rep. 240.

An innkeeper is prima facie liable for any loss or injury to the goods of his guest, though he may exculpate himself by proof that the loss or injury happened without any fault or negligence on his part, or on the part of his servants, so that, in an action by a guest for such loss, the complaint need not allege that plaintiff was free from fault or negligence.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. INN. §§ 3, 17–40.

See, also, 22 Cyc. pp. 1081–1083; note, 2 L. R. A. (N. S.) 100; note, 69 Am. Dec. 221; notes, 18 Am. Rep. 130, 41 Am. Rep. 777; note, 99 Am. St. Rep. 577.

§ 16. Offenses by guests, boarders, or lodgers.

Laws relating to as authorizing imprisonment for debt, see CONSTITUTIONAL LAW, § 83.

[a] (Sup. 1900)

Acts 1897, p. 123, §§ 1–3 (Burns' Supp. Rev. St. 1897, §§ 7254a–7254c; Horner's Rev. St. 1897, §§ 7560–7562), provide that any person obtaining board, lodging, or other accommodations at a rooming house "with intent to defraud the owner" shall be fined or imprisoned therefor. Section 2 declares that any person who has boarded or lodged at a hotel, inn, etc., "as provided in this act," who shall remove his baggage therefrom without paying his bills, shall be punished as provided in section 1. *Held*, that the words, "as provided in this act," did not refer to the "intent to defraud," but referred to the class of proprietors to be protected, and intent to defraud is not essential, and need not be alleged in an affidavit of information.—*State v. Engle*, 58 N. E. 698, 156 Ind. 339.

[b] (Sup. 1908)

Acts 1897, p. 123, c. 80, § 1 (Burns' Ann. St. 1901, § 7254a), declaring a punishment against any person who shall obtain food, lodging, entertainment, or other accommodations at an inn with intent to defraud the owner or keeper thereof, shows with sufficient clearness that the subject-matter to which the fraudulent intent relates is the price or value of the accommodations.—*Clark v. State*, 171 Ind. 104, 84 N. E. 984.

The direction as to omitting obsolete and repealed laws contained in the Act of 1903 (Acts 1903, p. 391, c. 212), authorizing the appointment of a codification commission, with provision that it, in compiling, revising, and codifying the statutes, should omit all parts repealed or obsolete and insert all amendments necessary to make all laws complete, referred only to laws already repealed or obsolete, and not to any laws which should be repealed by the adoption of such acts as the commission itself might recommend; so that the mere failure to embody in Cr. Code 1905, either Acts 1897, p. 123, c. 80, § 1 (Burns' Ann. St. 1901, § 7254a), making it an offense to obtain accommodations at a hotel with intent to defraud the owner or keeper, or any other provision on the subject, did not repeal it; the repealing clause of public offense law of 1905 (Laws 1905, p. 757, c. 168, § 699), being directed only against former laws within the "purview" of that act; that is, former statutes relating to matters covered in the body of the act.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. INN. § 48.

See, also, 22 Cyc. p. 1095.

## INNOCENCE.

Presumptions as to innocence, see CRIMINAL LAW, § 308.

## INNOCENT PURCHASERS.

See—

Cancellation of instruments in equity as against. CANCELLATION OF INSTRUMENTS, § 31.

Duration of judgment lien as against. JUDGMENT, § 796.

Grantees in fraudulent conveyances. FRAUDULENT CONVEYANCES, §§ 164–170, 185, 186.

Of purchasers at foreclosure sale. MORTGAGES, § 563.

Mortgagees—

CHATTEL MORTGAGES, § 139.

MORTGAGES, §§ 152–157.

Reformation of instruments as against. REFORMATION OF INSTRUMENTS, § 29.

From particular classes of persons.

See—

Devises or legatees. WILLS, § 845.

Insolvent corporations. CORPORATIONS, § 543.

**Of particular species of property, estates, or interests.***See—*Bills or notes. **BILLS AND NOTES**, §§ 481, 497, 509, 525.Secured by mortgage. **MORTGAGES**, § 258.Mortgaged property. **MORTGAGES**, §§ 174, 244, 249, 298, 315.To secure loan of school funds. **SCHOOLS AND SCHOOL DISTRICTS**, § 18.Municipal bonds or other securities. **MUNICIPAL CORPORATIONS**, §§ 940-948.Personal property. **SALES**, §§ 234-239, 473.Property fraudulently conveyed. **FRAUDULENT CONVEYANCES**, §§ 192, 198-204.Sold on execution. **EXECUTION**, §§ 270-273.Sold on foreclosure. **MORTGAGES**, § 536.Real property. **VENDOR AND PURCHASER**, §§ 220-244, 265.Rights in public lands. **PUBLIC LANDS**, § 138.Trust property. **TRUSTS**, § 357.Warehouse receipts. **WAREHOUSEMEN**, § 17.**INNUENDO.**Averment in complaint for libel and slander, *see* **LIBEL AND SLANDER**, § 86.**IN PAIS.***See* **ESTOPPEL**, §§ 52-120.**IN PARI DELICTO.**Relief of parties to illegal contracts, *see* **CONTRACTS**, §§ 138, 139.**IN PARI MATERIA.**Construction of statutes, *see* **STATUTES**, § 225.**INQUEST.***See—*

Coroner's inquest—

**CORONERS**, §§ 9-21.**HOMICIDE**, §§ 222-226.

Damages, on default or interlocutory judgment

**DAMAGES**, §§ 193-204.**INQUIRY, WRIT OF.***See* **DAMAGES**, § 197.**INQUISITION.***See—*Common or habitual drunkenness. **DRUNKARDS**, § 2.**FORCIBLE ENTRY AND DETAINER**, § 56.Lunacy. **INSANE PERSONS**, §§ 7-29.**IN REM.***See—*Judgment. **JUDGMENT**, §§ 807, 808.Venue of action. **VENUE**, § 2.**INSANE ASYLUMS.***See* **ASYLUMS**.**INSANE DELUSIONS.***See—*Affecting responsibility for crime. **CRIMINAL LAW**, § 49.Testamentary capacity. **WILLS**, § 38.**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

# INSANE PERSONS.

## *Scope-Note.*

[INCLUDES persons affected by mental incapacity of any kind not merely temporary in its nature; evidence of such incapacity; rights and disabilities of such persons in general; custody and protection of their persons and property; and legal proceedings affecting them.

[EXCLUDES temporary mental disability (see *Contracts; Deeds*; and other specific heads); testamentary capacity (see *Wills*); competency as witnesses (see *Witnesses*); effect of disability on running of statute of limitations (see *Limitation of Actions*); insane paupers (see *Paupers*); asylums for the insane (see *Asylums*); and insanity at the time of commission of an offense as a defense in a prosecution therefor (see *Criminal Law*). For complete list of matters excluded, see cross-references, post.]

## *Analysis.*

### **I. Disabilities in General.**

- § 1. Who are incompetent.
- § 2. Evidence of incompetency.
- § 3. Constitutional and statutory provisions.

### **II. Inquisitions.**

- § 7. Nature and grounds of proceedings.
- § 8. Jurisdiction.
- § 10. Parties.
- § 13. Notice.
- § 14. Appearance and representation by attorney.
- § 15. Custody of person pending proceedings.
- § 19. Conduct of hearing or trial in general.
- § 21. Personal examination.
- § 22. Finding and return.
- § 25. Traversing and setting aside inquisition.
- § 26. Conclusiveness of adjudication.
- § 27. Review.
- § 28. Costs and fees.
- § 29. Restoration to sanity.

### **III. Guardianship.**

- § 30. Nature and grounds.
- § 31. Appointment, qualification, and tenure of guardian or committee.
- § 33. — Proceedings for appointment.
- § 36. — Operation and effect of appointment in general.
- § 37. — Resignation and discharge.
- § 38. — Disqualification and removal.
- § 40. Authority of guardian or committee in general.
- § 41. Compensation of guardian or committee.
- § 42. Accounting by guardian or committee.
- § 44. Death of person under guardianship.

### **IV. Custody and Support.**

- § 46. Power to control and regulate.
- § 47. Constitutional and statutory provisions.
- § 49. Commitment to asylum.
- § 52. Compensation for support in asylum.
- § 53. Duties and liabilities of relatives.
- § 54. Powers and duties of guardian or committee of person.
- § 56. Indigent insane.
- § 58. Proceedings to enforce liability for support.

**V. Property and Conveyances.**

- § 60. Capacity to convey.
- § 61. Validity of conveyances.
- § 62. Claims against estate in general.
- § 63. Liability of estate for support.
- § 64. Allowances to family.
- § 65. Powers and duties of guardian or committee of estate.
- § 66. Ratification or avoidance of conveyances or other transactions in general.
- § 68. Jurisdiction of courts.
- § 69. — In equity.
- § 71. Sale, mortgage, or lease under order of court.

**VI. Contracts.**

- § 72. Capacity to contract.
- § 73. Validity in general.
- § 77. Bills and notes.
- § 79. Avoidance after restoration to sanity.

**VII. Torts.**

- § 81. Insanity at time of trial.

**VIII. Crimes.**

**IX. Actions.**

- § 87. Capacity to sue and be sued in general.
- § 89. Rights of action.
- § 91. Jurisdiction and powers of courts.
- § 92. Parties.
- § 93. Authority, rights, and duties of general guardian or committee.
- § 94. Guardian ad litem or next friend.
- § 96. Appearance and representation by attorney.
- § 97. Pleading.
- § 98. Evidence.
- § 99. Trial.
- § 100. Judgment.
- § 102. Review.

*Cross-References.*

*See—*

Competency as witnesses. WITNESSES, § 41.  
 Confinement of insane person in jail as constituting private nuisance. NUISANCE, § 5.  
 Expert testimony as to mental capacity. EVIDENCE, § 537.  
 Impeachment of capacity of witness on ground of insanity. WITNESSES, § 327.  
 Insane asylums. ASYLUMS.  
 Insanity as affecting limitation of actions. LIMITATION OF ACTIONS, § 74.  
     As defense in criminal prosecutions—  
         CRIMINAL LAW, §§ 47-51, 331, 354, 570, 740, 773.  
         HOMICIDE, §§ 27, 179, 237, 294.  
     As defense to action for divorce. DIVORCE, § 43.  
     As ground for divorce. DIVORCE, §§ 23, 38.  
     As probable cause for arrest. FALSE IMPRISONMENT, § 13.  
     As terminating relation of attorney and client. ATTORNEY AND CLIENT, § 76.  
     Of ancestor at time of heir's deed of expectant estate. ASSIGNMENTS, § 8.  
     Of county treasurer. COUNTIES, § 66.

Insanity, etc.—(Cont'd).

Of husband, effect on right of wife to contract or convey. HUSBAND AND WIFE, § 65.  
 Of officer as ground for removal. OFFICERS, § 66.  
 Opinion evidence as to mental capacity—  
     CRIMINAL LAW, § 456.  
     EVIDENCE, §§ 478, 510.  
 Impeachment of witness. WITNESSES, §§ 379, 386.  
 Personal opinions as to defense of insanity as affecting competency of person in criminal prosecution. JURY, § 106.  
 Presumptions as to continuance of sanity or insanity. EVIDENCE, § 67.  
     As to sanity in civil actions. EVIDENCE, § 63.  
 Suicide while insane, affecting right of representatives of policeman to participate in benefit fund. MUNICIPAL CORPORATIONS, § 187.  
     Cause of death within insurance policy. INSURANCE, §§ 446, 465.  
 Testamentary capacity. WILLS, §§ 33-38.  
 Testimony as to transactions with persons subsequently incompetent. WITNESSES, §§ 127-183.

**I. DISABILITIES IN GENERAL.**

Capacity to sue or be sued, see post, § 87.  
 Necessity of proof of sanity, see TRIAL, § 33.  
 Restoration to sanity, see post, § 29.

**§ 1. Who are incompetent.**

Inquisitions of lunacy and proceedings thereon, see post, §§ 7-29.

**[a] (Sup. 1881)**

An instruction that "if, at the time of executing the deed in question, the grantor had mind to know and comprehend that he was making a deed, and thereby conveying the land described in it to his son, and had an object in so doing which he comprehended, then he was of sound mind," did not define mental soundness correctly, as all that might be consonant with monomania.—*Schuff v. Ransom*, 79 Ind. 458.

**[b] (Sup. 1886)**

Upon the trial of a proceeding, under Rev. St. 1881, § 2545, to have a person adjudged of unsound mind and incapable of managing his own estate, an instruction that "insanity is a stronger term, and implies a greater degree of mental infirmity, than is implied in the statutory phrase, 'of unsound mind,'" was asked. Held properly refused.—*McCammon v. Cunningham*, 108 Ind. 545, 9 N. E. 455.

**[c] (Sup. 1890)**

Rev. St. 1881, §§ 2545, 2546, provide that, on petition of any inhabitant of the county in which he resides that a person is "of unsound mind, and incapable of managing his own estate," the probate court may summon a jury to try the issue, and, if they find that such person is "of unsound mind," may appoint a guardian for him. Section 2544 declares that the words "person of unsound mind" shall be taken to mean "any idiot, non compos, lunatic, monomaniac, or distracted person." Held that, in such case, an instruction that if there is in such person an essential privation of her reasoning powers, or if she is incapable of understanding and acting with discretion in the ordinary affairs of life, she is a person of unsound mind, and incapable of managing her estate, is correct.—*Fiscus v. Turner*, 125 Ind. 46, 24 N. E. 602.

**[d] (Sup. 1893)**

An instruction declaring a person of "unsound mind and incapable of managing his estate," within Rev. St. 1881, § 2545, if found incapable of conducting the ordinary business affairs of life with reasonable prudence, "and reasonable safety from his own folly and the fraud of others," is not erroneous on account of the clause quoted, although it would also have been substantially correct had the clause been omitted.—*Hamrick v. State ex rel. Hamrick*, 134 Ind. 324, 34 N. E. 3.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Ins. Per. §§ 1-3.

See, also, 22 Cyc. p. 1109; note, 29 Am. Dec. 38; note, 63 Am. St. Rep. 80.

**§ 2. Evidence of incompetency.**

Burden of proving insanity in general, see EVIDENCE, § 91.

Relevancy of evidence to show insanity, see EVIDENCE, § 103.

Reputation as to insanity, see CRIMINAL LAW, § 421.

**[a] (Sup. 1858)**

Mere inadequacy of consideration, according to the judgment of others, does not show that the contracting party was of nonsane memory.—*Johnson v. Johnson*, 10 Ind. 387.

**[b] (Sup. 1859)**

Every man being presumed to be sane until the contrary appears, the rejection of evidence tending to prove the sanity of a grantor, where no evidence has been introduced to prove him insane, is not error.—*Dearmond v. Dearmond*, 12 Ind. 455.

**[c] (Sup. 1862)**

Where one party to a contract alleges unsoundness of mind in the other party thereto, he must show by preponderance of evidence the existence of such unsoundness at the time of the making of the contract; but, if it appears that the person was at any time of unsound mind (unless from a transient cause), the presumption is that the unsoundness continues till the contrary be made to appear; and if, despite such unsoundness, the person is of sufficient disposing memory (as if the unsoundness be a monomania, not impairing his capacity to acquire and dispose of property), it devolves upon the party seeking to sustain his acts to show this state of facts.—*Crouse v. Holman*, 19 Ind. 30.

**[d] (Sup. 1876)**

On an issue as to the alleged insanity of a grantor, evidence tending to prove his sanity or insanity previous or subsequent to the execution of the deed, including the record of a subsequent inquisition by which he was found to be insane, is admissible as tending to show his mental condition at the time of its execution.—*Nichol v. Thomas*, 53 Ind. 42.

**[e] (Sup. 1882)**

The burden of proving insanity is upon the party alleging it. He cannot, by proving insanity at a day prior to the transaction in controversy, cast upon the other party the burden of proving sanity at the time of the transaction.—*Fay v. Burditt*, 81 Ind. 433, 42 Am. Rep. 142.

**[f] (Sup. 1886)**

Where insanity is once shown to exist, it will, unless from temporary cause, be presumed to continue until the contrary is made to appear; and, although the deed of a person of unsound mind, not judicially so declared, is voidable only, it will not be presumed, especially where such person was very old at the time, that reason was afterwards restored, and the deed ratified.—*Physio-Medical College v. Wilkinson*, 108 Ind. 314, 9 N. E. 167.

## [a] (Sup. 1887)

In a suit to foreclose a mortgage executed by a person afterwards adjudged to be insane, it is not error to refuse an examination of such person as a witness; nor, in the absence of an offer to prove that her condition was the same, or about the same, at the trial as when the mortgage was executed, is it error to refuse an examination of her by "three reputable physicians" as to her mental condition, especially where the evidence has nearly all been introduced before the request is made.—Hull v. Louth, 100 Ind. 315, 10 N. E. 270, 58 Am. Rep. 405.

## FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. §§ 4-10.

See, also, 22 Cyc. pp. 1117, 1118.

## § 3. Constitutional and statutory provisions.

## [a] (Sup. 1862)

2 Rev. St. 1852, p. 233, § 11, which declares "every contract, sale, or conveyance of any person, while a person of unsound mind, shall be void," applies alone to "a person of unsound mind" found to be so in the mode prescribed by the statutes.—Crouse v. Holman, 19 Ind. 30.

## [L] (Sup. 1876)

By the phrase, "a person of unsound mind" as used in the eleventh section of the act of May 29, 1852, "defining who are persons of unsound mind," etc. (2 Rev. St. 1876, p. 598), is meant only a person who has been so found in a proceeding for that purpose under such statute.—Freed v. Brown, 55 Ind. 310.

## [c] (Sup. 1882)

Where a person has been adjudged to be of unsound mind, the act of 2 Rev. St. 1876, p. 598, § 11, providing that every contract, sale, or conveyance of any person while of unsound mind shall be void, becomes immediately operative, and such operation is not dependent upon the existence of guardianship.—Redden v. Baker, 86 Ind. 191.

## FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. § 1.

## II. INQUISITIONS.

Adjudication of insanity as notice to subsequent purchaser from incompetent, see *VENDOR AND PURCHASER*, § 231.

As malicious prosecution, see *MALICIOUS PROSECUTION*, § 12.

Right of dismissal without prejudice, see *DISMISSAL AND NONSUIT*, § 2½.

## § 7. Nature and grounds of proceedings.

## [a] (App. 1893)

A proceeding to have a person declared of unsound mind, and for the appointment of a guardian if he is found incapable of managing his estate, is not *ex parte*, but is strictly adversary, and jurisdiction is only acquired by

his production in court, unless it is shown that his production would be injurious to his health, or by his appearance.—*Jessup v. Jessup*, 34 N. E. 1017, 7 Ind. App. 573.

## FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. § 15.

See, also, 22 Cyc. p. 1123.

## § 8. Jurisdiction.

## [a] (Sup. 1892)

Under Rev. St. 1881, § 2545 et seq. the circuit court has exclusive jurisdiction in proceedings to determine defendant's mental unsoundness and her capacity to manage her estate.—*Martin v. Motsinger*, 130 Ind. 555, 30 N. E. 523.

## [b] (Sup. 1903)

Acts 1875, p. 133 (*Burns' Rev. St. 1901*, §§ 6987-6995; *Rev. St. 1881*, §§ 5142-5150; *Horner's Rev. St. 1901*), providing for proceedings before justices of the peace to commit insane persons, does not repeal or conflict with Act May 6, 1853, § 12 (*Burns' Rev. St. 1901*, § 2725; *Rev. St. 1881*, § 2555; *Horner's Rev. St. 1901*), providing for such proceedings in a court having probate jurisdiction.—*Board of Com'rs of Madison County v. Moore*, 68 N. E. 905, 161 Ind. 426.

## FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. § 16.

See, also, 22 Cyc. pp. 1120, 1121.

## § 10. Parties.

## [a] (App. 1893)

In a proceeding under Rev. St. 1881, § 2545, to determine the insanity of defendant, it is not necessary to join as a party defendant a person who previously instituted like proceedings, in which a judgment was rendered, appointing one of defendants guardian of the person whose insanity is in issue, but which judgment is claimed to be void because rendered without jurisdiction of such person.—*Jessup v. Jessup*, 34 N. E. 1017, 7 Ind. App. 573.

Rev. St. 1881, § 2545, providing that whenever any one shall represent to the court having probate jurisdiction that an inhabitant of the county is of unsound mind, and incapable of managing his estate, an issue as to such person's sanity shall be tried by a jury, authorizes any person to institute such proceedings.—*Id.*

## FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. § 18.

See, also, 22 Cyc. p. 1124.

## § 13. Notice.

## [a] (Sup. 1878)

The statute authorizing a proceeding to test the sanity of an alleged insane person does not require that notice of the proceeding be given him, and the court may dispense with his personal appearance if it is satisfied that he cannot be produced in court without injury to his health.—*Hutts v. Hutts*, 62 Ind. 214.

[b] (Sup. 1883)

Rev. St. § 2545, relating to the insane, provides that on the proper written statement being filed the court shall cause the person alleged to be insane to be produced in court, and shall cause an issue to be made by the clerk of such court denying the facts set forth in such statement, which issue shall be tried by a jury to be impaneled under the direction of the court. *Held* that, where such person is in court during the entire proceedings, no further notice to him is necessary.—*Nyce v. Hamilton*, 90 Ind. 417.

[c] (Sup. 1892)

Where, in proceedings to have defendant adjudged of unsound mind and incapable of managing her estate, and for the appointment of a guardian, no notice was served on defendant, and she herself does not appear, but she is represented in court by counsel, such appearance, even if unauthorized, is binding on her until set aside.—*Martin v. Motsinger*, 130 Ind. 555, 30 N. E. 523.

[d] (App. 1893)

In case the production in court, required by Rev. St. 1881, § 2545, of one whose sanity is at issue, is dispensed with under Rev. St. 1881, § 2547, providing that it may be dispensed with if the court is satisfied that the person cannot be produced in court without injury to his health, it is necessary that process be served on him in order to give the court jurisdiction.—*Jessup v. Jessup*, 7 Ind. App. 573, 34 N. E. 1017.

## FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. § 21.

See, also, 22 Cyc. p. 1124; note, 23 L. R. A. 737.

## § 14. Appearance and representation by attorney.

[a] (Sup. 1892)

Rev. St. 1881, § 5864, providing that the prosecuting attorney shall "protect the interest of all persons of unsound mind," does not require such officer to interpose in proceedings to determine a person's mental condition, and a defendant in such proceedings is not bound by the act of the prosecuting attorney in assuming to appear for her.—*Martin v. Motsinger*, 130 Ind. 555, 30 N. E. 523.

[b] (Sup. 1904)

Where a lunatic was too imbecile to entertain a desire that a defense to a lunacy inquisition should be made for him, the protection of his interests was properly confided to the prosecuting attorney, as authorized by Burns' Ann. St. 1901, § 2715.—*Chase v. Chase*, 71 N. E. 485, 163 Ind. 178.

On rule to determine the authority of attorneys to prosecute an appeal from a decree of lunacy, under a prior contract with the alleged lunatic, the lunacy decree cannot be treat-

ed as an adjudication that the alleged lunatic was of unsound mind.—*Id.*

Where an alleged lunatic, at the time an inquisition was instituted, was so insane that he was wholly oblivious to the fact, and was incapable of knowing that his mental status was involved in the proceeding, a prior agreement, entered into between him and his attorneys at a time when he was sane, conferred no authority on such attorneys to appear for him at the trial of such inquisition, or to prosecute an appeal from a decree finding him to be a person of unsound mind.—*Id.*

## FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. § 22.

See, also, 22 Cyc. pp. 1124, 1129.

## § 15. Custody of person pending proceedings.

[a] (Sup. 1909)

Burns' Ann. St. 1908, §§ 3706, 3712, requiring the clerk of the circuit court, on receipt of the acceptance of an application for the admission of an insane person from the superintendent of the insane hospital, to issue a warrant to the sheriff commanding him to arrest and convey such person to the hospital, and requiring the clerk to direct how the patient shall be taken care of until he can be admitted to the extent of confinement in the county jail, if necessary, when construed liberally to effectuate their purpose, give the clerk power to issue a warrant for the arrest of a person adjudged insane under section 3691 et seq., and to direct his confinement in the county jail while waiting for the order of commitment.—*State ex rel. Gillespie v. Barr*, 88 N. E. 604.

The warrant issued by the clerk of the circuit court under Burns' Ann. St. 1908, §§ 3706, 3712, authorizing the clerk to direct how a person adjudged insane shall be taken care of until he can be admitted to the hospital, need not set forth the jurisdictional matters as to the residence of such person, since such matters were determined by the justice before whom the proceedings were brought, and since his judgment thereon is conclusive on the lunatic, the clerk, and the sheriff receiving such warrant.—*Id.*

The warrant issued by the clerk of the circuit court under Burns' Ann. St. 1908, §§ 3706, 3712, for the arrest and confinement in the county jail of a person adjudged insane until he can be admitted to the hospital, need not contain the reasons why the clerk issued it.—*Id.*

A sheriff, receiving a warrant directing him to arrest and detain in the county jail a person adjudged insane until he could be committed to the hospital, must search for, arrest, and confine such person in the county jail and hold him as authorized by Burns' Ann. St. 1908, § 3691 et seq., until such person can be admitted to the hospital; the sheriff, under section 9814, being keeper of the county jail and

bound to execute all process directed to him by legal authority.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. INS. PER. § 23.

See, also, 22 Cyc. p. 1127.

**§ 19. Conduct of hearing or trial in general.**

[a] (Sup. 1883)

One who has instituted a proceeding, under the statute, to declare another of unsound mind and to procure the appointment of a guardian, is not entitled to dismiss the proceeding at his pleasure.—*Galbreath v. Black*, 89 Ind. 300.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. INS. PER. §§ 24, 27.

See, also, 22 Cyc. p. 1127.

**§ 21. Personal examination.**

[a] (Sup. 1861)

On trial on an information for lunacy, the judge may, of his own motion, order an examination of the supposed lunatic; neither will it be error for him to order it on motion of persons interested. And perhaps the jury may require and enter into such examination; but, where the triers of the questions do not desire the examination, there is no error in a refusal of the court to order it on motion of the party charging the unsoundness.—*Jones v. Van Gundy*, 16 Ind. 490.

[b] (Sup. 1890)

Rev. St. 1881, § 2545, requires that the court shall cause the person alleged to be of unsound mind to be produced in court. Section 2547 provides that such personal appearance may be dispensed with if the court is satisfied that it cannot be caused without injury to the person's health. *Held*, that the legislature did not intend that the jury should, in making up their verdict, consider the appearance and conduct of the person, but only required her presence in order that she might have the opportunity of being heard, and of meeting the witnesses face to face.—*Fiscus v. Turner*, 125 Ind. 46, 24 N. E. 662.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. INS. PER. § 29.

See, also, 22 Cyc. p. 1127.

**§ 22. Finding and return.**

[a] (Sup. 1885)

A verdict as follows: "We, the jury, find that E. C. is a person of unsound mind, and incapable of managing her estate"—covers the entire case, and is sufficient to support a judgment pronouncing E. C. not to be of sound mind and to be incapable of managing her estate.—*Cochran v. Amsden*, 3 N. E. 934, 104 Ind. 282.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. INS. PER. § 30.

See, also, 22 Cyc. p. 1129.

**§ 25. Traversing and setting aside inquisition.**

[a] (Sup. 1897)

It is such a fraud on a court to falsely represent that an alleged insane person, for whom a guardian is sought to be appointed, cannot be brought into court without injury to his health, and thereby cause the court not to comply with Rev. St. 1894, § 2715, providing that an alleged insane person shall be produced in court before he shall be adjudged insane, as to be ground for setting aside the judgment.—*Asbury v. Frisz*, 47 N. E. 328, 148 Ind. 513.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. INS. PER. §§ 32-34.

See, also, 22 Cyc. pp. 1130, 1131.

**§ 26. Conclusiveness of adjudication.**

As affecting testamentary capacity, see WILLS, § 35.

[a] (Sup. 1882)

Where one is once authoritatively pronounced insane in judicial proceedings, the presumption of insanity continues until the fact of sanity shall be found as provided by statute, and it is immaterial that there is no guardian; nor can a marriage in any way affect the presumption.—*Redden v. Baker*, 86 Ind. 191.

[b] (Sup. 1884)

Record of justices in 1872 that a person was a proper person to be admitted to the hospital for the curable insane was no evidence that he was insane in 1881.—*Breedlove v. Bundy*, 96 Ind. 319.

[c] (Sup. 1889)

B. was adjudged insane, and a guardian appointed for him. Three years afterwards he was married, and three years after his marriage his guardian was discharged. B. and the woman he married lived together as man and wife until B.'s death, a period of 33 years, and during that time no question was ever raised as to the sanity of B. or the legality of the marriage. *Held*, that the presumption of continued insanity, after one has been adjudged insane, was overcome in B.'s case by the counter presumption of the legality of the marriage relation.—*Castor v. Davis*, 120 Ind. 231, 22 N. E. 110.

[d] (Sup. 1890)

A proceeding by a lunatic to enjoin the sale of his property was based on the theory that the judgment adjudging him insane and appointing a guardian was erroneous. That judgment was affirmed on appeal. *Held*, that there was therefore no foundation for the proceeding to rest upon.—*Fiscus v. Guthrie*, 125 Ind. 598, 25 N. E. 285.

[e] (Sup. 1902)

Though a judgment in a proceeding to adjudge a person to be of unsound mind may be set aside by the court in which it is rendered on the application of any person entitled to

be heard, where the record does not show appearance or notice, it is conclusive until so set aside; and any proceeding brought, while it stands unrevoked, in any other county, which results in either the appointment of a guardian or a judgment that the party is of sound mind, is consequently void.—*Soules v. Robinson*, 62 N. E. 909, 158 Ind. 97, 92 Am. St. Rep. 301.

On collateral attack it will be presumed, in support of the jurisdiction of a circuit court in a proceeding to adjudge a person to be of unsound mind, that it acquired jurisdiction of the person of the alleged incompetent, though the record does not show appearance or notice.—*Id.*

Where want of notice does not affirmatively appear from the face of the record, a judgment in a proceeding to adjudge a person to be of unsound mind, adjudging the alleged incompetent to be of unsound mind, is not void, and hence is not subject to collateral attack.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. §§ 35, 36.

See, also, 22 Cyc. pp. 1133-1135; note, 18 Am. Dec. 421.

#### § 27. Review.

[a] (Sup. 1877)

In an action to review proceedings declaring plaintiff a person of unsound mind, the issue in legal effect is as to the validity of such proceedings; and a verdict of the jury that plaintiff is a person of sound mind and capable of managing his estate is not responsive.—*Meharry v. Meharry*, 59 Ind. 237.

In an action to review proceedings declaring plaintiff a person of unsound mind, the complaint must set out a complete record of such proceedings.—*Id.*

A person who has been declared insane and is under guardianship cannot, in person or by next friend, bring an action to review such proceedings; but such action must be brought by the committee or guardian of his estate.—*Id.*

[b] (Sup. 1878)

From a judgment in a statutory inquest declaring a person to be of unsound mind, he may appeal to the supreme court personally.—*Cuneo v. Bessoni*, 63 Ind. 524.

[c] (App. 1893)

Under Rev. St. 1881, § 2545, relating to proceedings to adjudge a person of unsound mind, whenever judgment has been rendered in favor of the person charged after the trial judge with the aid of the jury has reached a conclusion in favor of sanity, the proceeding should be at an end, and no appeal from such a determination is contemplated or can be allowed.—*Studabaker v. Markley*, 34 N. E. 606, 7 Ind. App. 308.

[d] (App. 1908)

Where a prosecuting attorney appeared and defended a proceeding for an adjudication of incompetency and for the appointment of a guardian for a person of alleged unsound mind under Burns' Ann. St. 1901, § 2715, making it the prosecuting attorney's duty to appear and make proper defense and protect the interests of such person, the prosecuting attorney, after his motion for a new trial had been stricken from the files, had no right to prosecute an appeal from a judgment in favor of petitioner, there being no statutory authority therefor.—*Keeley v. Keeley*, 84 N. E. 767, 41 Ind. App. 672.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. §§ 37, 38.

See, also, 22 Cyc. p. 1136.

#### § 28. Costs and fees.

[a] (Sup. 1874)

Under Act May 29, 1852, § 5, relating to insane persons and the appointment of guardians, etc., the guardian of an insane person may be required to pay an attorney, employed by the children of such insane person to prosecute the proceeding in which such person was adjudged insane and said guardian was appointed, for services rendered under such employment.—*Brownlee v. Switzer*, 49 Ind. 221.

[b] (Sup. 1879)

Under 2 Rev. St. 1876, p. 600, § 5, the property of the ward cannot be bound for anything more than the reasonable value of the services rendered in procuring a verdict of insanity, and the appointment of a guardian, without regard to any contract which may have been made in relation thereto, before the inquest by the person subsequently appointed guardian.—*State ex rel. Nave v. Newlin*, 69 Ind. 108.

Under 2 Rev. St. 1876, p. 600, § 5, providing that, "whenever a guardian shall be appointed for any person of unsound mind, he shall pay the expense of such trial, but, if the jury find that such person is not of unsound mind, then the court shall give judgment against the person making the complaint for the costs," no specific contract in relation thereto, made before the determination of the injury, can bind the estate of the ward beyond the reasonable value of the services rendered in such inquest.—*Id.*

[c] (Sup. 1883)

One instituting proceedings under Rev. St. 1881, § 2545, to have another declared of unsound mind, and a guardian appointed for him, is chargeable with the costs of the proceedings, where the jury find that such person is of sound mind.—*Galbreath v. Black*, 89 Ind. 300.

[d] (Sup. 1885)

It is proper to render judgment for costs against one who unsuccessfully petitions for a discontinuance of the guardianship of an in-

sane person.—*Cochran v. Amsden*, 104 Ind. 282, 3 N. E. 934.

[e] (*Sup.* 1887)

A proceeding to have a person adjudged of unsound mind is a special statutory proceeding, and not a civil action; but such a proceeding is under the control of the court, and, where it permits a dismissal upon complainant's motion, it may also award costs against the complainant, who, not having objected thereto below, cannot successfully assail such judgment on appeal.—*Ruhlman v. Ruhlman*, 110 Ind. 314, 11 N. E. 294.

[f] (*App.* 1903)

As *Burns' Rev. St.* 1901, § 2718, expressly directs costs to be against applicant where the person is found not to be of an unsound mind, and as no appeal lies from such a finding, an order taxing the costs against the applicant cannot be reviewed, as it would necessitate a review of the action of the jury in making the finding.—*State ex rel. Brooking v. Branyan*, 66 N. E. 464, 30 Ind. App. 502.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. §§ 39-41; 13

CENT. DIG. Costs, § 379.

See, also, 22 Cyc. p. 1137.

## § 29. Restoration to sanity.

Avoidance of conveyances or contracts, see post, § 79.

Discharge of guardian operating as, see post, § 37.

[a] (*Sup.* 1855)

*Rev. St.* 1852, p. 333, § 10, providing that, whenever it is alleged that a "person of unsound mind has become of sound mind again, the fact may be determined in the same manner as the allegation of the unsoundness of the mind," does not enable a person under guardianship as a lunatic to have the fact of his restoration tried and determined on his personal application.—*Gillespie v. Thompson*, 7 Ind. 353.

[b] (*Sup.* 1885)

The guardianship of a person of unsound mind cannot be discontinued unless he is so far restored to reason as to be capable of understanding the ordinary affairs of life.—*Cochran v. Amsden*, 104 Ind. 282, 3 N. E. 934.

In a proceeding to remove the disability of one adjudged to be of unsound mind, on the ground that his reason has been restored, it is proper to instruct the jury that the question for their decision is whether the person whose mental soundness is under investigation is then of sound mind, and capable of managing his estate; and it is also proper to instruct them that, if they find against the petitioner, they should state in their verdict that he is of unsound mind, and incapable of managing his estate.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. §§ 42, 140, 150.

See, also, 22 Cyc. p. 1146.

## III. GUARDIANSHIP.

Actions against guardian, see post, § 89.

Authority, rights, and duties of guardian or committee as to actions, see post, § 93.

Effect on testamentary capacity, see WILLS, § 35.

Estoppel of guardian to deny insanity, see ESTOPPEL, § 64.

Powers and duties of guardian or committee as to custody and support of ward, see post, § 54.

Powers and duties of guardian or committee as to property, see post, § 65.

## § 30. Nature and grounds.

[a] (*Sup.* 1855)

A person could not legally act as a guardian of an insane person under *Rev. St.* 1843, until the fact of insanity was established by a jury, in accordance with the statute.—*Coon v. Cook*, 6 Ind. 268.

Under *Rev. St.* 1843, a person could not be regarded as insane so as to authorize the appointment of a guardian, unless found to be so by jury impaneled as therein provided.—*Id.*

[b] (*Sup.* 1886)

The jurisdiction of the proper court to appoint a guardian is not confined to cases of insanity, idiocy, or lunacy, strictly so called, but extends to every case of mental unsoundness which has reached such a degree as renders its subject incapable of conducting the ordinary affairs of life, and leaves him in condition to become the victim of his own folly or the fraud of others; but such a degree of mental unsoundness should be clearly made to appear.—*McCammon v. Cunningham*, 108 Ind. 545, 9 N. E. 455.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. §§ 43, 45, 61.

## § 31. Appointment, qualification, and tenure of guardian or committee.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. §§ 44-60.

See, also, 22 Cyc. pp. 1139-1144.

## § 33. — Proceedings for appointment.

Change of venue, see VENUE, § 36.

[a] (*Sup.* 1897)

Proceedings for the appointment of a guardian of a person of unsound mind are not *ex parte*, but are adversary, and notice is indispensable unless waived.—*Berry v. Berry*, 46 N. E. 470, 147 Ind. 176.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. §§ 44-46, 48, 50, 51, 59.

See, also, 22 Cyc. pp. 1141-1144.

### § 36. — Operation and effect of appointment in general.

[a] (Sup. 1882)

The appointment of a guardian to an insane person is conclusive as to the latter's insanity.—*Pavey v. Wintrobe*, 87 Ind. 379.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. INS. PER. §§ 54, 55.

See, also, 22 Cyc. p. 1144.

### § 37. — Resignation and discharge.

[a] (Sup. 1882)

The discharge of the guardian of a lunatic upon his report that his ward had intermarried, and that the guardian has turned over to her husband all the property of the estate, does not amount to an adjudication that the lunatic has been restored to her reason.—*Redden v. Baker*, 86 Ind. 191.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. INS. PER. § 56.

See, also, 22 Cyc. pp. 1145, 1146.

### § 38. — Disqualification and removal.

[a] (Sup. 1874)

An order of removal of a guardian is a final judgment, from which an appeal lies to the supreme court.—*Ward v. Angevine*, 46 Ind. 415.

Pending a petition to remove the guardian of an insane person on the ground that he has taken his ward to a neighboring state and was there keeping him, an order was made that such guardian should bring his ward within the jurisdiction of the court by a day fixed. Having failed to perform the order, a rule was entered at a subsequent term requiring the guardian to show cause why he should not be attached. To this he presented an answer, to which exceptions were filed and submitted. Without deciding the exceptions, the court summarily removed the guardian, and refused an application on his part to file an answer to the petition for his removal and to introduce his evidence. *Held* that, on the exceptions to the answer to the rule to show cause, etc., the question of the removal of the guardian was not before the court, and hence it was error to pass over the exceptions and summarily remove him without allowing him to file an answer and introduce his evidence.—*Id.*

[b] (Sup. 1890)

The record failing to show that any inventory had been filed when the order therefor was made, it will be presumed, on appeal from an order removing the guardian of an insane person for failure to file an inventory in support of the judgment, that no inventory had been filed, and that a report was then due.—*Ex parte Cottingham*, 124 Ind. 250, 24 N. E. 750.

The guardian of an insane person having failed to comply with an order of court directing him to make a report and file an inventory

instantly, a citation was issued and served on him to report within three days. No attention being paid to the citation, the court, 12 days thereafter, removed the guardian, and appointed a successor. *Held*, that under Rev. St. 1881, § 2521, providing that a guardian should file an inventory within 90 days from appointment, and on failure should be removed, the guardian was not entitled to notice that such order of removal would be made.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. INS. PER. §§ 57, 58, 60.

See, also, 22 Cyc. p. 1145.

### § 40. Authority of guardian or committee in general.

[a] (Sup. 1877)

The same duties are required of, and the same powers granted to, the guardian of an insane person as are required of, and granted to, the guardian of a minor, so far as the same are applicable.—*Stumph v. Guardianship of Pfeiffer*, 58 Ind. 472.

[b] (Sup. 1879)

The guardian of an insane person cannot before his appointment make a specific contract for the employment of an attorney which will bind the estate of his ward.—*State ex rel. Nave v. Newlin*, 69 Ind. 108.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. INS. PER. § 62.

See, also, 22 Cyc. p. 1149.

### § 41. Compensation of guardian or committee.

[a] (App. 1897)

Where the court, in a proceeding without notice to a person charged with insanity, declares him insane, and appoints for his person and property a guardian, such guardian is entitled to compensation for his services, and to expenses and costs reasonably incurred in managing the estate.—*Jessup v. Jessup*, 46 N. E. 550, 17 Ind. App. 177.

[b] (App. 1902)

A guardian of a person of unsound mind, who, under Burns' Rev. St. 1901, § 2721 (*Hornor's Rev. St. 1901*, § 2551), has the same duties and powers as the guardian of a minor, is subject to the statute which provides that a guardian failing to render an account at least once every two years shall receive no allowance for services, and therefore credits taken for services in such cases should be charged to the guardian as a part of the assets of the estate.—*Peterson v. Erwin*, 62 N. E. 719, 28 Ind. App. 330.

[c] (App. 1909)

The guardian of an insane person who, pursuant to his duty, takes care of her, and furnishes her a suitable home, board, clothing, and necessities, is entitled to allowance therefor from her estate, notwithstanding he is a relative of hers, though this may be considered

in fixing the amount.—Taylor v. Taylor, 43 Ind. App. 367, 87 N. E. 25.

The acts of the guardian of an insane person in taking care of her need not be authorized by the court in advance, nor need the compensation be fixed, but the court may afterwards approve his acts, and pass on the compensation.—Id.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. §§ 39, 63.

See, also, 22 Cyc. p. 1153.

#### § 42. Accounting by guardian or committee.

[a] (App. 1899)

On the trial of exceptions filed by an administrator of a deceased insane person, to the final account of his guardian, an application for a continuance on the ground of the absence of the administrator was made on affidavit by his attorney showing that he was sick in bed, that he lived 125 miles from the place of trial, that he was a material and competent witness in behalf of the estate, and setting out fully all the facts to which he would testify if present, and that his attorney could not safely go to trial without him because he had carefully examined the guardian's account, and the case could not be properly presented in his absence. The affidavit was supported by a letter from his wife, and a certificate from a physician showing that he was not able to be in court. The attorney for the guardian in open court admitted that, if the witness was present, he would testify to the facts stated in the affidavit. The court refused to continue the case, and rendered judgment approving the report, and discharging the guardian. *Held*, that the refusal to continue the case was an abuse of discretion, for which a new trial would be ordered.—Schwartz v. Parsons, 53 N. E. 785, 22 Ind. App. 340.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. §§ 64-67;  
3 CENT. DIG. App. & E. § 4412.

See, also, 22 Cyc. pp. 1149-1153.

#### § 44. Death of person under guardianship.

[a] (Sup. 1877)

The guardianship of an insane person is terminated by the death of the ward, and the duty of the guardian then is to fully account for, and pay over to the proper person, all of his deceased ward's estate remaining in his hands; but his performance of such duty cannot be enforced by an order of the court to pay such estate into court, for the use of the proper person, within a certain time, or "show cause why he does not stand in contempt."—Stumph v. Guardianship of Pfeiffer, 58 Ind. 472.

[b] (Sup. 1902)

The failure of persons caring for an insane person, under a contract with his guardi-

an, to collect compensation from the guardian or the ward's estate prior to the death of the ward does not preclude the collection of such claim from the estate of the ward in the possession of his executor, the guardianship being expressly terminated by Burns' Rev. St. 1901, § 2722, on the death of the ward.—Masters v. Jones, 64 N. E. 213, 158 Ind. 647.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. §§ 69, 70.

See, also, 22 Cyc. p. 1148.

### IV. CUSTODY AND SUPPORT.

Laws relating to as abridging privileges and immunities of citizens of the several states, see CONSTITUTIONAL LAW, § 207.

Laws relating to hospital for insane as encroachment by legislature on executive, see CONSTITUTIONAL LAW, § 58.

Liability of estate for support, see post, § 63. Mandamus to compel acceptance of custody, see MANDAMUS, § 73.

Validity of laws as conferring on judiciary executive power, see CONSTITUTIONAL LAW, § 74.

#### § 46. Power to control and regulate.

[a] (App. 1908)

Under Burns' Ann. St. 1908, § 3712, insane persons may be confined in the county jail.—Pritchett v. Board of Com'rs of Knox County, 42 Ind. App. 3, 85 N. E. 32.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. §§ 73, 77.

See, also, 22 Cyc. p. 1164; note, 58 L. R. A. 931.

#### § 47. Constitutional and statutory provisions.

Effect of constitutional provisions on past legislation, see CONSTITUTIONAL LAW, § 24.

Implied repeal of special by general act, see STATUTES, § 162.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. § 74.

#### § 49. Commitment to asylum.

Mandamus to compel, see MANDAMUS, § 23.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. §§ 78-80.

See, also, 21 Cyc. pp. 1158-1161.

#### § 52. Compensation for support in asylum.

[a] (Sup. 1890)

Const. art. 9, § 3, confers power on boards of county commissioners to provide farms as an asylum for those who, by reason of age, infirmity, or other misfortune, have claims on the sympathies and aid of society. Rev. St. 1881, §§ 6069, 6090, provide that every county should relieve and support all poor and indi-

gent persons lawfully settled therein; that it should be lawful for the county commissioners to purchase a tract of land, and to build, establish, and organize an asylum for the poor and employ some humane and responsible person to take charge of them; that all poor persons who have become permanent charges on the county may be received into and supported in the county asylum; and that the county commissioners may assess a tax for the support of the poor, and for the establishment and maintenance of an asylum. There is no express authority in the statute for the county board to admit any one into the asylum by contract, or to receive pay for care and support of any one admitted. *Held*, that the organization and maintenance of county asylums for the poor and the care and support of those who are admitted into them is part of the scheme of unmixed public charity and benevolence, inaugurated under the express sanction of the constitution, and, where the commissioners admitted an insane person into the asylum, there could be no recovery by the county against the estate of such insane person for his care and maintenance, either under an express or an implied contract.—Board of Com'rs of Montgomery County v. Ristine, 24 N. E. 990, 124 Ind. 242, 8 L. R. A. 461.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. INS. PER. § 82.

### § 53. Duties and liabilities of relatives.

#### [a] (Sup. 1854)

The moral obligation upon a father to support an adult idiot son is stronger than upon a brother, both being equally able.—House v. House, 6 Ind. 60.

#### [b] (Sup. 1875)

The board of commissioners of a county cannot maintain an action against the husband of an insane wife for her board, attendance upon her, and the use of a room for lodging her in the county asylum for the poor, though the husband promised to pay for the same.—Board of Com'rs of Noble County v. Schmoke, 51 Ind. 416.

#### [c] (App. 1891)

Rev. St. § 2842, provides that all insane persons residing in the state of Indiana, and having a legal settlement in any county therein, shall be entitled to be maintained in the insane hospital "at the expense of the state," when admitted thereto in the manner prescribed. Section 2871 requires all the taxable costs incident to the inquest to be paid out of the county treasury of the proper county. Section 2856 makes it the duty of the county clerk to send suitable clothing with every patient admitted to the hospital, and, if not otherwise furnished, requires him to purchase it, to be paid for out of the county treasury. Section 2857 requires the superintendent, after the admission of the patient, if clothing is not otherwise furnished, to purchase it, and make out an ac-

count against the proper county, and send it to the state treasurer for collection. *Held*, that the county is ultimately liable for all these expenses, and has no claim over against the husband of an insane patient.—Board of Com'rs of Marshall County v. Burkey, 1 Ind. App. 565, 27 N. E. 1108.

Rev. St. §§ 2762-2767, providing that the expenses of maintenance of the blind, deaf, and dumb in public institutions may be recovered from the parents, guardians, or other friends of the pupils by action in the name of the county, although it names the hospital for the insane, does not authorize a recovery for such expenses against the estate of a husband incurred on behalf of his insane wife.—Id.

Act March 11, 1889 (Elliott's Supp. § 568), authorizing the trustees of the insane hospital to sue, in the state's behalf, the estate of an insane patient to recover the expense of his maintenance, gives a county no right to recover such expenses from the husband of an insane patient.—Id.

#### [d] (App. 1897)

Where a son became insane after he ceased to be a member of his mother's family, and while he was insane she rendered services in taking care of him, in good faith, and with an understanding with one supposed to be his legal guardian that she was to be compensated therefor, a reasonable sum paid her for such services was a proper charge against his estate.—Jessup v. Jessup, 46 N. E. 550, 17 Ind. App. 177.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. INS. PER. §§ 84, 85.

See, also, 22 Cyc. p. 1162.

### § 54. Powers and duties of guardian or committee of person.

#### [a] (Sup. 1893)

Where one boarded and cared for a person of unsound mind at the request of his guardian, and on an understanding that compensation should be made therefor by the guardian, and out of the ward's estate, such compensation is a proper charge against the estate.—Miller v. Hart, 34 N. E. 1003, 135 Ind. 201.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. INS. PER. §§ 76, 86.

See, also, 22 Cyc. p. 1164.

### § 56. Indigent insane.

#### [a] (Sup. 1903)

Acts 1855, p. 134, c. 65, § 4 (Burns' Rev. St. 1901, § 6991; Rev. St. 1881, § 5146; Horner's Rev. St. 1901, § 5146), provides that, on the determination of the insanity of a poor person by a justice, he shall appoint some person to take charge of the insane person, for which the guardian shall receive reasonable compensation from the commissioners of the county. The county reform law (Acts 1899, p. 354, c. 154, § 33; Burns' Rev. St. 1901, §§ 5594m1)

provided that thereafter the county commissioners should have no authority to make any allowance for voluntary services, or to pay any money for the relief of any poor person not at the time an inmate of some county institution, and such statute repealed all laws conferring any authority to make such payment. *Held*, that the latter provision repealed section 4 of the act of 1855, so far as it provided for compensation for care of an insane person, and one caring for an insane person under appointment pursuant to the act of 1855 could not recover for services after the taking effect of the act of 1899.—Board of Com'rs of Harrison County v. Hunter, 68 N. E. 1022, 161 Ind. 478.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Ins. Per. § 88.

See, also, 22 Cyc. p. 1164.

**§ 58. Proceedings to enforce liability for support.**

Grounds for demurrer to pleading, see PLEADING, § 194.

[a] (Sup. 1893)

A complaint in an action against a person of unsound mind and his guardian, alleging the furnishing of board to the ward at the request of the guardian with promise of payment, and asking that the amount due be adjudged a valid claim against the ward's estate, and that the guardian be directed to pay it out of the estate of the ward in his hands, is not demurrable on the ground that it does not seek to make the guardian personally liable, as it states a claim good against the estate, and Rev. St. 1881, §§ 2521, 2551, declare it the duty of the guardian to pay all just debts due from the ward out of the estate in his hands.—Miller v. Hart, 135 Ind. 201, 34 N. E. 1003.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Ins. Per. § 90.

See, also, 22 Cyc. p. 1168.

**V. PROPERTY AND CONVEYANCES.**

Acceptance of gift from person of unsound mind, as creating constructive trust, see TRUSTS, § 94.

Cancellation in equity, see CANCELLATION OF INSTRUMENTS.

Construction of allegations in pleading relating to, in general, see PLEADING, § 34.

Real estate of deceased incompetent as passing to administrator or heirs, see EXECUTORS AND ADMINISTRATORS, § 39.

Taxation of property, see TAXATION, §§ 254, 270, 319, 735, 827.

**§ 60. Capacity to convey.**

Mental capacity requisite to make deed, see DEEDS, § 68.

[a] (Sup. 1832)

It seems that a conveyance may be avoided by a grantor, either at law or in equity, if at

the time of its execution he was so destitute of understanding as not to know what he was doing, whether the incapacity was occasioned by idiocy, lunacy, or drunkenness.—Harbison v. Lemon, 3 Blackf. 51, 23 Am. Dec. 376.

**FOR CASES FROM OTHER STATES,**

SEE 27 CENT. DIG. Ins. Per. §§ 93-99.

See, also, 22 Cyc. p. 1170.

**§ 61. Validity of conveyances.**

Conveyances in fraud of creditors, see FRAUDULENT CONVEYANCES, § 240.

Record of adjudication of insanity as notice to subsequent purchaser, see VENDOR AND PURCHASER, § 231.

[a] (Sup. 1865)

The deed of a person of unsound mind, not under guardianship, conveys a seisin to the grantee; such deed being voidable only, and not void.—Somers v. Pumphrey, 24 Ind. 231.

[b] (Sup. 1876)

The deed of a person non compos mentis, under guardianship, is void; of one not under guardianship is voidable only.—Nichol v. Thomas, 53 Ind. 42.

[c] (Sup. 1882)

Where one had not been adjudged to be of unsound mind, his mortgage was not void, and, until disaffirmed, it justified the taking and holding of the possession of the property by the mortgagee.—Fay v. Burditt, 81 Ind. 433, 42 Am. Rep. 142.

[d] (Sup. 1884)

A mortgage made by a wife, while insane, to secure a loan to her husband, she continuing insane all her life, cannot be enforced, although she was apparently sane, was never judicially declared insane, and never disaffirmed the mortgage, and the plaintiff had no notice of her insanity and took the mortgage in good faith, and the husband is insolvent.—Northwestern Mut. Fire Ins. Co. v. Blankenship, 94 Ind. 535, 48 Am. Rep. 185.

[e] (Sup. 1887)

Where an insane person conveys land, without any consideration, to one who, for aught that appears, accepts the deed with knowledge of the insanity, and another, relying upon the public records, advances money to such grantee, and takes a mortgage on such land from him without knowledge that the grantor was insane at the time the deed was executed, there being nothing to show that any part of the loan was ever received by the insane person, or used for her benefit, the mortgage cannot be enforced against her; and the fact that there was no disaffirmance prior to the action can make no difference where it appears that there was no guardian, and that she was continuously insane. The filing of an answer and cross-complaint by the guardian is a sufficient disaffirmance in any event.—Hull v.

Louth, 109 Ind. 315, 10 N. E. 270, 38 Am. Rep. 405.

[f] (Sup. 1887)

Conveyances made by insane persons may be avoided unless they are afterwards ratified by the grantors at a time when they have a capacity to ratify. This is so even though the land conveyed may have come into the possession of a third person who purchased for full value and without notice of the mental infirmity of the grantors on account of whose insanity the deed is assailed. Persons are affected with constructive notice of the incapacity to convey of those through whom they claim title.—Gray v. Turley, 11 N. E. 40, 110 Ind. 254.

[g] (Sup. 1889)

It seems that a judgment creditor cannot have a conveyance by an insane person set aside.—Rollet v. Heiman, 22 N. E. 666, 120 Ind. 511, 16 Am. St. Rep. 340.

[h] (Sup. 1892)

A deed of land given by one not judicially declared to be insane, cannot, during his lifetime, be avoided on the ground of his insanity, by a person to whom, under the provisions of a will, the land would descend if not disposed of by the grantor during his lifetime.—McMillan v. William Deering & Co., 139 Ind. 70, 38 N. E. 398.

[i] (Sup. 1900)

Until disaffirmed, a voidable release of a mortgage executed by an insane person not under guardianship extinguishes all his rights under the mortgage.—Aetna Life Ins. Co. v. Sellers, 56 N. E. 97, 154 Ind. 370, 77 Am. St. Rep. 481.

[j] (Sup. 1902)

A deed of a person of unsound mind not under guardianship is not void, but voidable, and vests the title to the land in the grantee the same as an impeachable deed until disaffirmed by the grantor on becoming sane or by his heirs after his death.—Downham v. Holloway, 64 N. E. 82, 158 Ind. 626, 92 Am. St. Rep. 330.

[k] (Sup. 1908)

A deed made by a person of unsound mind before office found, the grantee having had no knowledge of such grantor's mental incapacity, and having dealt fairly with him, is voidable only, and the grantee must be put in statu quo before the deed may be avoided.—Studabaker v. Faylor, 170 Ind. 498, 83 N. E. 747, 127 Am. St. Rep. 397.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. §§ 93-99.

See, also, 22 Cyc. p. 1171; notes, 19 L.

R. A. 489, 37 L. R. A. 332.

#### § 62. Claims against estate in general.

[a] (App. 1891)

Services rendered to a lunatic before he became insane constitute no cause of action

against his guardian, though the latter has failed to pay for them on demand.—Baker v. Groves, 1 Ind. App. 522, 27 N. E. 640.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. §§ 108, 109.

See, also, 22 Cyc. p. 1176.

#### § 63. Liability of estate for support

[a] (Sup. 1902)

Adult daughters of an insane person, who have lived with him prior to his insanity, and who take care of him at his home at the request of his guardian, and on the latter's promise that they shall receive pay therefor, are not precluded from receiving compensation by the rule that when relatives live together as members of a common family there is no implied obligation to pay for services rendered for each other.—Masters v. Jones, 64 N. E. 213, 138 Ind. 647.

The guardian of an insane person may contract for the care of his ward, and charge the ward's estate with the expense thereof, either by the direction of the circuit court or subject to its approval.—Id.

Where a guardian of an insane person employs persons to care for the latter without the circuit court having fixed the compensation to be paid therefor, the amount to be allowed against the estate of the ward is nevertheless subject to the approval and judgment of the court.—Id.

[b] (App. 1902)

A person caring for an insane person under contract with his guardian to be compensated from the ward's estate, made without a precedent order of court, is not required to proceed for such compensation against such guardian personally or against his estate, or make any demand on him or his administrator, before bringing suit against his successor as guardian.—Hart v. Miller, 64 N. E. 239, 29 Ind. App. 222.

Failure of the guardian of an insane person to get an order of court directing the employment of a person to care for the ward before such a person is employed does not defeat the latter's right to be compensated from the ward's estate.—Id.

[c] (App. 1909)

Burns' Ann. St. 1908, §§ 3101, 3102, provides for the appointment of a guardian for an insane person on the petition of any person. Section 3111 provides that, if it appear dangerous for an insane person to be at large, the court shall make an order for his safe-keeping and direct the expenses to be paid out of his estate or out of the county treasury. Section 3691 et seq. provides for committing an insane person to the insane hospital at the expense of the state. Section 3879 et seq. provides for complaint before a justice of the peace in relation to a dangerously insane person, and provides that the justice may appoint a resident

of the county to take charge of the incompetent, for which he shall receive compensation from the county. A complaint against the guardian of an insane person alleged that, while she was violently insane, and at large, and wholly destitute and without a guardian, and while she was exposing herself to severe weather and dangerously armed, plaintiff took charge of her and maintained her, and recovery was sought for reasonable compensation. *Held*, that the complaint stated no cause of action.—*Stewart v. Unger*, 88 N. E. 716.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. §§ 89, 106.

See, also, 22 Cyc. p. 1176.

### § 64. Allowances to family.

[a] (Sup. 1891)

A physician who renders medical attention to the wife of an insane man, on request of the latter's guardian, may recover therefor from the guardian out of the insane husband's property.—*Booth v. Cottingham*, 126 Ind. 431, 26 N. E. 84.

[b] (App. 1893)

The wife of an insane husband may procure necessities, and her husband's estate will be liable therefor, or, if his guardian refuses to furnish support, she may apply to the court under whose authority he is acting, to compel him to make suitable provision.—*Hallett v. Hallett*, 8 Ind. App. 305, 34 N. E. 740.

Where, before appointment of a guardian for an insane husband, the wife and children are in possession of his land, and raise a crop thereon, they are entitled thereto for their support, and may recover from the guardian as an individual, if he takes possession and sells the same.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. § 107.

See, also, 22 Cyc. p. 1179.

### § 65. Powers and duties of guardian or committee of estate.

[a] (Sup. 1877)

A guardian of an insane person, who allows his ward's money to lie idle in his hands for an unreasonable time, or mingles the same with his own, is chargeable with interest thereon.—*Stumph v. Guardianship of Pfeiffer*, 58 Ind. 422.

[b] (Sup. 1884)

A person who on inquisition has been found to be of unsound mind cannot sue to impeach sales of his property by his guardian.—*Robeson v. Martin*, 93 Ind. 420.

[c] (App. 1891)

Services rendered to a lunatic at the request of his guardian, or under a contract with the guardian, constitute a good cause of action against the guardian personally.—*Baker v. Groves*, 1 Ind. App. 522, 27 N. E. 640.

[d] (App. 1908)

Where an insane person under guardianship held two pieces of real estate, subject to a mortgage, one of the lots being worth \$400 and the other \$200 more than enough to redeem, but the guardian, without applying to an order of sale or endeavoring to sell the ward's equity of redemption, or redeem the land, permitted the ward's equity of redemption to be barred by foreclosure proceedings, he did not exercise such care of the estate as an ordinarily prudent man would have exercised, and was therefore responsible to the ward for the loss sustained.—*Alcon v. Koons*, 42 Ind. App. 537, 82 N. E. 92, 84 N. E. 1104.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. §§ 108-114.

See, also, 22 Cyc. pp. 1183-1188; note, 34 L. R. A. 297.

### § 66. Ratification or avoidance of conveyances or other transactions in general.

Avoidance as condition precedent to right of action, see post, § 89.

[a] (Sup. 1876)

An insane person, or his guardian, may bring an action to recover land, of which a deed was made by him while insane, which deed has not since been ratified or affirmed, without first restoring the consideration to the grantee.—*Nichol v. Thomas*, 53 Ind. 42.

[b] (Sup. 1890)

In the absence of fraud, the deed of an insane person, given before office found, to one who did not know of the grantor's insanity, is voidable only on return of the consideration.—*Boyer v. Berryman*, 123 Ind. 451, 24 N. E. 249.

[c] (Sup. 1893)

Where an insane person executes a conveyance, the mere affirmance of the conveyance by his guardian subsequently appointed, without any order of the court appointing him, will not give the grantee a valid title.—*Funk v. Rentchler*, 134 Ind. 68, 33 N. E. 364, 898.

[d] (App. 1895)

When a person, apparently of sound mind and not known to be otherwise, fairly and bona fide purchases property and the contract becomes so far executed that parties cannot be placed in statu quo, such contract cannot afterwards be set aside either by the alleged insane person or by his representative.—*Voris v. Harshbarger*, 39 N. E. 521, 11 Ind. App. 555.

[e] (App. 1909)

Where a wife, while of unsound mind, executed a satisfaction of a judgment for alimony, and she continued to be of unsound mind until her death, occurring after the death of the husband, the filing of the judgment as a claim against her husband's estate was a suffi-

cient disaffirmance of the satisfaction.—Wilson v. Fahnestock, 86 N. E. 1037.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. §§ 100–102, 104, 105.

See, also, 22 Cyc. pp. 1174–1175.

#### § 68. Jurisdiction of courts.

##### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. §§ 115–117.

See, also, 22 Cyc. p. 1183.

#### § 69. — In equity.

[a] (Sup. 1846)

The courts of equity possess the power, in addition to the usual jurisdiction of a court of chancery, of taking cognizance of and protecting the persons, rights, and property of idiots and lunatics.—McCord v. Ochiltree, 8 Blackf. 15.

##### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. § 116.

See, also, 22 Cyc. p. 1183.

#### § 71. Sale, mortgage, or lease under order of court.

Consent to sale of decedent's real estate by guardian of insane widow, see EXECUTORS AND ADMINISTRATORS, § 336.

##### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. §§ 118–124.

See, also, 22 Cyc. pp. 1189–1194.

### VI. CONTRACTS.

Cancellation of written contracts in equity, see CANCELLATION OF INSTRUMENTS.

Evidence, see post, § 98.

Mental capacity affecting validity of contracts in general, see CONTRACTS, § 92.

Mental capacity to make contract of sale, see SALES, § 35.

Pleading, see post, § 97.

Right to elect under will, see WILLS, § 786.

#### § 72. Capacity to contract.

[a] (App. 1904)

Under Burns' Ann. St. 1894, §§ 3209, 3211, 3216, 3233, and 3234, relative to the examination by justices of the peace of persons alleged to be of unsound mind, to determine whether they shall be admitted to the State Hospital for the Insane, the fact that a person has been declared of unsound mind by two justices of the peace and sent to an insane asylum, from which he is discharged as cured, is not, after his discharge, and in the absence of conduct that would lead a prudent man to think him otherwise than sane, notice to persons dealing with him in good faith that he is incompetent.—Leinss v. Weiss, 71 N. E. 254, 33 Ind. App. 344.

##### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. § 125.

See, also, 22 Cyc. pp. 1194–1209; note, 34 L. R. A. 274.

#### § 73. Validity in general.

[a] (Sup. 1862)

The contract of a person non compos mentis, but who has never been found "a person of unsound mind" in the statutory mode, is only voidable.—Crouse v. Holman, 19 Ind. 30.

[b] (Sup. 1870)

2 Gav. & H. St. c. 575, § 11, providing that every contract of any person while of unsound mind shall be void, is applicable only to a person who has been adjudged non compos mentis in the manner prescribed by statute.—Wilder v. Weakley's Estate, 34 Ind. 181.

Where a person apparently of sound mind, and not known to be otherwise, and who has not been found to be otherwise by proper proceedings for that purpose, fairly and bona fide purchases property, and receives and uses the same, whereby the contract of purchase becomes so far executed that the parties cannot be placed in statu quo, such contract cannot afterwards be set aside, or payment for the goods be refused, either by the alleged lunatic or his representatives.—Id.

[c] (Sup. 1874)

The contract of a person who has been judicially pronounced to be of unsound mind is void, but, if not so adjudged, such contract is only voidable.—Musselman v. Cravens, 47 Ind. 1.

[d] (Sup. 1878)

The contract of an insane person not under guardianship is voidable merely.—Wray v. Chandler, 64 Ind. 146.

[e] (Sup. 1880)

The acts or deeds of a person of unsound mind whose unsoundness of mind has not been judicially ascertained, and who is not under guardianship, are voidable only, and not absolutely void, and are subject to ratification or disaffirmance upon the removal of the disability.—Hardenbrook v. Sherwood, 72 Ind. 403.

[f] The contracts of persons of unsound mind, whose incapacity has not been judicially declared, are voidable only, and not void, and may be disaffirmed upon the removal of the disability, or by a duly-appointed guardian.—(Sup. 1881) McClain v. Davis, 77 Ind. 419; (1882) Fay v. Burditt, 81 Ind. 433, 42 Am. Rep. 142.

[g] (Sup. 1881)

The contract of an insane person entered into prior to the adjudication may be disaffirmed by his guardian.—McClain v. Davis, 77 Ind. 419.

[h] (Sup. 1882)

If a person of unsound mind makes a contract with another, who is ignorant of his want of capacity, and who takes no undue advantage,

and the contract is so far executed that the parties cannot be restored to their former positions, the contract will be enforced.—*Copenrath v. Kienby*, 83 Ind. 18.

The contract of a person not under guardianship, but of unsound mind, is not necessarily void, but will be held voidable or not, according to circumstances.—*Id.*

[l] (*Sup.* 1882)

Where one of the parties to a contract is insane, and the parties can by the action of the court, though not by the insane person, be placed in statu quo, the contract may be avoided, though the mental incapacity was not known to the other party when the contract was made.—*Fulwider v. Ingels*, 87 Ind. 414.

[j] (*Sup.* 1886)

Where a contract is honestly made with a person of unsound mind, not judicially so declared, in ignorance of such mental incapacity, and a fair consideration has been paid to him, and used for his benefit, there can be no rescission without an offer to restore the same; but, where no such beneficial consideration has been received, there is no necessity for any tender, in a suit by the heirs of such insane person to have the contract rescinded.—*Physio-Medical College v. Wilkinson*, 108 Ind. 314, 9 N. E. 167.

[k] (*Sup.* 1900)

The executed contract of an insane person not under guardianship is voidable only, and not void.—*Etna Life Ins. Co. v. Sellers*, 56 N. E. 97, 154 Ind. 370, 77 Am. St. Rep. 481.

[l] (*App.* 1909)

A contract of a person of unsound mind, but who has not been judicially determined to be insane, is voidable.—*Wilson v. Fahnestock*, 86 N. E. 1037.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. §§ 125, 132-138, 153.

See, also, 22 Cyc. pp. 1194-1203; note, 21 Am. Rep. 20.

## § 77. Bills and notes.

[a] (*Sup.* 1874)

To a complaint on a note given to erect and endow an institution of learning the defendant pleaded that at the time of the execution of the note he was of unsound mind. The plaintiffs replied that at said time defendant was apparently of sound mind, and not to them known to be otherwise, and that in reliance upon his promise, before any disaffirmance by him, just debts and obligations had been incurred in purchasing property, erecting buildings, and endowing said institution, and thereby defendant was estopped from averring that he was not of sound mind. *Held*, that the reply was bad.—*Musselman v. Cravens*, 47 Ind. 1.

[b] (*App.* 1895)

In an action on a note, an answer that the maker at the time of its execution was a person

of unsound mind constitutes a good defense.—*Voris v. Harshbarger*, 39 N. E. 521, 11 Ind. App. 555.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. § 131.

## § 79. Avoidance after restoration to sanity.

Avoidance by personal representative of deceased incompetent, see EXECUTORS AND ADMINISTRATORS, § 92.

[a] (*Sup.* 1874)

The contract of a person who has been judicially pronounced to be of unsound mind is void, but if not so adjudged such contract is only voidable, and capable of ratification or disaffirmance when reason has been restored.—*Musselman v. Cravens*, 47 Ind. 1.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. §§ 138, 141.  
See, also, 22 Cyc. pp. 1209-1211.

## VII. TORTS.

### § 81. Insanity at time of trial.

[a] (*Sup.* 1898)

In an action for conspiracy, the unsoundness of mind of one conspirator at the time of the trial is no defense either for him or the other conspirators sued.—*Tucker v. Hyatt*, 51 N. E. 469, 151 Ind. 332, 44 L. R. A. 129.

## VIII. CRIMES.

Arrest, see ARREST, §§ 63, 70.

Insanity as defense in criminal prosecutions, see CRIMINAL LAW, §§ 47-51, 331, 354, 570, 740, 773; HOMICIDE, §§ 27, 179, 237, 294.  
Opinion evidence as to mental capacity in criminal prosecution, see CRIMINAL LAW, § 456.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. §§ 144-150.

See, also, 22 Cyc. pp. 1212-1222; note, 36 Am. Dec. 402; note, 76 Am. St. Rep. 83.

## IX. ACTIONS.

For cancellation of instruments, see CANCELLATION OF INSTRUMENTS.

Replevin by guardian, see REPLEVIN, § 66.

### § 87. Capacity to sue and be sued in general.

[a] (*Sup.* 1884)

An insane person under guardianship cannot sue to impeach sales of his property made by his guardian.—*Robeson v. Martin*, 93 Ind. 420.

[b] (*Sup.* 1893)

A person of unsound mind and under guardianship could appear only by his guardian, and

a demurrer filed in the incompetent's name should be stricken.—*Miller v. Hart*, 34 N. E. 1003, 135 Ind. 201.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. § 155.

See, also, 22 Cyc. pp. 1222-1224; note, 2 L. R. A. (N. S.) 961.

#### § 89. Rights of action.

Pleading disaffirmance, see post, § 97.

##### [a] (Sup. 1877)

Where a guardian of an insane person fails to account for and pay over the estate of his deceased ward, the remedy of the person entitled to such estate is by an action against the guardian personally or on his bond; as section 161 of the act in relation to the settlement of decedents' estates (2 Rev. St. 1870, p. 549), providing that an embezzling administrator or executor may be attached and imprisoned, does not apply to an embezzling guardian either of an infant or of an insane person.—*Stumph v. Guardianship of Pfeiffer*, 53 Ind. 472.

##### [b] (Sup. 1831)

In an action by heirs to set aside a conveyance made by their ancestor, who was insane, though not judicially declared so, the deed being only voidable, some act of disaffirmance must have been done, either by ancestor or heirs, before bringing suit.—*Schuff v. Ransom*, 79 Ind. 458.

##### [c] (Sup. 1832)

A chattel mortgage made by an insane person, apparently sane and not judicially pronounced insane, vests title, and, after default, the right of possession, in the innocent mortgagee. After the latter has possession, they cannot be recovered without disaffirmance.—*Fay v. Burditt*, 81 Ind. 433, 42 Am. Rep. 142.

##### [d] (Sup. 1834)

Where a woman who is insane unites with her husband in a mortgage of her property to secure a loan of her husband's, her heirs after her death may defend in foreclosure proceedings on the ground of her insanity, although she had never been judicially declared insane, and the mortgage was in ignorance of her condition, and the mortgage was never disaffirmed by her or her heirs before filing the answer in the foreclosure proceedings.—*Northwestern Mut. Fire Ins. Co. v. Blankenship*, 94 Ind. 535, 48 Am. Rep. 185.

##### [e] (App. 1893)

An action by a wife against the guardian of her insane husband for support is, in effect, against her husband, and will not lie, as the common law gives no such right, and the statute gives it (Rev. St. 1881, § 5132) only where the husband has deserted his wife, or is in the state prison, or is an habitual drunkard, or has renounced the marital relation, and re-

fused to live with his wife, by joining a sect requiring such renunciation.—*Hallett v. Hallett*, 8 Ind. App. 305, 34 N. E. 740.

##### [f] (Sup. 1902)

Until a deed of a person of unsound mind not under guardianship is disaffirmed, there is no right of action; that is, the action does not accrue until after the disaffirmance.—*Downham v. Holloway*, 64 N. E. 82, 158 Ind. 626, 92 Am. St. Rep. 330.

##### [g] (App. 1908)

The right of insane persons to redeem from judicial sales may be enforced by a suit for that purpose.—*Ætna Life Ins. Co. v. Stryker*, 42 Ind. App. 57, 83 N. E. 647.

##### [h] (App. 1909)

A disputed claim against an insane person must be presented by a complaint or petition against the guardian in a court having jurisdiction of the ward's estate and the person of the guardian.—*Stewart v. Unger*, 88 N. E. 716.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. §§ 151-154, 158.

See, also, 22 Cyc. pp. 1222-1224.

#### § 91. Jurisdiction and powers of courts.

Jurisdiction of joint action against guardian and an administrator, see EXECUTORS AND ADMINISTRATORS, § 435.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. § 159.

#### § 92. Parties.

##### [a] (Sup. 1836)

An insane ward under guardianship is not a proper or necessary party to an action to foreclose a mortgage on the lands of said ward, and therefore the failure to serve summons on the ward, or the fact that the ward did not authorize the appearance of attorneys, is not ground, under Rev. St. 1894, § 399 (Rev. St. 1881, § 396), to set aside a judgment on the ground of the excusable neglect of the ward.—*Jones v. Crowell*, 42 N. E. 612, 143 Ind. 218.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. §§ 161, 162.

See, also, 22 Cyc. pp. 1227-1229.

#### § 93. Authority, rights, and duties of general guardian or committee.

##### [a] (Sup. 1863)

A general guardian of an insane person, under our statutes, is substantially the committee of such person, and is the proper party to appear for her, without any special order of the court.—*Symmes v. Major*, 21 Ind. 443.

#### FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. § 163.

See, also, 22 Cyc. p. 1230.

**§ 94. Guardian ad litem or next friend.**  
Failure to appoint as ground for setting aside judgment of foreclosure, see MORTGAGES, § 490.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. INS. PER. §§ 164, 165.

**§ 96. Appearance and representation by attorney.**

[a] (Sup. 1848)

An insane person cannot appear in court by attorney.—*Jelly v. Elliott*, 1 Ind. 119, Smith, 32.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. INS. PER. § 168.

See, also, 22 Cyc. p. 1237.

**§ 97. Pleading.**

Allegations as to mental capacity of grantor in action to set aside conveyance in fraud of creditors, see FRAUDULENT CONVEYANCES, § 259.

Construction of allegations in general, see PLEADING, § 34.

In suits for cancellation of instruments, see CANCELLATION OF INSTRUMENTS, § 37.

Motions to strike out pleadings, see PLEADING, § 352.

Pleading matters of fact or conclusions, see PLEADING, § 8.

[a] (Sup. 1857)

The answer of a defendant of unsound mind should be by committee.—*Aldridge v. Montgomery*, 9 Ind. 302.

[b] (Sup. 1874)

When the guardian of an insane person sues in his own name, the complaint should show that the right of action is in the insane person, and should not allege the cause of action to be in the guardian.—*Bearss v. Montgomery*, 46 Ind. 544.

[c] (Sup. 1880)

A complaint by a guardian of an insane person to have an act of such person set aside as void should allege that such person had been duly adjudged to be of unsound mind, and that such guardian had been legally appointed and qualified.—*Hardenbrook v. Sherwood*, 72 Ind. 403.

A complaint by a guardian of an insane person to have an act of such person set aside as void must aver that the alleged unsoundness of mind existed at the time of the commission of the act sought to be set aside, and was a continuing disability, or that upon removal of the disability the act had not been ratified.—*Id.*

A complaint by "A., guardian of B., a person of unsound mind," etc., is not sufficient, as it leaves to inference what should be proved, namely, that B. had been adjudged to be of unsound mind, and that A. had been appointed his guardian.—*Id.*

A complaint to set aside B.'s act in becoming replevin bail on a judgment, on the ground of mental unsoundness, held invalid, because it did not allege that at the time he thus became replevin bail, his insanity had been judicially ascertained, or that he was then under guardianship, and also because it did not allege that the disability was a continuing one, or that, upon its removal, B. had not ratified, but disaffirmed, such act.—*Id.*

[d] (Sup. 1882)

A complaint by a guardian to annul a contract, averring that the ward at the time "was of unsound mind, and incapable from mental incapacity to transact business," and that he was soon afterwards adjudged insane by the probate court, sufficiently shows his incapacity to contract.—*Fulwider v. Ingels*, 87 Ind. 414.

[e] In an action by a guardian of an insane person, the complaint need not allege that such person had been adjudged insane.—(Sup. 1883) *Hoke v. Applegate*, 88 Ind. 530; (1884) *Id.*, 92 Ind. 570.

[f] (Sup. 1883)

A complaint that defendant, by fraudulent contract, obtained a large sum of money from plaintiff's ward while of unsound mind, and after the appointment of plaintiff as guardian refused to repay, is bad in not alleging that the ward continued of unsound mind, and did not affirm his contract.—*Hoke v. Applegate*, 88 Ind. 530.

[g] (Sup. 1884)

Where in replevin by a guardian of an insane person the answer alleged that the ward gave the property to defendant, a reply that the ward was insane, and that the guardian had demanded the property and revoked the gift, was bad, as it failed to allege a continuance of insanity, and a judicial determination thereof, and that the guardian was lawfully appointed and qualified.—*Hoke v. Applegate*, 92 Ind. 570.

[h] (Sup. 1884)

In an action by a person who had been found to be of unsound mind, an allegation that about one month before the action plaintiff was released from the disability under which he was held was not sufficient to show that the plaintiff's legal capacity to sue had been regained.—*Robeson v. Martin*, 93 Ind. 420.

A complaint in an action by a person who has been insane and under guardianship to impeach sales of his property made by the guardian, alleging that the sale was made "about one month before the plaintiff was released from the disability under which he was held," was not sufficient to show that the guardianship had terminated.—*Id.*

[i] (Sup. 1889)

In an action by heirs to annul a conveyance made by their ancestor on the ground of insanity at the time of its execution, he not having been under guardianship at that time, a

complaint which does not allege any act in disaffirmance of the deed is good after verdict and against a motion in arrest of judgment.—*Lange v. Dammier*, 119 Ind. 567, 21 N. E. 749.

## [j] (Sup. 1890)

Where a complaint for specific performance against the heirs of a decedent alleges that decedent sold complainant land in consideration of her promise to support him for life, and agreed to convey or devise it to her, an answer which alleges as a defense insanity of decedent at the time the contract was made need not allege that it was a continuing disability, as, when insanity is once shown, it will be presumed to continue until the contrary is shown.—*Sheets v. Bray*, 125 Ind. 33, 24 N. E. 357.

## [k] (Sup. 1891)

A complaint, in an action to set aside a deed by plaintiffs' ancestor on the ground that the grantor was of unsound mind, should allege disaffirmance of the deed by plaintiffs before beginning the action.—*Ashmead v. Reynolds*, 127 Ind. 441, 26 N. E. 80.

## [l] (Sup. 1893)

In an action for personal injuries, where defendant pleads a settlement, a reply that plaintiff was non compos mentis when the settlement was procured, and that the consideration has been returned, is faulty, since it neither alleges that plaintiff was restored to reason, and then disaffirmed the contract, nor that his unsoundness continued, and that the settlement was disaffirmed by a guardian.—*Louisville, N. A. & C. Ry. Co. v. Herr*, 135 Ind. 591, 35 N. E. 556.

An allegation in the reply that defendant knew of plaintiff's mental unsoundness at the time the settlement was procured does not render a disaffirmance unnecessary.—*Id.*

## [m] (App. 1895)

In an action by or in behalf of a person of unsound mind, it is necessary to aver that the insanity continued, and disaffirmance before suit by the guardian or representative of the person of unsound mind or that after restoration to reason there was a disaffirmance of the contract by the person.—*Voris v. Harshbarger*, 39 N. E. 521, 11 Ind. App. 555.

Where, in an action upon a note, the answer alleged that defendant was of unsound mind at the time of its execution, a reply which alleged that, with the mind which he had when he executed the note, defendant had done business for more than 30 years, and made a large amount of money; that he had received full value for the note, and used the consideration so received in his lifetime; that he well understood the transaction; that he never offered or attempted to rescind the contract; and that he was never adjudged to be a person of unsound mind, and never so considered by his family or friends,—was not sufficient.—*Id.*

## [n] (Sup. 1900)

A complaint by an insane person not under guardianship for the foreclosure of a mortgage, alleging that a release thereof was procured from him without consideration, while he was of unsound mind and wholly incapable of understanding its nature, and that it was procured with notice of his disability, when no disaffirmance was pleaded, was demurrable for want of sufficient facts.—*Ætna Life Ins. Co. v. Sellers*, 56 N. E. 97, 154 Ind. 370, 77 Am. St. Rep. 481.

## [o] (App. 1909)

Where, in an action on a judgment for alimony, the complaint alleged that testatrix acknowledged satisfaction of the judgment while of unsound mind until her death, an answer alleging that the contract was entered into in good faith and was understood to secure to testatrix a fair provision, and that the husband had no knowledge of her incapacity, was insufficient to meet the allegations of incapacity.—*Wilson v. Fahnestock*, 86 N. E. 1037.

Where, in an action on a judgment for alimony, the complaint alleged that the receipt acknowledging satisfaction of the judgment was executed before the rendition thereof and pending the action for divorce, and alleged in another paragraph that the receipt was executed after the judgment of divorce and when the wife was of unsound mind, in which condition she remained until her death, evidence of her mental unsoundness was admissible.—*Id.*

## FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. §§ 169-171.

See, also, 22 Cyc. pp. 1238-1240.

## § 98. Evidence.

In suits for cancellation of instruments, see CANCELLATION OF INSTRUMENTS, § 45.

## [a] (Sup. 1848)

In proceedings against lunatics and minors to foreclose a mortgage, proof must be made of the matters contained in the exhibits, and must appear by the record to have been made.—*Ward v. Kelly*, 1 Ind. 101, Smith, 74.

## [b] (Sup. 1860)

One who seeks to set aside a contract on the ground of insanity must show that the contract was the result of such insanity.—*Wray v. Wray*, 32 Ind. 126.

## [c] (Sup. 1879)

In an action by an attorney against a guardian of an insane person to recover for his services at the inquest, where the complaint is so framed as to permit a recovery as to what such services were worth, it is not necessary to prove an alleged agreement to pay a particular sum.—*State ex rel. Nave v. Newlin*, 69 Ind. 108.

## [d] (App. 1902)

On an issue as to the actual mental and physical condition of an insane ward, as affect-

ing the reasonable value of his services to his custodian, evidence of the ward's admissions, while on custodian's farm, of having killed goslings and small turkeys, was properly received as showing his disposition towards domestic animals, which affects such issue.—*Hart v. Miller*, 64 N. E. 239, 29 Ind. App. 222.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. §§ 172-174.

See, also, 22 Cyc. pp. 1240, 1241.

### § 99. Trial.

Exception to conclusion of law as to insanity, see TRIAL, § 405.

[a] (Sup. 1839)

The question of the grantor's insanity is one proper for a jury.—*Doe ex dem. Sutton v. Reagan*, 5 Blackf. 217, 33 Am. Dec. 466.

[b] (Sup. 1861)

In a suit by a guardian, brought to set aside his ward's deed on the ground of insanity, it was held that though the impression made upon the jury by the appearance of the ward may have been slight, still, in connection with other evidence in relation thereto, it should have been allowed to have its effect.—*Koile v. Ellis*, 16 Ind. 301.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. §§ 175-178.

See, also, 22 Cyc. p. 1242.

### § 100. Judgment

Actions or proceedings to review, see JUDGMENT, § 335.

Collateral attack thereon, see JUDGMENT, § 480.

Equitable relief against, see JUDGMENT, § 461.

Opening or vacating, see JUDGMENT, §§ 371, 384.

[a] (Sup. 1883)

In proceedings to set aside a judgment, the mere allegation that when the judgment was rendered the defendant therein was of unsound mind was not, of itself, sufficient to vacate the judgment.—*Woods v. Brown*, 93 Ind. 164, 47 Am. Rep. 369.

It is no ground for setting aside a judgment that it was rendered on default, without service of process, at a time when defendant therein was insane.—*Id.*

[b] (Sup. 1887)

Where a judgment by default is taken against a person of unsound mind, presumably after due service of process, by a bona fide holder of a note obtained by fraud and without consideration by the original payee, the

judgment defendant never having been judicially declared of unsound mind, and the plaintiff having no knowledge thereof, it may be set aside, under Rev. St. 1881, § 306, and the guardian or administrator let in to defend, by simply showing that the defendant was of unsound mind when the note was executed and the judgment taken, and that it was without consideration.—*Dickerson v. Davis*, 111 Ind. 433, 12 N. E. 145.

Although after a judgment wrongfully obtained against an insane person, was rendered, and after the guardian had brought suit to set it aside, the judgment plaintiff succeeded in having a conveyance by such insane person to his wife set aside as fraudulent, and had the land sold to satisfy said judgment, the guardian, having resisted it unsuccessfully, and set up the fact that an action was pending to set aside such judgment, is not precluded, by redeeming from such sale, from having such default set aside.—*Id.*

[c] (Sup. 1901)

Where the court has jurisdiction of the person of one who was insane, but who had not been adjudged so, a judgment against him is valid until set aside by direct proceedings.—*Judd v. Gray*, 59 N. E. 849, 156 Ind. 278.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. §§ 179-184.

See, also, 22 Cyc. pp. 1243-1246; note, 39 L. R. A. 775; note, 130 Am. St. Rep. 841.

### § 102. Review.

[a] (Sup. 1870)

In a suit against a husband and wife to foreclose a mortgage, the husband being insane, the wife appeared and answered for him, and no objection was made by the plaintiff, against whom judgment was rendered. Held that, although the husband should have answered by a guardian, plaintiff could not be heard to object after a trial on the merits.—*Yount v. Turnpugh*, 33 Ind. 46.

[b] (Sup. 1883)

That a judgment was rendered on default without the service of process, and that a defendant therein was at the time insane, do not constitute sufficient cause for any relief against the judgment, or for a review thereof, or to effect a sale of the property upon execution issued thereon.—*Woods v. Brown*, 93 Ind. 164, 47 Am. Rep. 369.

FOR CASES FROM OTHER STATES,

SEE 27 CENT. DIG. Ins. Per. § 186; 2

CENT. DIG. App. & E. § 1010.

See, also, 22 Cyc. p. 1246.

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

# INSOLVENCY.

## *Scope-Note.*

[INCLUDES administration of estates of insolvents under local laws for the purpose of distribution of the assets among creditors, and discharge of the insolvents from liability for their debts; constitutional and statutory provisions relating thereto; what constitutes insolvency; nature, grounds, limits, and subjects of jurisdiction in insolvency cases; and procedure therein.

[EXCLUDES administration of insolvent estates of decedents (see *Executors and Administrators*); voluntary assignments by debtors for benefit of their creditors (see *Assignments for Benefit of Creditors*); bankruptcy under general bankrupt laws (see *Bankruptcy*); and organization, etc., of courts having jurisdiction over proceedings in insolvency (see *Courts*). For complete list of matters excluded, see cross-references, post.]

## *Analysis.*

### I. Constitutional and Statutory Provisions.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insolv. §§ 1-6.]

### II. Proceedings for Declaration of Insolvency and Surrender or Seizure of Property.

#### (A) JURISDICTION AND COURSE OF PROCEDURE IN GENERAL.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insolv. §§ 7-15.]

#### (B) VOLUNTARY PROCEEDINGS.

§ 21. Petition and proceedings thereon.

#### (C) INVOLUNTARY PROCEEDINGS.

§ 24. Insolvency of debtor.

#### (D) SEIZURE AND CUSTODY OF PROPERTY.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insolv. §§ 47-55.]

### III. Assignment, Administration, and Distribution of Insolvent's Estate.

#### (A) APPOINTMENT, QUALIFICATION, AND TENURE OF ASSIGNEE OR TRUSTEE.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insolv. §§ 56-65.]

#### (B) ASSIGNMENT, AND TITLE, RIGHTS, AND REMEDIES OF ASSIGNEE OR TRUSTEE IN GENERAL.

§ 57. Title acquired by assignee or trustee.

#### (C) PREFERENCES AND TRANSFERS BY INSOLVENT, AND ATTACHMENTS AND OTHER LIENS.

#### (D) ADMINISTRATION OF ESTATE.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insolv. §§ 107-131.]

#### (E) ACTIONS BY OR AGAINST ASSIGNEE OR TRUSTEE.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insolv. §§ 132-155.]

#### (F) CLAIMS AGAINST AND DISTRIBUTION OF ESTATE.

§ 121. Mode of distribution.

§ 123. Dividends.

#### (G) ACCOUNTING AND DISCHARGE OF ASSIGNEE OR TRUSTEE.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insolv. §§ 200-209.]

### IV. Composition, Respite, or Raising Assignment.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insolv. §§ 210-218.]

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

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## V. Rights, Remedies, and Discharge of Insolvent.

- § 146. Discharge from arrest or imprisonment.
- § 155. Operation and effect of discharge.
- § 163. — Effect of foreign discharge.

## VI. Appeal and Revision of Proceedings.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insolv. §§ 292-305.]

## VII. Costs and Fees.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insolv. §§ 306-309.]

## VIII. Offenses Against Insolvency Laws.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insolv. §§ 310, 311.]

### Cross-References.

#### See—

Appointment of receiver. RECEIVERS, § 19.  
 Assignment by husband in insolvency as bar to dower. DOWER, § 45.  
 As vesting inchoate dower interest. DOWER, § 36.  
 ASSIGNMENTS FOR BENEFIT OF CREDITORS. BANKRUPTCY.  
 Condition precedent to appointment of receiver. RECEIVERS, § 16.  
 Discharge of execution debtor on bond to proceed under insolvent laws. EXECUTION, § 440.  
 Of person imprisoned in bastardy case. BASTARDS, § 83.  
 Dissolution of firm. PARTNERSHIP, § 271.  
 Effect of bankruptcy acts on state insolvency laws and proceedings. BANKRUPTCY, § 9.  
 Effect of insolvency of insurer on extent of liability of reinsurer. INSURANCE, § 684.  
 On judgment lien. JUDGMENT, § 753.  
 Equitable set-off. SET-OFF AND COUNTERCLAIM, § 8.  
 Evidence of existence of contract of sale. SALES, § 52.  
 Excuse for laches. EQUITY, § 77.  
 Financial inability to comply with ordinance as affecting willful character of violation. MUNICIPAL CORPORATIONS, § 631.  
 Ground for issuance of ne exeat as against maker of note. NE EXEAT, § 3.  
 Pleading matters of fact or conclusions of law relating to. PLEADING, § 8.  
 Representations as to solvency in order to obtain goods. FALSE PRETENSES, § 7.  
 Warranty of solvency in sale of accounts. ASSIGNMENTS, § 97.

#### Of particular classes of persons.

#### See—

Bank. BANKS AND BANKING, §§ 63-85.

#### Bank—(Cont'd).

Collecting bank, effect on rights and liabilities as to proceeds of collections. BANKS AND BANKING, § 166.  
 Transmitting bank, effect on rights and liabilities as to proceeds of collection. BANKS AND BANKING, § 167.  
 BUILDING AND LOAN ASSOCIATIONS, § 42.  
 Buyer, and concealment thereof, as affecting validity of sale. SALES, § 45.  
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 As affecting liability of officers for corporate debts and acts. CORPORATIONS, § 349.  
 As affecting or ground for dissolution. CORPORATIONS, § 604.  
 As ground for abatement of action. ABATEMENT AND REVIVAL, § 44.  
 Debtor as element of voidable preference. BANKRUPTCY, § 160.  
 As failure of consideration of sale of account. SALES, § 21.  
 Liable primarily or jointly with grantor, element of fraud as to creditors or subsequent purchasers. FRAUDULENT CONVEYANCES, § 60.  
 Decedent's estate. EXECUTORS AND ADMINISTRATORS, §§ 410-418.  
 Defendant in action, ground for relief by injunction. INJUNCTION, § 18.  
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 Grantor, element of fraud as to creditors or subsequent purchasers. FRAUDULENT CONVEYANCES, §§ 56-58, 61, 62.  
 Insurance company. INSURANCE, §§ 41-44, 61-72, 700-710.  
 Insured, effect on assignment of certificate. INSURANCE, § 728.  
 Trustee after mingling of trust and individual funds, effect on right to follow trust property or proceeds thereof. TRUSTS, § 353.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

**I. CONSTITUTIONAL AND STATUTORY PROVISIONS.****FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insolv. §§ 1-6.  
See, also, 22 Cyc. pp. 1263-1265.

**II. PROCEEDINGS FOR DECLARATION OF INSOLVENCY AND SURRENDER OR SEIZURE OF PROPERTY.****(A) JURISDICTION AND COURSE OF PROCEDURE IN GENERAL.****FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insolv. §§ 7-15.  
See, also, 22 Cyc. p. 1265.

**(B) VOLUNTARY PROCEEDINGS.****§ 21. Petition and proceedings thereon.**

[a] (Sup. 1893)

Where an intervening petition filed by a creditor in insolvency proceedings contains an averment of the insolvency of the debtor, the court need not make a finding as to such insolvency, for the reason that the averment is unnecessary.—Peed v. Elliott, 134 Ind. 536, 34 N. E. 319.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insolv. §§ 17, 21-27.  
See, also, 22 Cyc. pp. 1267-1271.

**(C) INVOLUNTARY PROCEEDINGS.****§ 24. Insolvency of debtor.**

[a] (Sup. 1883)

In an action in which the insolvency of the defendant was alleged, a contract between the defendant and a third party, whereby the former had transferred to the latter certain railroad securities, for which he was to receive a large sum of money, was admissible as bearing on the issue of insolvency.—Wells v. Morrison, 91 Ind. 51.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insolv. § 29.  
See, also, 22 Cyc. pp. 1257, 1271.

**(D) SEIZURE AND CUSTODY OF PROPERTY.****FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insolv. §§ 47-55.  
See, also, 22 Cyc. pp. 1276, 1277.

**III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF INSOLVENT'S ESTATE.****(A) APPOINTMENT, QUALIFICATION, AND TENURE OF ASSIGNEE OR TRUSTEE.****FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insolv. §§ 56-63.  
See, also, 22 Cyc. pp. 1277-1279.

**(B) ASSIGNMENT, AND TITLE, RIGHTS, AND REMEDIES OF ASSIGNEE OR TRUSTEE IN GENERAL.****§ 57. Title acquired by assignee or trustee.**

[a] (Sup. 1890)

Involuntary assignments which are made under foreign insolvent laws have no operation outside of the state under whose laws they were made, while a voluntary assignment is a personal common-law right, possessed by every owner of property, and may operate in one state as well as another.—Catlin v. Wilcox Silver-Plate Co., 24 N. E. 250, 123 Ind. 477, 8 L. R. A. 62, 18 Am. St. Rep. 338.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insolv. §§ 74, 78.  
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**(C) PREFERENCES AND TRANSFERS BY INSOLVENT, AND ATTACHMENTS AND OTHER LIENS.**

By insolvent corporations in general, see CORPORATIONS, §§ 544, 545.

Preference affecting validity of conveyance as to creditors, see FRAUDULENT CONVEYANCES, §§ 115-128.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insolv. §§ 79-106.  
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**(D) ADMINISTRATION OF ESTATE.****FOR CASES FROM OTHER STATES,**

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**(E) ACTIONS BY OR AGAINST ASSIGNEE OR TRUSTEE.****FOR CASES FROM OTHER STATES,**

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**(F) CLAIMS AGAINST AND DISTRIBUTION OF ESTATE.**

Claims against insolvent banks, see BANKS AND BANKING, § 80.

Claims against insolvent estates of decedents, see EXECUTORS AND ADMINISTRATORS, §§ 416-418.

**§ 121. Mode of distribution.**

[a] (Sup. 1856)

Distribution among creditors of an insolvent estate must be postponed until all claims are adjusted.—Henderson v. Bliss, 8 Ind. 100.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insolv. § 193.  
See, also, 22 Cyc. pp. 1323, 1324.

**§ 123. Dividends.**

[a] (Sup. 1889)

Where an assignee inexcusably neglects to have a dividend declared as soon as the greater part of the assets have been realized and the amount of claims can be approximately ascertained, he is liable for interest from the time when he might have procured an order directing a dividend.—*Manhattan Cloak & Suit Co. v. Dodge*, 120 Ind. 1, 21 N. E. 344, 6 L. R. A. 369.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. *Insolv.* §§ 195, 196.

See, also, 22 Cyc. p. 1323.

**(G) ACCOUNTING AND DISCHARGE OF ASSIGNEE OR TRUSTEE.**

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. *Insolv.* §§ 200-209.

See, also, 22 Cyc. pp. 1325-1327.

**IV. COMPOSITION, RESPITE, OR RAISING ASSIGNMENT.**

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. *Insolv.* §§ 210-218.

See, also, 22 Cyc. pp. 1328-1332.

**V. RIGHTS, REMEDIES, AND DISCHARGE OF INSOLVENT.****§ 146. Discharge from arrest or imprisonment.**

[a] A debtor was discharged under an insolvent law of Ohio, as to the imprisonment of his person from a debt due to the payee on a promissory note. The parties resided in Ohio, and the debt was there contracted. *Held*, that the debtor might plead the discharge, so far as respected the imprisonment of his person, in bar of an action brought against him in Indiana by an assignee thereof.—(Sup. 1830) *Pugh v. Bussel*, 2 Blackf. 366; (1831) *Id.* 394.

[b] (Sup. 1831)

A discharge under an insolvent law, of the person and not of after-acquired property, may be pleaded in discharge of the person from imprisonment; and the judgment, if the plea be supported, is that he recover his debt, etc., to be levied, not on the person of the defendant, but only on his property.—*Pugh v. Bussel*, 2 Blackf. 394.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. *Insolv.* §§ 226-231.

See, also, 22 Cyc. pp. 1335, 1336.

**§ 155. Operation and effect of discharge.**

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. *Insolv.* §§ 252-275, 290.

See, also, 22 Cyc. pp. 1343-1350.

**§ 163. — Effect of foreign discharge.**

[a] (Sup. 1831)

A discharge of an insolvent debtor by a state law has no operation, out of the state, over contracts not made and to be carried into effect within the state, nor over the citizens of other states, who do not make themselves parties to the proceedings under the law.—*Pugh v. Bussel*, 2 Blackf. 394.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. *Insolv.* §§ 273-275.

See, also, 22 Cyc. p. 1350.

**VI. APPEAL AND REVISION OF PROCEEDINGS.**

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. *Insolv.* §§ 292-305.

See, also, 22 Cyc. pp. 1355-1359.

**VII. COSTS AND FEES.**

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. *Insolv.* §§ 306-309.

See, also, 22 Cyc. pp. 1360, 1361.

**VIII. OFFENSES AGAINST INSOLVENCY LAWS.**

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. *Insolv.* §§ 310, 311.**INSPECTION.**

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Cars. RAILROADS, § 275.

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Affecting implied warranty. SALES, § 270.

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Consideration in arriving at verdict—

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# INSURANCE.

## *Scope-Note.*

[INCLUDES the regulation and conduct of the business of insurance, in every form, by individual underwriters or corporations, mutual or co-operative associations, and insurance agents or brokers; organization, powers, and liabilities of insurance companies and associations, and rights and liabilities of their members, officers, and agents; and contracts of insurance, and rights, liabilities, and remedies incident thereto.

[EXCLUDES associations for mutual benefit otherwise than by insurance (see *Beneficial Associations*); burning property to defraud insurers (see *Arson; Fires*); and taxation of capital, stock, or property of insurance companies (see *Taxation*). For complete list of matters excluded, see cross-references, post.]

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Mutual benefit insurance companies, see post, § 692.

**§ 3. Power to control and regulate.**[a] (*Sup.* 1864)Insurance companies are not favorites of the law.—*Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96.[b] (*Sup.* 1905)

The Legislature has no power to enact a statute prohibiting citizens of the state from en-

tering into contracts outside of the state, insuring property within its boundaries.—*Swing v. Hill*, 165 Ind. 411, 75 N. E. 658.**FOR CASES FROM OTHER STATES,****SEE 28 CENT. DIG. Insurance, § 3.**

See, also, 22 Cyc. p. 1387.

**§ 4. Constitutional and statutory provisions.**

Construing statutes and charters as part of policy, see post, § 152.

Pleading, see post, § 641.

Subjects and titles of acts, see **STATUTES**, § 113.

## [a] (Sup. 1863)

The act prescribing the terms on which agents of foreign corporations may transact business in Indiana (1 Rev. St. p. 242) is clear and unambiguous, without reference to other legislation, and includes foreign insurance companies, though an attempt was made to specially regulate foreign insurance companies by an unconstitutional enactment.—*Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 320.

## [b] (Sup. 1872)

1 Rev. St. p. 242, providing the terms upon which agents of foreign corporations shall be permitted to transact business within the state, is repealed so far as it relates to foreign insurance companies by act of December, 1865, forbidding agents of such insurance companies to transact business in the state without first procuring a certificate of authority from the auditor, and when an agent of a foreign insurance company complies with the provisions of act of December, 1865, his authority to act as agent within the state is complete.—*Hoffman v. Banks*, 41 Ind. 1.

## [c] (Sup. 1878)

Act June 17, 1852, imposed certain requirements on foreign corporations doing business within the state. Afterwards Act Dec. 21, 1865, was passed, regulating foreign insurance companies doing business in the state, which related (1) "to companies incorporated by any other state within the state of Indiana," and (2) to those "incorporated by any government foreign to the United States." *Held*, that an insurance company created by act of congress in the District of Columbia, and doing business in the state of Indiana, was not included in either of the classes named in the act of 1865, and hence that act did not impliedly repeal the act of 1852 as to such company.—*Daly v. National Life Ins. Co. of United States of America*, 64 Ind. 1.

## [d] (Sup. 1888)

Rev. St. 1881, § 3772, empowering the auditor of state to sue, either by the attorney general or such other attorneys as he may designate, for violation of the act relating to foreign insurance companies doing business in the state, does not repeal section 5668, providing that the attorney general shall sue for amounts due the state from any source, but is simply cumulative; and an action against a foreign insurance company for taxes and license fees due the state is properly brought by the state on the relation of the attorney general.—*State ex rel. Baldwin v. Insurance Co. of North America*, 115 Ind. 257, 17 N. E. 574.

## [e] (Sup. 1899)

Under Act Feb. 10, 1899 (Acts 1899, p. 30) § 17, declaring that no order, judgment, or decree interfering with the prosecution of the business of an insurance company organized under the act shall be made, except on appli-

cation of the attorney general, the court has no jurisdiction of the subject-matter of a suit brought by another than the attorney general to enjoin such a company doing certain business.—*Lowery v. State Life Ins. Co.*, 54 N. E. 442, 153 Ind. 100.

## FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 4, 14.

See, also, 22 Cyc. pp. 1387-1390.

## § 7. License fees and taxes.

As denial of equal protection of laws, see CONSTITUTIONAL LAW, § 230.

Foreign underwriters or companies, see post, § 20.

## FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 6.

See, also, 22 Cyc. p. 1390.

## § 9. Reports and statements.

Subjects and titles of acts, see STATUTES, § 113.

## FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 9.

See, also, 22 Cyc. p. 1394.

## § 10. Supervision by public officers or courts.

Service of process on insurance commissioner or other officer in action on policy issued by foreign company, see post, § 627.

## [a] (Sup. 1902)

Acts Sp. Sess. 1865, p. 105, is entitled, "An act relating to foreign insurance companies doing business in this state," etc. The amendatory act of 1877 (Acts 1877, p. 65) was entitled, "An act to amend section one of an act entitled 'An act regulating foreign insurance companies doing business in this state,' etc." Section 2 (being Burns' Rev. St. 1901, § 4925) provides that the state auditor shall examine or cause to be examined every detail of the business of "any company transacting the business of insurance in the state," etc. *Held*, that this section must be construed as applicable only to foreign insurance companies, and under it the state auditor could not force the examination of a domestic company.—*State ex rel. Hart v. Commercial Ins. Co.*, 64 N. E. 466, 158 Ind. 680.

## FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 10.

See, also, 22 Cyc. p. 1388.

## § 15. Foreign underwriters or companies and their agents.

Compensation of agent, see post, § 84.

Insurance agents and brokers in general, see post, § 73.

Mutual benefit association, see post, § 696.

Payment of taxes, see TAXATION, § 524.

Subjects and titles of acts, see STATUTES, § 113.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 12-33.

See, also, 19 Cyc. pp. 1260, 1261, 1277-1279, 22 Cyc. pp. 1391-1394, 25 Cyc. p. 1525; note, 24 L. R. A. 298.

#### § 16. — What constitutes "doing business."

[a] (Sup. 1905)

The appointing of an agent by a foreign insurance company, or the taking of a bond from him, does not amount to the transaction of any business of insurance, within Rev. St. 1881, § 3765, requiring foreign insurance companies to obtain a certificate of authority from the auditor of the state before doing business in the state.—*Wilson v. Ohio Farmers' Ins. Co.*, 73 N. E. 892, 164 Ind. 462.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 17.

See, also, 22 Cyc. p. 1391.

#### § 17. — Application of local laws.

[a] (Sup. 1874)

Before an insurance company incorporated by another state can lawfully transact business in this state, it must conform to the requirements of our laws.—*Farmers' & Merchants' Ins. Co. v. Harrah*, 47 Ind. 236.

Act March 9, 1855, was repealed by implication so far as foreign insurance companies were concerned by Act June 17, 1852 (1 Gav. & H. Rev. St. 1870, p. 272), as the two acts were repugnant, and the last express will of the Legislature must prevail.—*Id.*

[b] (Sup. 1905)

In a suit by a trustee for creditors of a foreign mutual fire insurance company to recover a statutory liability against policy holders, it was no defense that the company had written defendant's policies, insuring property in Indiana, for the benefit of defendants, who were citizens of that state, without having complied with its insurance laws; the Legislature having no authority to prohibit citizens from making contracts outside the state insuring property within its boundaries.—*Swing v. Hill*, 75 N. E. 658, 165 Ind. 411.

[c] (App. 1908)

By Act March 9, 1897 (Acts 1897, p. 332, c. 195) § 25, which provided that certain associations in transacting business in this state shall be subject only to the provisions of this act, and Acts 1897, p. 332, c. 195, § 27, providing that "all laws or parts of laws in conflict herewith are hereby repealed," the Legislature did not intend to relieve foreign accident associations from compliance with the general laws of the state.—*Phoenix Accident & Sick Benefit Ass'n v. Lathrop*, 81 N. E. 227, 41 Ind. App. 141.

#### FOR CASES FROM OTHER STATES.

SEE 28 CENT. DIG. Insurance, § 12.

#### § 18. — Subjection to special requirements.

[a] (Sup. 1887)

The Legislature has the constitutional right to prescribe the terms upon which foreign insurance companies may transact business in Indiana.—*Insurance Co. of North America v. Brim*, 111 Ind. 281, 12 N. E. 315.

[b] (Sup. 1887)

A state Legislature has authority to prescribe the conditions upon which a foreign insurance corporation may do business within its territory, and the fourth section of the act of December 21, 1865 (Rev. St. 1881, § 3768), requiring their agent to retain money of the company until a loss of which he has notice is paid, is a rightful exercise of this authority.—*Phenix Ins. Co. v. Burdett*, 112 Ind. 204, 13 N. E. 705.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 13, 14.

#### § 19. — Retaliatory legislation.

As denial of equal protection of laws, see CONSTITUTIONAL LAW, § 230.

[a] (Sup. 1888)

Money which may have or may become due to the state from any foreign insurance company under the provisions of the retaliatory section of the statutes regulating foreign insurance companies doing business in the state are or will be due and payable as a part of the terms or conditions of its entering the state and transacting business within its limits. Such retaliatory section, therefore, is not within the constitutional restriction in relation to taxation.—*State ex rel. Baldwin v. Insurance Co. of North America*, 17 N. E. 574, 115 Ind. 257.

[b] (Sup. 1888)

The Legislature of New York having imposed on insurance companies of other states doing business there a tax greater than that imposed by Indiana, and requiring it to be paid to the treasurer of the fire department of each city, or to the city treasurer, who should have all the powers of such treasurer of the fire department in cities where there was none, the treasurer of such city in Indiana cannot maintain an action against a New York company for taxes under said section, as the collection thereof is the duty of the state officers only; Acts 1873, p. 205, § 8, providing that such companies shall report their earnings to the auditor of the state, and pay taxes thereon into the state treasury.—*Blackmer v. Royal Ins. Co.*, 115 Ind. 291, 17 N. E. 580.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 15.

### § 20. — Local authority or license and license fees or taxes.

Presumption on appeal in action for insurance premium, see post, § 188.

#### [a] (Sup. 1874)

Before an insurance company incorporated by another state can lawfully transact business in this state, it must procure a certificate of authority from the auditor of state.—*Farmers' & Merchants' Ins. Co. v. Harrah*, 47 Ind. 236.

#### [b] (Sup. 1878)

Rev. St. 1876, p. 594, § 1, requires a foreign insurance company to file in the office of the circuit court clerk of the counties in which it transacts business its certificate from the auditor of state and the certified copy of the statement on which it was so issued, but provides that such certificate and copy shall be renewed semiannually in the months of January and July of each year. *Held* that, though such company did not file such renewals until the last day of January or July, it might validly transact business during the whole of such month.—*American Ins. Co. v. Pettijohn*, 62 Ind. 382.

#### [c] (Sup. 1882)

Under Rev. St. 1881, § 3765, a foreign insurance company is not required to file in the county clerk's office a certificate of the state auditor showing that it is authorized to do business in the county, but it is made the duty of any agent of such company, who assumes to act as agent in any county, to procure and file in the office of the clerk of the circuit court of the county a certificate of the state auditor showing that he is authorized to act as such agent in such county.—*State v. Tumey*, 81 Ind. 559.

#### [d] (Sup. 1888)

Under Rev. St. 1881, § 240, subd. 7, declaring that the word "state," applied to any one of the United States, shall include the District of Columbia and the territories, the District of Columbia is a state, within the meaning of sections 3765, 3771, prohibiting any agent "of any insurance company incorporated by any other state than the state of Indiana" to transact any insurance business without license.—*State v. Briggs*, 116 Ind. 55, 18 N. E. 395.

#### [e] (App. 1897)

*Burns' Rev. St. 1894*, § 4915 (Rev. St. 1881, § 3765), forbidding an agent of "any insurance company incorporated by any other state" than Indiana to transact insurance business without a certificate of authority, applies only to incorporated companies.—*State v. Campbell*, 46 N. E. 944, 17 Ind. App. 442.

### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 16, 18-22.

See, also, 22 Cyc. pp. 1392, 1393; notes, 24 L. R. A. 298, 1 L. R. A. (N. S.) 1019.

### § 24. — Effect of noncompliance with law.

Pleading in action on premium note, see post, § 197.

#### [a] (Sup. 1863)

A policy in a foreign insurance company negotiated in Indiana by an agent of such company who had not complied with 1 Rev. St. p. 242, prescribing the terms on which agents of foreign corporations may transact business in this state, is void.—*Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520.

#### [b] (Sup. 1872)

A premium note given for a policy of insurance in a foreign company which has not complied with the provisions of law governing such companies doing business in this state, and to an agent to whom the auditor has issued no certificate, as provided by statute, authorizing him to act as agent, is void.—*Hoffman v. Banks*, 41 Ind. 1.

#### [c] (Sup. 1874)

A policy issued in Indiana by agents of a foreign insurance company without a compliance with the statute prescribing conditions on which foreign companies may transact business within the state is void, towards the company as well as towards the agents.—*Union Cent. Life Ins. Co. v. Thomas*, 46 Ind. 44.

#### [d] (Sup. 1879)

A policy is not void, though issued by a company which has not complied with the statute authorizing it to do business in Indiana.—*Behler v. German Mut. Fire Ins. Co.*, 68 Ind. 347.

#### [e] (Sup. 1879)

A note executed in Indiana to a foreign insurance company which has not complied with the laws of the state authorizing it to do business, is not void, but its enforcement is suspended until such laws have been complied with.—*American Ins. Co. v. Wellman*, 69 Ind. 413.

#### [f] (Sup. 1880)

Where a foreign insurance company has complied with the provisions of 1 Rev. St. 1876, p. 594, § 1, its contracts are not rendered void by the fact that the certified copy of the statement required to be filed in the office of the clerk of the circuit court of the county wherein the company establishes its agency fails, through the act of the auditor of state, to contain a copy of the company's act of incorporation.—*American Ins. Co. of Chicago v. Butler*, 70 Ind. 1.

#### [g] (Sup. 1880)

Premium notes taken by a foreign insurance company for insurance effected without having obtained authority to do business therein, as required by statute, are void.—*Cassaday v. American Ins. Co.*, 72 Ind. 95.

Where the answer in an action on a note given for insurance showed that the insurance

company had not complied with Act Dec. 21, 1865 (1 Rev. St. 1876, p. 594), in regard to foreign insurance companies, a recovery could not be had.—Id.

[b] (Sup. 1881)

The failure of a state auditor to furnish a foreign insurance company with a copy of its charter, as part of the certificate required to be filed by it in the county in which it does business, is no defense to an action by the company on a premium note.—*American Ins. Co. of Chicago v. Pressell*, 78 Ind. 442.

[1] (App. 1851)

Rev. St. 1881, §§ 3022, 3030, 3765, require agents of nonresident corporations to deposit in the office of the clerk of the county where they propose to do business the power of attorney or commission under which they act as agents, and to procure a certificate of authority from the auditor of the state, etc. *Held*, that a contract of insurance made in Indiana by an agent of a foreign corporation who did not comply with the requirements of these sections was invalid, and hence the contract of the assured to pay assessments was not enforceable in Indiana.—*Wiestling v. Warthin*, 1 Ind. App. 217, 27 N. E. 576.

[j] (Sup. 1893)

Though a foreign insurance corporation failed to comply with the statute requiring the performance of certain duties before transacting any business in the state of Indiana, yet, where it paid a loss on a policy issued to a citizen of that state, it was entitled to be subrogated to his rights as against a person whose negligence caused the loss; the statutory provisions in relation to foreign corporations having no application to an action for damages by such company against the person causing the loss, since it is not seeking to enforce a contract, but is merely standing in the place of the insured, to enforce a duty the person causing the loss owes the insured.—*Phenix Ins. Co. v. Pennsylvania R. Co.*, 134 Ind. 215, 33 N. E. 970, 20 L. R. A. 405.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 28-32.

See, also, 22 Cyc. p. 1393; note, 20 L. R. A. 405.

§ 25. — Civil liability of agents.

[a] (Sup. 1874)

One to whom the local agents of a foreign insurance company have issued a policy without compliance with the statute prescribing conditions on which foreign companies may transact business in this state may maintain an action to recover back his premium; and this independent of the doctrine of recovering back the consideration upon the rescission of a contract.—*Union Cent. Life Ins. Co. v. Thomas*, 46 Ind. 44.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 27, 32.

See, also, 22 Cyc. p. 1395.

§ 26. — Actions.

Action on policy, see post, § 628.

On mutual benefit certificate, see post, § 814.

Process and service thereof in actions on policies issued by foreign companies, see post, § 627.

[a] (Sup. 1888)

Under Rev. St. 1881, § 5668, providing that the attorney general shall sue for amounts due the state from any source, an action against a foreign insurance company for taxes and license fees due the state is properly brought by the state on the relation of the attorney general, though, the obligation being to the state, and no individual having an interest therein, no relator is necessary.—*State ex rel. Baldwin v. Insurance Co. of North America*, 115 Ind. 257, 17 N. E. 574.

[b] (App. 1909)

That a mutual fire insurance company was dissolved and ousted from doing business in the state where it was organized, so that it could not comply with Acts 1905, p. 113, c. 65 (Burns' Ann. St. 1908, § 4663), requiring the auditor, before issuing a license to a foreign mutual fire insurance company, to require a certificate by the insurance department of its home state that it is entitled to do business there, was a complete bar to an action in this state by a trustee to wind up its affairs, to recover an amount due on policies, and did not merely abate the action, as would have been the case if it could subsequently comply with the statute.—*Swing v. Wellington*, 89 N. E. 514.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 33.

See, also, note, 23 L. R. A. 490.

§ 30. Offenses by agents or brokers.

[a] (App. 1897)

In an affidavit on a complaint for violating Burns' Rev. St. 1894, § 4915 (Rev. St. 1881, § 3765), in unlawfully acting as agent of a foreign insurance company, the incorporation of such insurance company is not sufficiently alleged by an averment that it is "a certain foreign insurance company of a state other than" Indiana.—*State v. Campbell*, 46 N. E. 944, 17 Ind. App. 442.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 35.

See, also, 22 Cyc. p. 1396.

§ 31. Offenses by persons dealing with insurers.

Conspiracy to obtain money by false pretenses, see CONSPIRACY, §§ 38, 43, 45.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 36.

II. INSURANCE COMPANIES.

Taxation of insurance companies, liability, see TAXATION, §§ 136-141.

(A) STOCK COMPANIES.

§ 32. Incorporation, organization, and existence.

Evidence of corporate existence, see CORPORATIONS, § 32.

Recording articles of association, see RECORDS, § 6.

[a] (Sup. 1908)

A "stock insurance company" is one wherein the stockholders contribute all the capital, pay the losses, and take the profits.—*State v. Willett*, 171 Ind. 296, 86 N. E. 68, 23 L. R. A. (N. S.) 197.

"Mixed insurance companies" are those which embody the characteristics of both stock and mutual companies.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 37.

See, also, 22 Cyc. pp. 1397, 1398.

§ 33. Capital and stock.

Local and special laws prohibiting increase of capital stock, see STATUTES, § 80.

Right to share in new stock in general, see CORPORATIONS, § 158.

[a] (Sup. 1858)

A statement by the secretary of an insurance company that he has no stock for a subscriber does not dispense with an offer to pay therefor.—*Ohio Ins. Co. v. Nunemacher*, 10 Ind. 234.

[b] (Sup. 1907)

Where a special act authorizing an insurance corporation to increase its capital stock was void, the contract of a subscriber to such stock was without consideration and unenforceable either by the corporation or its receiver.—*Marion Trust Co. v. Bennett*, 82 N. E. 782, 169 Ind. 346, 124 Am. St. Rep. 228.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 38.

See, also, 22 Cyc. p. 1398.

§ 35. Officers.

Release of liability for corporate debts and acts in general, see CORPORATIONS, § 344.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 40.

See, also, 22 Cyc. p. 1401.

§ 36. Franchises and powers.

Power to reinsure, see post, § 676.

[a] (Sup. 1878)

An insurance company, authorized by its charter to invest its capital, etc., in "bonds and mortgages on unincumbered real estate," is authorized to loan money to A., and accept his notes and his wife's mortgage on her land to secure the same.—*Daly v. National Life Ins. Co. of United States of America*, 64 Ind. 1.

An insurance company authorized by its charter to invest its capital, etc., in "bonds and mortgages on unincumbered real estate," is authorized to loan money to A., and accept his notes and his wife's mortgage on her land to secure the same.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 41-45.

See, also, 22 Cyc. p. 1400.

§ 41. Insolvency and dissolution.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 8, 49-63.

See, also, 22 Cyc. pp. 1404-1409.

§ 44. — Remedies and proceedings on insolvency.

[a] (Sup. 1907)

In an action by a receiver of an insurance company for subscriptions on unpaid stock, evidence held to require a finding that the subscription was for stock issued under an unconstitutional statute, and not for the valid stock which the corporation was originally authorized to issue.—*Marion Trust Co. v. Bennett*, 169 Ind. 346, 82 N. E. 782, 124 Am. St. Rep. 228.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 54.

See, also, 22 Cyc. pp. 1405, 1406.

(B) MUTUAL COMPANIES.

Injunction involving mutual companies, see INJUNCTION, § 69.

Mutual benefit insurance associations, see post, §§ 692-710.

§ 52. Incorporation, organization, and existence.

Of mutual benefit insurance associations, see post, § 692.

[a] (App. 1901)

Under Burns' Rev. St. 1894, § 4932, limiting the territory in which mutual insurance companies may do business to three counties, and requiring the articles for forming such corporation to be recorded in the counties where the association does business, an association which in good faith attempted to organize under the statute, and in pursuance of such purpose secured notes for policies, but failed to record its articles as required, could be questioned as to its existence by the state only, and it was no defense to an action on the notes.—*Farmers' Ins. Co. v. Borders*, 60 N. E. 174, 26 Ind. App. 491.

[b] (App. 1905)

A mutual fire company organized under the act of 1877 (Acts 1877, p. 53), by amending its articles and regulations so as to protect against fire and lightning, must be held to be operating under the act of 1881 (Acts 1881, p. 714), allowing such companies to protect their members against fire and lightning.—*Farmers'*

Mut. Fire Ins. Co. of De Kalb County v. Jackman, 73 N. E. 730, 35 Ind. App. 1.

[c] (Sup. 1908)

A "mutual insurance company" is one wherein the members constitute both the insurers and the insured, where the members all contribute by assessments to the creation of a fund from which all losses and liabilities are paid, and wherein the profits are divided among themselves in proportion to their interests.—State v. Willett, 171 Ind. 296, 86 N. E. 68, 23 L. R. A. (N. S.) 197.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 49, 64, 65.

See, also, 22 Cyc. p. 1410, 25 Cyc. p. 1524.

#### § 54. Constitutions and by-laws.

Incorporation and construction as part of policy, see post, § 152.

Of mutual benefit insurance associations, see post, § 693.

Right of members to question validity, see post, § 55.

Secondary evidence of constitution, see EVIDENCE, § 164.

[a] (Sup. 1864)

An insurance corporation has power to enact a by-law providing that all premium notes given by members shall be paid in installments as ordered by the directors, after notice, and that, if the installments called are not so paid, the entire note shall become due and collectible.—German Mut. Fire Ins. Co. v. Franck, 22 Ind. 364.

[b] (App. 1905)

Members of a mutual fire company must take notice of by-laws which it has a right to make.—Farmers' Mut. Fire Ins. Co. of De Kalb County v. Jackman, 73 N. E. 730, 35 Ind. App. 1.

A mutual fire company has the right to make by-laws.—Id.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 66.

See, also, 22 Cyc. p. 1411; note, 1 L. R. A. (N. S.) 623.

#### § 55. Members.

Of mutual benefit insurance associations, see post, § 694.

[a] (Sup. 1882)

The stipulations of a contract of insurance with a member of a mutual company are no less binding than upon a stranger.—Willcuts v. Northwestern Mut. Life Ins. Co., 81 Ind. 300.

[b] (Sup. 1890)

One insuring in a mutual company becomes a member thereof.—Pfister v. Gerwig, 122 Ind. 567, 23 N. E. 1041.

A member of a mutual insurance company cannot question the validity of the by-laws under which he became a member.—Id.

[c] (App. 1901)

Acts 1899, p. 30, § 17, provides that no order for an accounting, or enjoining the prosecution of the business of any insurance company, or appointing a temporary or permanent receiver thereof, shall be made otherwise than on the application of the attorney general of his own motion. Held, that the act does not bar the consideration of a counterclaim pleaded by an individual member of a mutual insurance company in an action by the company.—Muller v. State Life Ins. Co., 60 N. E. 958, 27 Ind. App. 45.

A contract of a mutual life insurance association appointing a member thereof as a vice counselor of such company, with right to participate in a special renewal commission dividend, in consideration of his favorable influence, is not void as without consideration.—Id.

Neither was the contract void as diverting the expense fund of a mutual company for purposes of private gain, as the contract was for enlarging and extending its business.—Id.

[d] (App. 1905)

That insured is a member of a mutual fire company is no reason for treating the contract, as respects prevention of a forfeiture, as different from a contract issued by a stock company.—Farmers' Mut. Fire Ins. Co. of De Kalb County v. Jackman, 73 N. E. 730, 35 Ind. App. 1.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 67-69.

See, also, 22 Cyc. pp. 1412, 1413; note, 17 L. R. A. 547, 32 L. R. A. 481.

#### § 56. Officers.

[a] (Sup. 1872)

The act permitting the incorporation of mutual fire insurance companies (1 Gav. & H. St. p. 396, § 48), providing that if the directors refuse or neglect to make an assessment after a loss has been recovered against them, they shall be personally liable for the whole amount of the judgment, is in the nature of a penal statute, and makes the directors personally liable only where there has been a judgment recovered on a policy made by the corporation.—Raber v. Jones, 40 Ind. 436.

If a person holding a claim on a policy of insurance receives the company's note in settlement, and releases the claim, or elects to take judgment on the note, he cannot enforce the personal remedy provided by the statute (1 Gav. & H. p. 396) against the directors for failure to make an assessment to meet such judgment.—Id.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 70.

See, also, 22 Cyc. p. 1414; note, 2 L. R. A. (N. S.) 165.

**§ 57. Franchises and powers.**

Of mutual benefit insurance associations, see post, § 696.

[a] (App. 1910)

Act March 9, 1897 (Laws 1897, p. 318, c. 195), provides that five or more persons may associate themselves for the purpose of insurance on the assessment plan, and authorizes the managers of the company to fix the fee, rates, and amounts of premiums or assessments, the time and manner of payment thereof, and the risks to be assumed and the duration thereof, and provides that nothing in the statute shall prevent the creation and accumulation of other funds in excess of the amount required for the purposes of the corporation. *Held*, that an insurance company organized under such statute had authority to contract for extended insurance.—*Federal Life Ins. Co. v. Arnold*, 90 N. E. 493, rehearing denied 91 N. E. 357.

The statute authorizing the directors of a life insurance company organized under it to fix the amount of premiums, assessments, or periodical calls and the time and manner of payment thereof and the risks to be assumed, and the duration thereof and to change the same from time to time, and empowering the company to provide for the payment of policy claims or the accumulation of reserve, and the expenses of the management of the business by payments to be made either at periods named in the contract or on assessment, etc., does not restrict the power of a company organized under it, but extends the liability of the insured, and a company may fix the premium at such sum as will create a fund, not only sufficient to meet mortuary claims, but to create an unlimited reserve, and it may contract for extended insurance.—*Id.*

**FOR CASES FROM OTHER STATES.**

SEE 28 CENT. DIG. Insurance, §§ 71-75.

See, also, 22 Cyc. pp. 1415-1417.

**§ 58. Special funds.**

[a] (Sup. 1897)

A bill by policy holders in a mutual life insurance company to enjoin the payment of certain policies, which alleges that plaintiffs are each holders of policies in the company, contributing to its funds by assessments; that the company has accumulated a fund for the benefit of its policy holders, from which dividends are distributed; that such fund belongs to the members; and that plaintiffs are interested in such fund,—sufficiently shows that they were members of the company, and have such interests as entitle them to bring the action.—*Carmien v. Cornell*, 47 N. E. 216, 148 Ind. 83.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 76.

See, also, 22 Cyc. p. 1419.

**§ 61. Insolvency and dissolution.**

Of mutual benefit associations, see post, §§ 700-710.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 84-98.

See, also, 22 Cyc. pp. 1420-1425.

**§ 62. — Insolvency and its effect in general.**

[a] (Sup. 1868)

Code, § 199 (2 Gav. & H. St. p. 151), provides that a receiver may be appointed, where a corporation is in imminent danger of insolvency, or has forfeited its corporate rights. *Held*, that a receiver was properly appointed for an insurance company which, by reason of the illegal and fraudulent conduct of its officers, was unable to make and enforce assessments on its premium, notes, and where its officers were fraudulently and illegally disposing of its assets for the purpose of paying their own salaries, so as to render the company in imminent danger of insolvency.—*Howard v. Whitman*, 29 Ind. 557.

[b] (Sup. 1892)

Rev. St. 1881, § 3752, provides that every member of a mutual fire insurance company shall, before receiving a policy, deposit his note, as a premium note, payable, in whole or in part, when, on any assessment, the directors may require the same. "But should any person insuring in such company so desire, he can pay a definite consideration in lieu of a premium note;" and such person shall not be deemed a member, nor entitled to share in the accumulations of the company. Section 3753 provides that the funds of every such corporation shall be appropriated, first, to pay the expenses, and then to pay the damages which any member may be entitled to recover on his policy. *Held*, where a receiver was appointed for a mutual fire insurance company, and all the policies were canceled by order of the court, that the holders of the "all cash premium" policies had valid claims against the company for unearned return premiums.—*Clark v. Manufacturers' Mut. Fire Ins. Co.*, 130 Ind. 332, 30 N. E. 212.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 85.

See, also, 22 Cyc. p. 1420.

**§ 63. — Rights and liabilities of members on insolvency.**

[a] (Sup. 1892)

Where a receiver is appointed for a mutual fire insurance company organized under the laws of Indiana, and its policies are canceled under an order of court, paid-up policy holders in such company are entitled to payment of their unearned premiums paid out of any money remaining on hand after payment of the company's expenses in preference to claims of members for fire losses, and the latter must resort to the fund to be created by the payment of premium notes.—*Clark v. Manufacturers' Mut. Fire Ins. Co.*, 30 N. E. 212, 130 Ind. 332.

Under Rev. St. 1881, §§ 3752, 3753, the fire losses due paid-up policy holders stand on the same footing with those of the purely mutual plan.—Id.

[b] (App. 1892)

Where, in an application against a mutual fire insurance company for a receiver, the company appeared and admitted its insolvency, whereupon it was adjudged insolvent, and its policies ordered canceled, and a receiver appointed, its policy holders, being members of the company, under Rev. St. §§ 3751, 3752, are barred, without further notice, and cannot recover for losses occurring thereafter.—*Reliance Lumber Co. v. Brown*, 4 Ind. App. 92, 30 N. E. 625.

Such rule is not changed even though by the terms of the policy the company is required to give notice to the insured in case it desires to cancel the policy.—Id.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 86-88.

See, also, 22 Cyc. pp. 1421, 1422.

### § 66. — Reorganization.

Right to recover premium paid on reorganization, see post, § 198.

[a] (App. 1901)

Act Feb. 1899, p. 40, §§ 27, 28, relating to the reorganization of mutual insurance companies, did not intend that there should necessarily be a new company formed, but that the old company without changing its corporate identity might, by complying with the requirements of the act, be authorized to do business thereunder.—*Muller v. State Life Ins. Co.*, 60 N. E. 958, 27 Ind. App. 45.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 84.

See, also, 22 Cyc. p. 1419.

### § 70. — Assets and receivers.

Hearing of application for receivers, see RECEIVERS, § 40.

[a] (Sup. 1871)

A receiver of a mutual insurance company is authorized by statute to sue in his own name.—*Manlove v. Burger*, 38 Ind. 211.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 93.

### § 71. — Assessments by receivers.

[a] (Sup. 1868)

Where a receiver has been appointed to settle the liabilities of a mutual company, the expenses of suit brought to procure his appointment, together with all other incidental expenses in collecting an assessment ordered by the court and settling up the affairs of the company, are necessarily chargeable to the fund raised by the assessment; there being no other.—*Howard v. Whitman*, 29 Ind. 557.

It is no objection to an assessment made by the court in winding up the affairs of an insolvent mutual insurance company that the assessment will produce an amount more than sufficient to pay the company's liabilities and the necessary expenses attending the settlement, there being nothing in the court's decree authorizing the misapplication of the fund, since the surplus will be refunded to those from whom it was collected.—Id.

In case of a receivership to settle the liabilities of a mutual insurance company, the amount necessary to be assessed for such purpose is a proper matter for the court to determine; and an error of judgment in that respect will not vitiate the assessment or render it liable to be questioned collaterally.—Id.

[b] (Sup. 1870)

In a suit by the receiver of a mutual fire insurance company on a premium note, the answer alleged that the officers of the company entered into a fraudulent combination, and procured the institution of the suit against said company, in which said receiver was appointed, and the assessment sued for in this action was made, and by fraud, collusion, improper admissions, and false testimony procured the decree, assessment, and appointment of plaintiff in this action as receiver. Held that, if the defendant could in this collateral manner impeach said decree for fraud, the answer was bad for failing to allege any material facts constituting fraud.—*Boland v. Whitman*, 33 Ind. 64.

[c] (Sup. 1870)

The complaint by the receiver of an insurance company to collect an assessment, showing the organization of the company, the giving of the note for a policy, the assessments on the note, the notice and demand for their payment, legal proceedings on which the franchises of the company were declared forfeited for insolvency, and the appointment of a receiver, with the powers usually and properly conferred on such officers or fiduciaries of the courts in such cases, held good on demurrer.—*Whitman v. Hall*, 34 Ind. 422.

[d] (Sup. 1870)

Where, in an action on premium notes given an insurance company, brought by the company's receiver, the defendants alleged that the agent had represented the company to be entirely solvent; that by its charter it was forbidden to assess insured more than at the rate of 10 per cent. per annum on the amount of its premium notes, and no assessment should be made the first year; that the defendants were strangers in the country, and their insurance was obtained by false representations that other persons in whom they had confidence were insured in the plaintiff's company; but that after procuring the insurance, certain assessments had been made in violation of the agreement, which the defendants had paid to avoid litigation,—and plaintiff prayed that the policies be redelivered and canceled, the defense

was sufficient to require a reply as an answer, and an answer to it as a cross complaint.—*Whitman v. Meissner*, 34 Ind. 487.

[e] An action by a receiver of an insolvent mutual insurance company to collect an assessment on a premium note cannot be sustained where the complaint shows on its face that neither the receiver, nor the court to which he reports his action, has examined and determined the validity of the claims against the company.—(Sup. 1871) *Embree v. Shideler*, 36 Ind. 423; *Heller v. McCormick*, 38 Ind. 30; (1871) *Manlove v. Curtis*, 38 Ind. 31; (1872) *Tippecanoe Tp., Carroll County, v. Manlove*, 39 Ind. 249; (1873) *Hashagan v. Same*, 42 Ind. 330.

[f] The amount of claims which the receiver of an insolvent insurance company or the court will allow as just demands against the company, together with any indebtedness previously allowed by the directors of the company, as shown by their books, must be ascertained before an assessment can be made to pay such indebtedness.—(Sup. 1871) *Embree v. Shideler*, 36 Ind. 423; (1871) *Manlove v. Curtis*, 38 Ind. 31; (1872) *Tippecanoe Tp., Carroll County, v. Manlove*, 39 Ind. 249.

[g] (Sup. 1871)

In an action by a receiver to recover assessments made by the court upon premium notes given to a mutual insurance company, he must allege all the facts necessary to show a liability on the premium notes, and that the claims for losses had been adjusted, or were justly due to the parties making or setting up the claims.—*Manlove v. Burger*, 38 Ind. 211; *Same v. Naylor*, Id. 424.

[h] (Sup. 1871)

The appointment of a receiver does not determine the liability of the makers of premium notes.—*Manlove v. Burger*, 38 Ind. 211.

A complaint to recover assessments on premium notes must allege that the claims for losses had been adjusted or were justly due.—Id.

[i] A complaint in a suit by a receiver of a mutual insurance company to recover an assessment on a premium note must show that the assessment is to pay losses that occurred while defendant was a member of the company.—(Sup. 1871) *Manlove v. Naylor*, 38 Ind. 424; (1872) *Same v. Naw*, 39 Ind. 289; (1872) *Same v. Bender*, 39 Ind. 371, 13 Am. Rep. 280; (1872) *Whitman v. Mason*, 40 Ind. 189; (1874) *Downs v. Hammond*, 47 Ind. 131.

[j] (Sup. 1874)

In an action to collect an assessment on a premium note, the amount of claims which the receiver or the court will allow, together with any indebtedness previously allowed by the directors of the company, must be ascertained before an assessment can be made.—*Downs v. Hammond*, 47 Ind. 131.

The complaint, in an action by the receiver of an insolvent mutual insurance company to collect an assessment on a premium note, must show on its face that the court from which the receiver derives his authority has determined on the validity of the claims for the payment of which the assessment is made.—Id.

[k] (App. 1899)

A receiver cannot collect an assessment from a member whose policy provides for forfeiture of membership on failure to pay his assessment.—*Clark v. Schromyer*, 55 N. E. 785, 23 Ind. App. 565.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 94-97.

See, also, 22 Cyc. pp. 1423-1425.

## § 72. — Distribution of assets and funds.

[a] (Sup. 1892)

As used in Rev. St. 1881, § 3753, providing that the funds of every mutual fire insurance corporation shall be appropriated first to pay the expenses of the corporation and then to pay the damages to which any member may be entitled under his policy, the term "member" is synonymous with "policy holder."—*Clark v. Manufacturers' Mut. Fire Ins. Co.*, 30 N. E. 212, 130 Ind. 332.

As used in Rev. St. 1881, § 3753, providing that the funds of every mutual fire insurance company shall be appropriated first to pay the expenses of the corporation, and then to pay the damages which any member may be entitled to recover on his policy, the word, "damages" means fire losses.—Id.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 98.

See, also, 22 Cyc. p. 1426; note, 3 L. R. A. (N. S.) 653.

## III. INSURANCE AGENTS AND BROKERS.

Of mutual benefit insurance association, see post, §§ 753, 755.

### (A) AGENCY FOR INSURER.

Agency for both parties, see post, §§ 97-99.

Authority to receive notice of loss, see post, § 538.

Effect of representation by agent as to property covered by policy, see post, § 419.

Estoppel of insurer by acts, conduct, or statements of agent, see post, §§ 373, 558.

Extension by agent or broker of time for payment of premium or assessment, see post, § 358.

Insertion by agent of false answers in application, see post, § 379.

Knowledge of or notice to agents as element of estoppel or waiver affecting right of insurer to avoid or forfeit policy, see post, § 378.

Offenses by agents or brokers, see ante, § 30.  
Payment or tender to agent or broker of premium or assessment to prevent forfeiture, see post, § 361.

Power of agents as to contracts in general, see post, § 129.

Power of agents to waive grounds for avoidance or forfeiture of policy, see post, §§ 374–376.

Power of agents to waive notice and proof of loss, see post, § 556.

Requirement of appointment of local agents by foreign insurance companies, see ante, § 22.

Service of process on agent of foreign insurance company in action on policy, see post, § 627.

Statements and acts of agents constituting implied waiver of notice and proofs of loss, see post, § 558.

Wrongful discharge, see MASTER AND SERVANT, §§ 30, 39.

### § 73. The relation in general.

[a] (Sup. 1888)

The rule that the services performed by an insurance agent are performed as the agent of the company is essentially true where the principal is a foreign insurance corporation.—*Commercial Union Assur. Co. v. State ex rel. Smith*, 15 N. E. 518, 113 Ind. 331.

[b] (Sup. 1890)

There is no reason for drawing a distinction between an insurance broker who procures a risk which is adopted and accepted by an insurance company and a commissioned agent who effects the insurance, so far as their relations to the company are concerned. In either case what is done is the authorized act of the company, and for the services rendered the company responds.—*Indiana Ins. Co. v. Hartwell*, 24 N. E. 100, 123 Ind. 177.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 99, 100–115.

See, also, 22 Cyc. pp. 1435–1443, 1448.

### § 74. Appointment or employment of agent.

[a] (Sup. 1881)

A paper signed by an insurance agent, acknowledging receipt of certain books and papers “to be duly accounted for and delivered up to or on the order of the said company when demanded,” was not conclusive of the fact that the employment of the agent was at the pleasure of the company, so as to permit it to discharge the agent at any time without liability to respond in damages as for breach of the contract of employment.—*Niagara Fire Ins. Co. v. Greene*, 77 Ind. 590.

[b] (Sup. 1890)

Plaintiff asked an insurance broker to obtain insurance for him. The broker applied to a firm of insurance agents, who procured the insurance from defendant. They had no authority to place insurance for defendant, but

were in the habit of submitting applications to it for action. They received from defendant part of the premium for their compensation in the matter. *Held*, that they were defendant's agents, so as to charge it with their knowledge regarding the insured premises.—*Indiana Ins. Co. v. Hartwell*, 123 Ind. 177, 24 N. E. 100.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 99, 100.

See, also, 22 Cyc. p. 1427.

### § 78. Scope and extent of agency.

[a] (App. 1896)

An agent holding a commission from an insurance company authorizing him to take risks, without placing any limitation thereon either as to the kind of risks or as to the territory within which they may be, is a general agent.—*German Fire Ins. Co. v. Columbia Encaustic Tile Co.*, 15 Ind. App. 623, 43 N. E. 41.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 103.

See, also, 22 Cyc. pp. 1429–1434.

### § 80. Authority and duties of agent as to insurer.

[a] (Sup. 1881)

In an action by an insurance agent to recover for wrongful discharge, evidence that he was at the same time acting as agent for other companies is immaterial, where the terms of the contract did not require him to give his whole time to the service of the defendant.—*Niagara Fire Ins. Co. v. Greene*, 77 Ind. 590.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 105, 500.

See, also, 22 Cyc. pp. 1435–1443.

### § 82. Accounting by agent.

Consolidation of action for accounting with other action, see ACTION, § 57.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 107, 108.

See, also, 22 Cyc. p. 1437.

### § 84. Compensation of agent.

[a] (Sup. 1882)

Where the contract of an insurance agent with the company provided that the agent should receive a certain percentage of the premiums on policies procured by him, and a certain percentage of renewal premiums, the agent, on termination of the contract by the company, was entitled to recover the probable value of his percentage of the renewal premiums with such damages as were not too remote or speculative.—*Ætna Life Ins. Co. v. Nexsen*, 84 Ind. 347, 43 Am. Rep. 91.

Where defendant insurance company engaged plaintiff as its agent, and agreed to pay him a certain percentage of the first premiums on the business he solicited, and also a certain percentage of each renewal premium, plaintiff was entitled to recover compensation already

earned, though defendant had a right to discharge him.—Id.

In a suit by an insurance agent for his wrongful discharge, he may recover not merely his commissions on premiums collected prior to his dismissal, but also the probable value of renewals on policies obtained by him.—Id.

In a suit by an insurance agent for his wrongful discharge, resort may be had to life or actuary's tables to determine the probable value of his commissions from premiums on renewals of policies obtained by him.—Id.

[b] (Supp. 1890)

A contract by which a foreign insurance company employs an agent to represent it in Indiana not being within the purview of Elliott, Supp. § 903, providing for suits against such insurance companies, suit can only be brought on such contract in a forum within the company's domicile.—Rehm v. German Ins. & Sav. Inst., 125 Ind. 135, 25 N. E. 173.

[c] (App. 1897)

A suit by an agent of a foreign insurance company against it on a contract for compensation, or on a check to his order drawn and payable in the foreign state, is not authorized by Act March 5, 1883, forbidding any foreign insurance company to do business in the state until it files with the state auditor an order consenting that process against it may be served on any of its agents in the state, that such service may be made while any liability remains outstanding against it, and that, if there be no agent in the county where suit is brought, service may be made on the state auditor.—Byers v. Union Cent. Life Ins. Co., 46 N. E. 475, 17 Ind. App. 101.

[d] (Sup. 1902)

Where a life insurance company's contract with a general agent provided he should be entitled to certain commissions on renewals, etc., after the termination of the agency, but further stipulated that, if the agent should fail to remit money belonging to the company and collected by him, all his rights under the contract should be forfeited to the company, a plea of breach of this stipulation was a good defense in an action by the agent to recover commission on renewals.—Frankel v. Michigan Mut. Life Ins. Co., 62 N. E. 703, 158 Ind. 304.

A plea, by way of set-off, of the failure to turn over the moneys, was not bad, because not setting out the contract, where a copy of that instrument was filed with the complaint, referred to in the answer, and its execution mutually admitted.—Id.

The plea by way of set-off having expressly averred that the agent had collected and wrongfully retained money under the contract, and that instrument requiring the remittance of such money "immediately," there was a sufficient showing that the set-off "arose out of a debt, duty, or contract held by defendant at the time the suit was commenced, and matur-

ed at or before the time it was offered as a set-off," as required by Burns' Rev. St. 1901, § 351.—Id.

As the contract required an "immediate" payment of money coming into plaintiff's hands, the plea of set-off was not bad because failing to allege a demand.—Id.

Where a life insurance company and its general agent had an accounting and settlement of all transactions up to a certain date, in which it was agreed that the agent had received credit for all claims for commissions up to the date of settlement, a plea of such settlement in an action by the agent for commissions claimed to have been earned prior thereto, though not amounting to an estoppel, was good as a plea of payment, under which plaintiff would be entitled to show that items which should have been credited to him at the accounting were omitted.—Id.

The agreement did not release the agent from his obligation to pay over money in his hands belonging to the company which he failed to report at the time of settlement, but the insurance company was entitled to recover such money without returning the portion paid to it upon the settlement.—Id.

The subsequent recovery by plaintiff's wife of real property transferred to the company on settlement, in part payment of the amount due from plaintiff, rendered such payment unavailing, and was competent defensive matter.—Id.

[e] (App. 1904)

Plaintiff employed defendant as an insurance solicitor, agreeing to pay a specified commission for his services. The contract also provided that plaintiff might offset against any claims under the contract any and all debts or liabilities of defendant to plaintiff. A supplemental contract provided for advancements by plaintiff to defendant of \$15 a week, which advancements were to be a first lien on all commissions or renewals then due or that might thereafter become due, and plaintiff was authorized to deduct any advancements made from any money received on premiums which under the primary contract should be due to defendant. Held that, under the primary contract, the only compensation defendant was to receive was the commission agreed on, and that the advancement provided for in the supplemental contract was a part of, and not in addition to, such commission.—Arbaugh v. Shockney, 71 N. E. 232, 72 N. E. 668, 34 Ind. App. 268.

Plaintiff employed defendant as an insurance solicitor, agreeing to pay a specified commission for his services. The contract also provided that plaintiff might offset against any claim under the contract any and all debts or liabilities of defendant to plaintiff. A supplemental contract provided for advances by plaintiff to defendant of \$15 a week, which advances were to be a first lien on all commissions or renewals then due or that might thereafter be-

come due; and plaintiff was authorized to deduct any advances made from any money received on premiums, which, under the primary contract, should be due to defendant. *Held*, that such advances did not create a debt on the part of defendant, and on failure of the venture to prove successful plaintiff could not recover the same of defendant.—Id.

A contract between plaintiff and his agent provided for advances to the agent to be repaid from commissions to be earned, and that the agent should remain in the employment so long as he was in debt to plaintiff. *Held*, that the use of the word "debt" with reference to advances implied no different mode of repaying than that provided for by the terms of the contract, and did not import personal liability.—Id.

[f] (App. 1910)

The discharge of a general agent of a life insurance company being authorized by the terms of his contract with it, on his failure to make reports and pay over on demand money in his hands belonging to it, his discharge on failing so to do is not wrongful, and so does not authorize recovery by him of it of damages; and therefore he is not entitled to recover of it the present value of that part of his compensation consisting of a per cent. of renewal premiums on policies procured by him, payable to him, according to the terms of his contract with it, from year to year, as such premiums should be received by it, so long as \$100,000 of insurance procured by him should remain in force.—Security Mut. Life Ins. Co. v. Frankel, 92 N. E. 183.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 111-114.  
See, also, 22 Cyc. pp. 1439-1442.

§ 85. Breach of contract by principal.

Departure in pleading in action for wrongful discharge, see PLEADING, § 180.

Recovery of commissions on renewals, see ante, § 84.

[a] (App. 1904)

Where plaintiff, as part of a contract for the employment of defendant as an insurance solicitor, agreed to advance defendant \$15 per week, to be repaid from commissions, and defendant was deprived of his ability to perform the contract by plaintiff's refusal to longer make such advancements, and to continue defendant in her services, except under a new contract, which defendant refused to accept, plaintiff, having broken the contract, could not recover for defendant's failure to perform the same.—Arbaugh v. Shockney, 71 N. E. 232, 72 N. E. 668, 34 Ind. App. 268.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 115.  
See, also, 22 Cyc. p. 1436.

§ 86. Extent and exercise of powers of agents.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 116-122.  
See, also, 22 Cyc. pp. 1429-1434.

§ 88. — General or special agents.

[a] (App. 1908)

A local agent of an insurance company for a county has no authority to appoint another as its agent.—Michigan Mut. Life Ins. Co. v. Thompson, 86 N. E. 503.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 117, 118.  
See, also, 22 Cyc. pp. 1429-1431.

§ 89. — Assistants and clerks of agents.

[a] (Sup. 1890)

Insurance companies are not only responsible for the acts of their agents, within the scope of their agency, but also for the acts of the agents' clerks, when the company knew, as it had ought to have known, that other persons would be employed by and to act for the agents. Insurance brokers are the agents of insurance companies for the purpose of delivering policies and collecting premiums.—Indiana Ins. Co. v. Hartwell, 24 N. E. 100, 123 Ind. 177.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 119.  
See, also, 22 Cyc. p. 1431.

§ 91. — Effect of instructions to agent.

[a] (Sup. 1888)

It is immaterial what private instructions an insurance company may have given its agent, if they were not brought to the knowledge of the assured. The rule that private instructions do not bind a party dealing with an agent unless he has notice of them applies to contracts of insurance as well as to other contracts.—Commercial Union Assur. Co. v. State ex rel. Smith, 15 N. E. 518, 113 Ind. 331.

[b] (App. 1894)

Where an applicant for accident insurance acts in good faith with the insurance company's agent, relying on the statements made by such agent, within the scope of his apparent authority, the insurance company is bound by the statements. It is the duty of such company to bring to the knowledge of the applicant for insurance any limitation that there may be on the power of the agent within the scope of the business.—Kerlin v. National Acc. Ass'n, 35 N. E. 39, 36 N. E. 156, 8 Ind. App. 628.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 120.  
See, also, 22 Cyc. p. 1430.

**§ 92. — Evidence as to authority.**

[a] (App. 1896)

Where the defense in an action on a policy is that the policy was issued by a clerk of the agent of defendant, without its authority, evidence of the duties of the clerk, his custom in passing on applications for insurance, signing the agent's name to policies and to reports of risks taken which were sent to the company, was admissible on the question whether the policy was executed by the company as a matter of law.—*German Fire Ins. Co. v. Columbia Encaustic Tile Co.*, 15 Ind. App. 623, 43 N. E. 41.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 122.

**§ 93. Unauthorized and wrongful acts of agent.**

[a] (App. 1907)

An insurance company cannot be permitted to profit through the fraud of its agent and at the same time escape responsibility therefor.—*Ætna Life Ins. Co. v. Bockting*, 39 Ind. App. 586, 79 N. E. 524.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 123.

See, also, 22 Cyc. p. 1433.

**§ 94. Ratification.**

Reinsurance, see post, § 676.

[a] (App. 1895)

The acceptance by the insurer of an application forwarded through a person assuming to act as its agent, the applicant being ignorant of his want of authority, is a ratification of the acts of such agent in soliciting and contracting for the insurance within the scope of his apparent authority.—*Terry v. Provident Fund Soc. of New York*, 13 Ind. App. 1, 41 N. E. 18, 55 Am. St. Rep. 217.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 124; 40 CENT. DIG. Princ. &amp; A. § 645.

See, also, 22 Cyc. p. 1434.

**(B) AGENCY FOR APPLICANT OR INSURED.**

Authority to give notice of loss, see post, § 537. In mutual benefit insurance association, see post, § 740.

**§ 96. Creation of agency to procure insurance in general.**

[a] (App. 1908)

Where an agent of a life insurance company which had rejected an application, told applicant's husband that he could procure insurance in another company, and applicant's husband told him to "go ahead and get her in

any good company," and the agent obtained a policy through an agent of another company, he was the agent of the applicant, and not of the insurer.—*Michigan Mut. Life Ins. Co. v. Thompson*, 86 N. E. 503.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 120.

See, also, 22 Cyc. p. 1444, 25 Cyc. p. 1525.

**§ 97. Creation of agency for both parties.****FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 127, 128.

See, also, 22 Cyc. p. 1445.

**§ 98. — In general.**

[a] (Sup. 1888)

Where an applicant directs a person, who is local agent for several companies, to obtain policies for him, and the agent does obtain policies in the companies represented by him, he acts as the agent of the companies, and not as the agent of the insured.—*Commercial Union Assur. Co. v. State ex rel. Smith*, 113 Ind. 331, 15 N. E. 518.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 127.

See, also, 22 Cyc. p. 1444.

**§ 99. — Effect of provisions of policy.**

[a] (Sup. 1885)

Whether or not brokers employed by an owner of property to procure a line of insurance acted as the agent of the insured or the insurer must depend on the actual relations which existed between the parties at the time, and is not controlled by a stipulation in the policy to the effect that only such persons as should hold the commission of the company should be deemed its agents.—*Indiana Ins. Co. v. Hartwell*, 100 Ind. 566.

[b] (App. 1893)

An applicant for insurance, who agrees to accept a certificate of membership, subject to all its conditions and provisions, and also agrees that the society shall not be bound by any statement made to, or knowledge possessed by, any agent or broker not written in the application, hereby appointing such person my agent to enter my answers to the following statements, is not concluded thereby from showing that the person who wrote the same was in fact the agent of the company and not his agent, and that the language ascribed to him was in fact not his, but that of the agent.—*Howe v. Provident Fund Soc.*, 34 N. E. 830, 7 Ind. App. 586.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 128.

See, also, 22 Cyc. p. 1445.

**§ 103. Authority and duties of agent as to principal.****[a] (App. 1892)**

Plaintiff asked defendant, an insurance broker, for insurance with one of his regular companies. Defendant replied that his companies refused the risk, but he offered to insure elsewhere. Subsequently defendant wrote an application directing a company to send him the policy for delivery, which plaintiff signed. This company had offered defendant 20 per cent. on premiums as inducement for him to send applications for risks which his regular companies should refuse. Plaintiff, on receipt of the policy, paid the premium to defendant, who promised him to pay it to the company, but neglected to do so. The policy postponed the company's liability until the premium be actually paid to it, "at its office," and repudiated insurance unless by "the duly commissioned and lawfully authorized agent for this company." *Held*, that defendant acted as agent for plaintiff in procuring and delivering the policy and collecting the premium, and was liable to plaintiff for the loss.—*Criswell v. Riley*, 5 Ind. App. 496, 30 N. E. 1101, 32 N. E. 814.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 130.

See, also, 22 Cyc. pp. 1447, 1448.

**IV. INSURABLE INTEREST.**

Affecting validity of assignment of mutual benefit insurance, see post, § 728.

Authority of part owner of vessel to insure for the other owners, see SHIPPING, § 21.

Change of interest, after insurance, see post, § 328.

Effect of payment of loss, see post, § 600.

Instructions, see post, § 669.

Mutual benefit insurance, see post, § 767.

Pleading, see post, § 630.

Pleading matters of fact or conclusions relating to, see PLEADING, § 8.

Representations, warranties, or conditions in policy or application therefor, see post, §§ 282, 298.

Right to proceeds of policy, see post, §§ 580-594.

Verdict and findings, see post, § 670.

**§ 114. Necessity in general.**

Dependent on nature of contract, see post, § 124.

In mutual benefit insurance, see post, § 767.

**[a] (Sup. 1887)**

A policy of fire insurance taken out by a party who has no insurable interest in the premises is void.—*Bersch v. Sinnissippi Ins. Co.*, 28 Ind. 64.

**[b] (Sup. 1867)**

A beneficiary in a life policy may recover after the death of assured, though he has no pecuniary interest in the assured's life.—*Prov-*

ident Life Ins. & Inv. Co. v. Baum, 29 Ind. 236.

A person has an insurable interest in his own life and may effect insurance thereon and appoint any one to receive the money in case of his death during the existence of the policy.—*Id.*

**[c] (Sup. 1872)**

A person cannot purchase and hold for his own benefit, as a matter of mere speculation, a policy of insurance on the life of one in whose life he has no sort of insurable interest.—*Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116, 13 Am. Rep. 313.

**[d] (Sup. 1881)**

Plaintiff in an action on a policy must allege and prove an insurable interest at the time of loss.—*Etna Ins. Co. v. Kittles*, 81 Ind. 96.

**[e] (Sup. 1887)**

No one can have the benefit of an insurance effected by himself on the life of another unless he has an insurable interest in the life insured.—*Amick v. Butler*, 12 N. E. 518, 111 Ind. 578, 60 Am. Rep. 722.

[f] A policy of insurance taken by a person on his own life in favor of another is not invalid because the beneficiary has no insurable interest.—(App. 1899) *Prudential Ins. Co. of America v. Hunn*, 52 N. E. 772, 21 Ind. App. 525, 69 Am. St. Rep. 380.

**[g] (Sup. 1904)**

A policy of life insurance issued on a life in which the beneficiary had no insurable interest, without insured's knowledge, was void, as being against public policy, and in violation of Act March 9, 1883, § 6 (Acts 1883, p. 204, c. 136), providing that when payments of assessments on a policy are made by a person other than the insured, and without his written consent, the beneficiary must have an insurable interest in the insured's life.—*American Mut. Life Ins. Co. v. Bertram*, 70 N. E. 258, 163 Ind. 51, 64 L. R. A. 935.

**[h] (App. 1906)**

Under Burns' Ann. St. 1901, § 4902, providing that, when payments on a policy are made by a person other than the insured and without his written consent, the beneficiary must have an insurable interest in the insured's life, a policy of insurance issued on a life in which the beneficiary had no insurable interest without insured's knowledge was void.—*American Mut. Life Ins. Co. v. Mead*, 39 Ind. App. 215, 79 N. E. 526.

**[i] (App. 1908)**

Considerations of public policy require an insurable interest in the life of the person insured, and its presence is an evidence of the good faith of the parties, and the fact of one insuring his life for the benefit of himself or another is evidence of such good faith as will

validate the contract.—*New York Life Ins. Co. v. Greenlee*, 42 Ind. App. 82, 84 N. E. 1101.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 136-138.

See, also, 19 Cyc. p. 583, 25 Cyc. pp. 701, 702, 26 Cyc. p. 550; note, 25 L. R. A. 627; note, 58 Am. Rep. 852.

**§ 115. What constitutes interest in property.**

[a] (Sup. 1887)

One who has taken a conveyance of property in good faith, and gone into possession, claiming to be the owner in fee simple, has an insurable interest therein; and, in an action upon a policy issued to him thereon, the insurance company can raise no question as to the validity of his title.—*Home Ins. Co. v. Gilman*, 112 Ind. 7, 13 N. E. 118.

[b] (Sup. 1889)

Rev. St. 1881, § 5116, provides that the lands of a married woman shall not be subject to her husband's debts, but shall be her separate property as fully as though she were unmarried, provided that she shall not incur or convey the same unless he join her; and section 5117 provides that a married woman may acquire and hold real property, together with the issues thereof, as though she were unmarried, but shall not convey or mortgage the same unless her husband join her. *Held*, that the husband has no insurable interest in his wife's separate property, and cannot enforce a policy thereon, though she holds the legal title.—*Traders' Ins. Co. of Chicago v. Newman*, 120 Ind. 554, 22 N. E. 428.

[c] (Sup. 1907)

A life tenant has an insurable interest in a house situated on the life estate.—*Glens Falls Ins. Co. v. Michael*, 167 Ind. 659, 74 N. E. 964, 79 N. E. 905, 8 L. R. A. (N. S.) 708.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 139-157.

See, also, 19 Cyc. pp. 584-590, 25 Cyc. p. 1517, 26 Cyc. pp. 554-566; note, 43 L. R. A. 664, 66 L. R. A. 657; note, 20 Am. Dec. 510; note, 104 Am. St. Rep. 988-992.

**§ 116. What constitutes interest in human life or health.**

Mutual benefit insurance, see post, § 767.

[a] (Sup. 1887)

A creditor has an insurable interest in the life of his debtor, and may in good faith take insurance on such life either by procuring a policy designating him as beneficiary or by assignment, but the amount of the insurance obtained must bear some just proportion to the debt, or the extent of the obligation assumed by the beneficiary, and the probable contingencies attending the future maintenance of the policy.—*Amick v. Butler*, 12 N. E. 518, 111 Ind. 578, 60 Am. Rep. 722.

[b] (Sup. 1889)

As a rule, a grandfather is under no legal obligation to support or provide for his grandchild, and, though the relationship may be stated in the complaint, from this fact alone the court cannot as a matter of law infer such an insurable interest in the life of the grandfather as will uphold a policy issued on his life directly to the grandchild.—*Burton v. Connecticut Mut. Life Ins. Co.*, 21 N. E. 746, 119 Ind. 207, 12 Am. St. Rep. 405.

[c] (Sup. 1890)

A judgment creditor has an insurable interest in the life of his debtor.—*Walker v. Larkin*, 127 Ind. 100, 26 N. E. 684.

[d] (App. 1896)

An uncle living on his sister's place, and keeping his nephew, the child of his sister, has no insurable interest in such child.—*Prudential Ins. Co. of America v. Jenkins*, 15 Ind. App. 297, 43 N. E. 1056, 57 Am. St. Rep. 228.

[e] (App. 1896)

A complaint to recover on a policy issued to plaintiff on the life of his mother alleged that plaintiff was liable for the support of the assured under the laws of Illinois, where they lived when the insurance was effected; that plaintiff supported and maintained the assured until her death; that under the same law the assured was liable for the maintenance of plaintiff; and that thereby plaintiff had a valuable pecuniary interest in her life. The statute of Illinois, a copy of which was filed with the complaint, gives no right of action by the son against the mother, or vice versa, for non-support, but creates a legal liability in behalf of the town or county. The exhibits filed with the complaint showed that the assured was 76 years old when the policy was issued, and there was nothing to show that plaintiff expected any benefit from her in the way of service or maintenance. *Held*, that the complaint failed to show that plaintiff had an insurable interest in the life of the assured.—*People's Mut. Ben. Soc. v. Templeton*, 16 Ind. App. 126, 44 N. E. 809.

[f] (App. 1899)

A mother, as such, has not an insurable interest in the life of her son, so that she can take out a policy thereon.—*Prudential Ins. Co. of America v. Hunn*, 52 N. E. 772, 21 Ind. App. 525, 69 Am. St. Rep. 380.

[g] (App. 1906)

A policy of insurance issued to plaintiff on the life of his mother-in-law is *prima facie* void ab initio for lack of insurable interest of plaintiff in the life insured.—*American Mut. Life Ins. Co. v. Mead*, 39 Ind. App. 215, 79 N. E. 526.

[h] (Sup. 1908)

A person has an insurable interest in the life of another, where there is a reasonable probability that he will gain by the latter's re-

maintaining alive or lose by his death (quoting Words and Phrases, vol. 4, p. 3672).—*State v. Willett*, 171 Ind. 296, 86 N. E. 68, 23 L. R. A. (N. S.) 197.

The official undertakers of an association, whose business was to insure to each of its members a sum to defray his funeral expenses, and who through the profits they received from the sale of supplies were the sole beneficiaries under the contracts between the association and its members, had no insurable interest in the members' lives.—*Id.*

[1] (App. 1908)

Though a son has no insurable interest in the life of his father because of such relationship, the father may insure his life for the benefit of the son.—*New York Life Ins. Co. v. Greenlee*, 42 Ind. App. 82, 84 N. E. 1101.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 158–162. See, also, 1 Cyc. pp. 238, 239; note, 39 C. C. A. 632; notes, 19 L. R. A. 187, 53 L. R. A. 817, 54 L. R. A. 225, 57 L. R. A. 496; notes, 46 Am. Rep. 189, 52 Am. Rep. 135.

#### § 117. Estoppel to deny interest.

[a] (App. 1899)

A subsequent consent by insurer to its assignment does not validate a policy void when issued because insured had no insurable interest; the rule that the assignment by consent makes a new contract, and that defenses available against the assignor cannot be pleaded against the assignee, not being applicable to a policy void in its inception.—*Franklin Ins. Co. v. Wolf*, 54 N. E. 772, 23 Ind. App. 549.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 163. See, also, 19 Cyc. p. 590, 25 Cyc. p. 711; note, 5 L. R. A. (N. S.) 747.

#### § 118. Insurance without interest.

Effect of payment, see post, § 600.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 164, 165. See, also, 19 Cyc. p. 583; note, 60 Am. Rep. 729; note, 128 Am. St. Rep. 302.

#### § 119. — Wagering policies in general.

[a] Issue of policy of life insurance to one having no interest as relative, dependent, creditor, or otherwise in the life of the insured, and who pays the premiums, is against public policy, and the contract is void.—(App. 1899) *Prudential Ins. Co. of America v. Hunn*, 52 N. E. 772, 21 Ind. App. 525, 69 Am. St. Rep. 380; (Sup. 1904) *American Mut. Life Ins. Co. v. Bertram*, 70 N. E. 258, 163 Ind. 51, 64 L. R. A. 935.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 165. See, also, 19 Cyc. p. 583.

#### § 121. Necessity of interest to sustain assignment.

Mutual benefit insurance, see post, § 767.

[a] (Sup. 1872)

A life insurance policy, although valid, cannot be assigned to one having no insurable interest in the life of the person insured.—*Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116, 13 Am. Rep. 313.

[b] (Sup. 1876)

During the lifetime of a person who has a policy of insurance on his own life, payable, after his death, to his personal representative, another person, who has no insurable interest in the life of the insured, cannot purchase such policy, and take an assignment of it to himself from the insured, and hold the title thereof in himself for his own benefit.—*Franklin Life Ins. Co. v. Sefton*, 53 Ind. 380.

[c] (Sup. 1903)

Though a person cannot take out a policy in his own favor on the life of another unless he has an insurable interest in the latter's life, one may in good faith take out a policy on his own life, and assign it in good faith to a person having no insurable interest therein.—*Davis v. Brown*, 65 N. E. 908, 159 Ind. 644.

*Burns' Rev. St. 1901, § 4914h*, relating to insurance companies organized under the laws of the state, and which declares that the assignment of a life policy to a person having no insurable interest in the insured's life, except as security for debt, with remainder over to the beneficiary or the estate of the insured, shall render the policy void, is inapplicable to an assignment of a policy issued by a New York corporation.—*Id.*

[d] (App. 1903)

A husband, having a policy on his wife's life, with the consent of the insurer, assigned the same to plaintiff's intestate, to secure him against loss for becoming surety on certain notes given by the husband. *Held* that, since the assignee had no insurable interest in the life of the wife, the assignment was void.—*Thornburg v. Aetna Life Ins. Co.*, 66 N. E. 922, 30 Ind. App. 682.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 166, 167.

#### § 122. Assignment of policy to person without interest.

Pleading, see post, § 639.

[a] (App. 1891)

A policy of insurance on the life of a married woman was assigned by her and her husband to one of the husband's creditors, and was assigned by such creditor to one having no insurable interest in the woman's life. *Held*, that such second assignee acquired no interest by the assignment, it being contrary to public policy that any one should have insurance on the life of another in whose life he has no in-

surable interest.—*Kessler v. Kuhns*, 1 Ind. App. 511, 27 N. E. 980.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 166, 167.  
See, also, 19 Cyc. p. 591, 25 Cyc. p. 709;  
note, 27 Am. Rep. 327; note, 16 Am. St.  
Rep. 906.

**V. THE CONTRACT IN GENERAL.**

Mutual benefit insurance, see post, §§ 711-728.  
Parol or extrinsic evidence to contradict or vary  
contract, see EVIDENCE, §§ 405, 419.

Pleading policy and accompanying documents,  
see post, § 631.

Policy or other contract as evidence, see post, §  
651.

Reinsurance, see post, §§ 677-679.

Specific performance, see SPECIFIC PERFOR-  
MANCE, §§ 78, 115.

Stating name and address of family physician  
in application as consent that the physician  
might testify in an action on the policy, see  
WITNESSES, § 219.

**(A) NATURE, REQUISITES, AND  
VALIDITY.**

Contract of reinsurance, see post, § 678.

Effect of misrepresentation, fraud, or breach of  
warranty, covenant, or condition, see post, §§  
250-300.

Validity of application for insurance made on  
Sunday, see SUNDAY, § 13.

**§ 124. Nature of the contract.**

**[a] (Sup. 1875)**

A policy of insurance is a chose in action  
governed by the same principals applicable to  
other agreements involving pecuniary obliga-  
tions.—*Hutson v. Merrifield*, 51 Ind. 24, 19  
Am. Rep. 722.

**[b] (Sup. 1908)**

Contracts of insurance companies with  
those insured are plain indemnity contracts, by  
which one party agrees for a stipulated sum to  
assume some risk borne by the other party,  
and, if the apprehended loss occurs, to fully  
reimburse the loser, or to the extent agreed  
upon in the contract (citing *Words and Phrases*,  
vol. 4, pp. 3674-3677).—*State v. Willett*,  
171 Ind. 290, 86 N. E. 68, 23 L. R. A. (N.  
S.) 197.

A contract founded upon a legal consid-  
eration, whereby the obligor agrees to furnish the  
obligee or one of the obligee's near relatives  
with a burial reasonably worth a fixed sum, is  
a valid indemnity contract.—*Id.*

An "insurance contract" is one whereby,  
for an agreed premium, one party undertakes  
to compensate the other, for loss on a specified  
subject, by specific perils.—*Id.*

"Life and accident insurance" is a con-  
tract whereby one, for a stipulated considera-

tion, agrees to indemnify another against in-  
juries by accident or death.—*Id.*

The object of an association was to fur-  
nish each of its members at death a specific  
sum for application to his funeral expenses, by  
a system of mutual contribution; the members  
at the death of any member paying death as-  
essments. It employed agents to solicit busi-  
ness from the general public and was not found-  
ed on principles of philanthropy. *Held*, that  
its contracts with its members constituted "life  
insurance," within *Burns' Ann. St.* 1908, §  
4713, forbidding the taking of an application  
for insurance upon the life of any person in  
the state in favor of a person not having a  
bona fide insurable interest in the life of in-  
sured, or who is not related to him within a  
certain degree.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 172, 176,  
178.

See, also, 19 Cyc. p. 583, 25 Cyc. pp. 697-  
700, 1516, 26 Cyc. p. 566.

**§ 125. What law governs.**

Pleading common law of other state, see COM-  
MON LAW, § 15.

**[a] (App. 1891)**

Where an application for life insurance in  
a Pennsylvania company is taken by an agent  
in Indiana, and forwarded to the home office  
in Philadelphia, and upon the receipt of the  
policy issued thereon the agent delivers it to  
the assured, and receives from him the first  
payment, the contract is consummated in Indi-  
ana, and its validity determined by Indiana  
Laws.—*Wiestling v. Warthin*, 1 Ind. App. 217,  
27 N. E. 576.

**[b] (App. 1900)**

An insurance policy issued by a company  
organized under the laws of Pennsylvania,  
which recites that the company has, by its of-  
ficers, signed the contract at its office in Phila-  
delphia, and promises to make payment after  
proof of death received at its office in Phila-  
delphia, is a Pennsylvania contract governed  
by the laws of that state.—*Fidelity Mut. Life  
Ass'n of Philadelphia v. McDaniel*, 57 N. E.  
645, 25 Ind. App. 608.

**[c] (App. 1909)**

The agent of an Ohio fire insurance com-  
pany, where its offices were, went to Indiana  
and obtained from defendants at their place of  
business there two applications for policies,  
which were signed by defendants and delivered  
to the agent. The applications stated that pre-  
mium notes were to be given which the agent  
stated would be sent by the company to defend-  
ants for execution. The notes were sent to  
defendants in Indiana, together with applica-  
tions, and were signed by them and returned to  
the company, and shortly thereafter the policies  
were delivered to defendants and the first pre-  
miums were mailed to the company. The poli-  
cies were not to be binding until received and

examined by defendants. No place of payment of the notes, or of the policy in case of loss, was named either in the notes, applications, policies, or in the company's by-laws. *Held*, that the contracts of insurance were governed by Indiana laws.—*Swing v. Wellington*, 89 N. E. 514.

[d] (App. 1910)

A life policy issued on an application stipulating that the policy shall be construed according to the law of New York, the home office of insurer, and a loan agreement pledging the policy to secure a loan made by insurer to insured, which provides that the contract is made under and pursuant to the laws of New York, etc., are New York contracts, and the Indiana statute against suretyship contracts cannot be invoked, though insured and his wife are residents of Indiana.—*Eagle v. New York Life Ins. Co.*, 91 N. E. 814.

FOR CASES FROM OTHER STATES.

SEE 28 CENT. DIG. Insurance, §§ 173-175.

See, also, note, 46 C. C. A. 287, 83 C. C. A. 100; note, 63 L. R. A. 833.

§ 127. Existence and condition of subject-matter.

[a] (Sup. 1868)

An open or running policy, stipulated not to cover a loss accruing from any disaster by explosion or otherwise, "which occurrence might be known to the applicant, the public, or the company, at the time of such application being made, whether such property was known to be involved thereby or not, without such contingency is expressly provided for in writing on this policy," was *held* not to cover the loss of a package of money sent by the insured by express, and without his knowledge placed on a steamboat which at the time of the application had exploded its boiler and sunk, the explosion being known to the public and the insured.—*Mark v. Aetna Ins. Co.*, 29 Ind. 390.

[b] (Sup. 1908)

The contract between the association and a member being life insurance, the issuance thereof without the member having satisfactorily passed a medical examination by an authorized physician would violate the express provisions of Burns' Ann. St. 1908, § 4713.—*State v. Willett*, 171 Ind. 296, 86 N. E. 68, 23 L. R. A. (N. S.) 197.

FOR CASES FROM OTHER STATES.

SEE 28 CENT. DIG. Insurance, §§ 186. 187.

See, also, 19 Cyc. p. 591.

§ 128. Executory agreements to insure.

[a] (Sup. 1864)

A policy of insurance which has not been executed will not support an action; but, if there be a valid agreement to insure and to issue a policy, an action may be brought upon

such agreement.—*Peoria Marine & Fire Ins. Co. v. Walser*, 22 Ind. 73.

[b] (Sup. 1867)

An agreement to insure, founded on a consideration, may be valid, and will be enforced, although no formal policy was issued.—*American Horse Ins. Co. v. Patterson*, 28 Ind. 17.

[c] (App. 1898)

Where a railroad company took out an accident policy for the benefit of plaintiff's decedent, one of its employes, retaining from his wages money for the premium, an action does not lie against the railroad by the beneficiaries named in the policy without proof that the company failed to apply to the payment of premiums the money so retained by it.—*Carpenter v. Chicago & E. I. R. Co.*, 51 N. E. 493, 21 Ind. App. 88.

[d] (App. 1899)

While G. and O., a partnership, held an insurance policy in defendant company on a stock of goods, G. bought out O.'s interest, and continued the business. On January 18th, while defendant's agent, who was authorized to deliver policies and collect premiums, was in G.'s store on other than insurance business, G. informed him that the policy had run out, and that he desired to renew the same for the same amount, and upon the same terms, as the former policy, whereupon the agent promised that he would renew it immediately, knowing that G. was then the sole owner of the store, and nothing was said as to payment of the premium, but, the agent being indebted to G. for goods, a credit for the premium was contemplated by the parties. Previous to said transaction, the agent had issued two policies to G., for which he did not collect premiums at the making of the contract or the delivery of the policies, but credited the same on account. Subsequent to said promise to renew, and without the policy's having been delivered, the property was destroyed by fire, and the agent was orally notified thereof on the same day. Afterwards the premium was tendered, and demand was made on the agent for the policy, which was refused. *Held*, that defendant was liable for the amount specified in the expired policy, as there was a contract to insure between G. and defendant, and not merely a contract to issue a policy.—*Western Assur. Co. v. McAlpin*, 55 N. E. 119, 23 Ind. App. 220, 77 Am. St. Rep. 423.

[e] (App. 1901)

Where an action for a fire loss against a mutual fire insurance company is based on an agreement to issue a policy, and not on the policy, a complaint averring that a certain person was the president of the company, and that the contract was made with him, and that he was accustomed to make such contracts, but which does not allege that it was made by the company, or state that the president was acting for the company, or had authority so to do, is insufficient.—*Farmers' Co-operative Ins.*

Ass'n v. Nolan, 60 N. E. 163, 26 Ind. App. 514.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 188-193.

See, also, 19 Cyc. pp. 594-598, 25 Cyc. pp. 712-714.

**§ 129. Powers of agents in respect of contracts in general.**

Agents of mutual benefit societies, see post, § 755.

**[a] (App. 1893)**

The courts judicially know that applications for insurance are usually made with agents in their capacity as representatives of the company, and, if there are any restrictions or limitations on their powers as such, it is the duty of the company to bring the same to the knowledge of the applicant.—Howe v. Provident Fund Soc., 34 N. E. 830, 7 Ind. App. 586.

**[b] (App. 1896)**

An agent holding a commission from an insurance company authorizing him to take risks generally, without placing any limitation thereon, either as to the kind of risks, or as to the territory within which they may be, is a general agent; and the facts that the policy provides that, in any matter relating to the insurance, no person shall be deemed the agent of the company unless authorized in writing, and that the agent's commission states that he shall be subject to the rules of the company, and to such instructions as may be given him from time to time, do not impose on one dealing with the agent a duty to ascertain his authority to issue a policy on a risk extrahazardous, and located in a place other than the town in which is situated the agent's office.—German Fire Ins. Co. v. Columbia Encaustic Tile Co., 15 Ind. App. 623, 43 N. E. 41.

An insurance company is bound by the acts of a clerk of its agent in accepting risks and issuing policies against the same in the performance of his duties, and one dealing with the clerk as such is not bound to inquire into his authority as to those matters.—Id.

The list of risks kept in an insurance agent's office, being a part of his private instructions from the company, was properly excluded, in an action on a policy on an alleged prohibited risk, in the absence of proof of knowledge by plaintiff as to the existence of such list, or other similar instructions, when the insurance was taken out.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 180-182, 1849, 1850.

See, also, 19 Cyc. pp. 592-594, 25 Cyc. pp. 712, 1525, 26 Cyc. p. 567; note, 49 C. C. A. 335.

**§ 130. Application or offer and acceptance.**

Application or other accompanying papers as part of policy, see post, §§ 134, 151.

Delivery and acceptance of policy, see post, § 136.

Insertion by agent of false answers in application, see post, § 379.

Membership in mutual benefit insurance association, see post, § 713.

Necessity of attaching to complaint as exhibit in action on policy, see post, § 631.

Recovery of premium paid on rejection of application, see post, § 198.

**[a] (Sup. 1854)**

A. made an application to a life insurance company for an insurance upon his life for the benefit of his wife on September 27, 1850, and on that day the application was mailed to the company by their agent. It having been approved, a policy was issued thereon, and sent by mail to the agent October 2, 1850, which was received by him October 5, 1850. A. was taken sick September 29th, and died October 4th. The policy was returned by the agent to the company. *Held*, that the contract of insurance was complete October 2d, when the application was approved and the policy sent, and perhaps at the time A. completed his application.—Kentucky Mut. Ins. Co. v. Jenks, 5 Ind. 96.

**[b] (Sup. 1838)**

A risk accepted by a local agent cannot be rejected without notice to the assured.—Commercial Union Assur. Co. v. State ex rel. Smith, 113 Ind. 331, 15 N. E. 518.

**[c] (Sup. 1908)**

A fire policy expiring June 25th, June 17th insurer mailed the owner a renewal policy, but he refused to accept it. Insurer then left the policy with mortgage clause attached with the clerk of the mortgagee's agents, who placed it with the mortgage papers, where it remained. July 28th insurer presented a bill for the premium to such agents, who requested time to communicate with the owner of the property. They wrote him, stating that if he did not pay the premium they would charge it to him as authorized by the mortgage. The owner did not answer the letter, but wrote his agent directing immediate payment of the premium; but tender of payment was delayed until August 2d, when it was refused, the property having burned July 31st. *Held*, that the policy was not accepted by the insured, so as to bind insurer for the loss.—New v. Germania Fire Ins. Co., 171 Ind. 33, 85 N. E. 703, 131 Am. St. Rep. 245.

Mere receipt of a proposed policy by insured, to determine whether he will accept it, does not complete the contract; the completion of the contract not depending upon manual possession.

sion of the policy, but upon the parties' intent, as shown by their acts or agreements.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 195-202.

See, also, 19 Cyc. pp. 599, 600, 25 Cyc. pp. 713, 714; note, 5 L. R. A. (N. S.) 739.

**§ 131. Validity of oral contracts.**

[a] (Sup. 1865)

An application was made by plaintiff for an insurance policy. The president of the insurance company by letter accepted the risk for a certain sum, and a parol contract was made with the agent for an insurance for such amount; the policy to be delivered when called for; the premium to be paid within five days. Within that time the building was destroyed by fire. Held, that it was not necessary, in an action to recover the amount insured, to show that the conditions had been complied with, where the company, on tender of the amount of the premium and demand of the policy, had refused to issue it.—*New England Fire & Marine Ins. Co. v. Robinson*, 25 Ind. 536.

Section 6 of the charter of the New England, etc., Insurance Company provides that "the policies and other contracts of said company may be made with or without the seal of the company, and shall be signed by the president and countersigned by the secretary, and being so signed and executed shall be obligatory on said company." Held that, unless specially restrained by its charter, an insurance company may make a valid contract of insurance by parol, and that section 6 did not impose such restraint upon this company.—Id.

[b] (Sup. 1888)

General authority to make contracts of insurance extends to parol as well as written contracts.—*Commercial Union Assur. Co. v. State ex rel. Smith*, 15 N. E. 518, 113 Ind. 331.

[c] (App. 1898)

Negotiations and statements between insurer and insured are merged in the written application for the policy, which speaks for itself.—*Masons' Union Life Ins. Ass'n v. Brockman*, 50 N. E. 493, 20 Ind. App. 206.

[d] (App. 1906)

An oral contract for insurance is valid, where the negotiations show a completed agreement as to the subject of the insurance, the limit and duration of the risk, the perils insured against, the amount to be paid in event of loss, and the premium rate, leaving nothing open for future determination.—*Posey County Fire Ass'n v. Hogan*, 77 N. E. 670, 37 Ind. App. 573.

Where a provision of the constitution of a mutual insurance society required an appraisal of the property insured to be made by trustees for the purpose of protecting the company against overinsurance or fraud, a new

appraisal was not a condition precedent to the validity of an oral contract for insurance in favor of a transferee of the property, which had been appraised but a short time previously by insurer for the purpose of issuing a policy which became void by the transfer of the title; it not appearing that there had been any deterioration in the value or that there was any present necessity for another appraisal.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 203-209.

See, also, 19 Cyc. pp. 595, 600, 25 Cyc. p. 716; notes, 22 L. R. A. 768, 5 L. R. A. (N. S.) 407.

**§ 133. Form and requisites of policy.**

[a] (Sup. 1864)

It is necessary to a complete execution of a policy of insurance that it should be signed by the president and secretary and countersigned by the agent.—*Peoria Marine & Fire Ins. Co. v. Walser*, 22 Ind. 73.

[b] (App. 1897)

An insurance policy is not executed by attaching the insurer's corporate seal, in view of Rev. St. 1894, §§ 454, 455 (*Horner's Rev. St. 1897*, §§ 450, 451), providing that "every writing not sealed shall have the same force and effect that it would have if sealed," and "the execution of an instrument is the subscribing and delivering it, with or without affixing a seal."—*Globe Acc. Ins. Co. v. Reid*, 19 Ind. App. 203, 47 N. E. 947, 49 N. E. 291.

A policy ending with the words, "In witness, the Globe Accident Insurance Company affixes its corporate seal and signature of its president & secretary, 23rd Jan., 1894," without the name of the president and secretary being attached, was not executed, though the insurer's name appeared in the body of the policy.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 203, 211-213.

See, also, 19 Cyc. pp. 516, 601, 602, 25 Cyc. pp. 716, 1526, 26 Cyc. pp. 568-576.

**§ 134. Papers accompanying policy.**

Application for mutual benefit insurance as part of contract, see post, § 715.

Warranties as part of contract, see post, § 266.

[a] (Sup. 1862)

An indication in a policy of insurance of the place where the preliminary written application may be found on file does not make such application a part of the policy.—*Commonwealth's Ins. Co., etc., v. Monninger*, 18 Ind. 352.

To constitute a paper attached to a policy a part thereof, it must be expressly referred to as forming part of the policy.—Id.

[b] (*Sup. 1892*)

Where a policy contains a provision that "in consideration of the statement of facts warranted to be true in the application for this policy, and of the payment" of certain sums, the company "hereby insures," etc., the application referred to is part of the contract of insurance.—*Standard Life & Acc. Ins. Co. v. Martin*, 133 Ind. 376, 33 N. E. 105.

## FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 214–217.

See, also, 19 Cyc. p. 602, 25 Cyc. p. 716.

**§ 136. Delivery and acceptance of policy.**

Affecting construction of policy, see post, § 155.

As waiver of payment of premium before taking effect of policy, see post, § 141.

Delivery as waiver of immediate payment of premium, see post, § 141.

Delivery ground of estoppel or waiver, see post, § 389.

Parol evidence to show date of delivery, see EVIDENCE, § 414.

Questions for jury in action on policy, see post, § 668.

Transfer by delivery, see post, § 214.

Transfer by indorsement and delivery, see post, § 199.

[a] (*App. 1893*)

While a contract of life insurance may exist without payment of the premium or delivery of the policy, the proof must be strong to establish such contract.—*Union Cent. Life Ins. Co. v. Pauly*, 8 Ind. App. 85, 35 N. E. 190.

Where the premium for a life insurance policy is not paid, and the insurance agent has not waived payment except as to one-half thereof, the fact that he wrote the applicant that "your policy" has arrived is not equivalent to its constructive delivery.—*Id.*

A finding by the jury that a contract of life insurance had been effected without either payment of the premium or the delivery of the policy will be set aside on appeal where the evidence clearly shows that there were simply negotiations looking towards insurance, and that it was understood that the contract should take effect only by a policy to be made and delivered on payment of at least one-half the first annual premium.—*Id.*

[b] (*App. 1901*)

In the absence of fraud, an agreement that a life policy in the custody of the insurer shall be in force from its date is enforceable.—*Prudential Ins. Co. v. Sullivan*, 59 N. E. 873, 27 Ind. App. 30.

[c] (*App. 1905*)

An application for life insurance, and also the policy issued thereon, provided that the policy would not take effect unless the premium was paid and insured was in good health at the time the policy was delivered. The application was made and the premium paid on April 5th.

The application was received at the insurer's home office April 7th, and was referred to the medical director, and by him marked, "Rejected." On April 9th the decision of the medical director was overruled, and the application approved by defendant's secretary, whose determination was final. On the same day the policy was issued as of date April 5th. Insured died April 8th. *Held*, that the policy, not having been delivered until after insured's death, was void.—*Reserve Loan Life Ins. Co. v. Hockett*, 73 N. E. 842, 35 Ind. App. 89.

A premium receipt given to assured on April 5th, the day of his application, stating that such advance payment shall not create any liability till a policy is issued on the application, does not make valid policies issued on April 9th, and dated as of April 5th, where assured dies on April 8th, before their delivery to him in good health pursuant to the contract to render them effective.—*Id.*

[d] (*App. 1906*)

An insurance company may lawfully stipulate that the policy is issued on the written application of the insured, and that no obligation is assumed under the policy, unless on the date of the delivery thereof the insured is alive and in sound health.—*Metropolitan Life Ins. Co. v. Willis*, 76 N. E. 560, 37 Ind. App. 48.

[e] (*App. 1906*)

Delivery of a policy to an agent to be unconditionally delivered by him to the applicants is in law a delivery to the insured, although the agent never parts with the possession of the policy, and, although it is delivered to the applicants, is, by contract, made essential to its validity.—*Neff v. Metropolitan Life Ins. Co.*, 39 Ind. App. 250, 73 N. E. 1041.

[f] (*App. 1908*)

Whether a policy completely executed by insurer and placed in the possession of its agent for delivery to insured is binding while in the possession of the agent depends on the nature of the agent's duty; and, where insured has done everything necessary to entitle him to possession of the policy, and there rests on the agent the ministerial duty of transferring the policy to insured, the agent holds the policy for insured, and it is binding on the parties without physical transfer.—*New York Life Ins. Co. v. Greenlee*, 42 Ind. App. 82, 84 N. E. 1101.

Where insurer executed a policy in conformity with the application, not requiring the payment of the first premium before the delivery of the policy, insurer accepted the application, and, where the policy was sent to its agent for delivery, he became the trustee of insured, and the receipt by the agent of the policy to be unconditionally delivered to insured was delivery to insured, though the agent did not part with the possession of the policy, and though the delivery to insured was by contract made essential to the validity of the policy.—*Id.*

An application for insurance did not require payment of the first premium before delivery of the policy. By agreement between the insured and a third person made in the presence of the agent, the third person agreed to pay the premiums on the policy. The policy was executed in accordance with the application, and sent to the agent for delivery to insured. The third person was informed by the agent that the policy was in his possession. A partial payment of the premium was made by the third person and accepted by the agent, who requested the third person to leave the policy in the agent's possession until after a specified time, assuring the third person that the policy was the kind applied for, and that he could get it after the specified time. *Held* to support a finding that a policy of the form applied for was executed by insurer and sent to the agent for delivery to insured, and that constructive delivery of the policy was made to insured.—*Id.*

[g] (App. 1908)

Where an application for life insurance recites that the contract shall be completed only by delivery of the policy, or that the policy shall not be in force until its delivery to the applicant, the contract will not become binding on the company until the policy is delivered, especially where the policy provides that it shall not take effect unless it is delivered while the applicant is in good health.—*Michigan Mut. Life Ins. Co. v. Thompson*, 86 N. E. 503.

The rule that receipt by an agent from his insurance company of a policy to be unconditionally delivered by him to the applicant is in law a delivery to the applicant, though the agent never surrender possession of the policy, and though its delivery to the applicant be by contract made essential to its delivery, did not apply, where the first premium had not been paid to the company or its agent, but to an agent of the applicant of which payment the company had no notice, and the applicant was so seriously ill when the policy was received by the company's agent that she afterwards died, and the policy and application provided that the policy should not take effect unless the first premium was paid and insured was in good health at the time the policy was delivered to her.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 219-230.  
See, also, 19 Cyc. pp. 603, 604, 25 Cyc. pp. 716-723.

§ 137. Payment of premium or dues.

Amount of premium, and mode and sufficiency of payment, see post, § 186.

Delivery of policy as waiver of payment of premium, see post, § 141.

Recovery of premium paid on rejection of application, see post, § 198.

[a] (Sup. 1854)

Where a life insurance company agrees to take the first year's premium in advertising, by the very nature of the contract the payment of the premium and its indorsement on the policy are not requisite to complete the insurance; and, as it is incumbent upon the company to furnish the advertising matter, its neglect to do so, so that the value of the advertising does not equal the first year's premium, cannot affect the rights of the assured.—*Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96.

[b] (Sup. 1865)

A. made an application to the agent of a foreign insurance company to insure a building against loss by fire. The proposition was forwarded to the president of the company, who by letter to the agent accepted the risk to the amount of \$1,000, and a parol contract was thereupon made with the agent for an insurance for one year. By arrangement with the agent, the policy was to be delivered when called for, and the premium was to be paid by A. within five days. Before the expiration of that time, and before the payment of the premium, the building was destroyed by fire. A. immediately tendered the amount of the premium and demanded his policy, which was refused. In a suit by A. to recover the amount insured, it was held that the contract was complete and binding upon the company.—*New England Fire & Marine Ins. Co. v. Robinson*, 25 Ind. 536.

[c] (Sup. 1881)

The agreement of an agent of an insurance company to issue a policy is sufficient consideration for a note given for the premium.—*American Ins. Co. v. McWhorter*, 78 Ind. 136.

[d] (Sup. 1887)

Where the agent receives, instead of cash, a credit upon his account due the assured, agreeing to be responsible to the company therefor, and it is credited to the company in his account therewith, and duly forwarded, the policy cannot be avoided, in the absence of fraud, notwithstanding a stipulation therein that "the company shall not be liable by virtue of the policy until the premium thereof be actually paid."—*Home Ins. Co. v. Gilman*, 112 Ind. 7, 13 N. E. 118.

[e] (Sup. 1890)

A parol agreement that a note was accepted as an absolute payment of a premium, when it is stipulated in the policy that "such note shall be accepted as payment thereof only until maturity of such note, and, if the same be not paid at maturity according to its terms, this policy shall be void so long as the same remains unpaid," is contradictory of the written agreement, and is void.—*Continental Ins. Co. v. Dorman*, 25 N. E. 213, 125 Ind. 189.

An insurance policy provided that a note taken for the premium should be accepted as payment only until maturity, that if not paid at maturity the policy should be void while it

remained unpaid, and that, on payment of the note after maturity, the policy should be in force from such payment. The property was burned after maturity of the note, and while it remained unpaid. *Held*, that a tender of payment after the fire would not revive the company's liability.—*Id.*

[f] (App. 1892)

Plaintiff asked defendant, an insurance broker, for insurance with one of his regular companies. Defendant replied that his companies refused the risk, but he offered to insure elsewhere. Subsequently defendant wrote an application directing a company to send him the policy for delivery, which plaintiff signed. This company had offered defendant 20 per cent. on premiums, as inducement for him to send applications for risks which his regular companies should refuse. Plaintiff on receipt of the policy paid the premium to defendant, who promised to pay it to the company, but failed to do so. *Held*, that defendant acted as agent for plaintiff in procuring and delivering the policy and collecting the premium.—*Criswell v. Riley*, 5 Ind. App. 496, 30 N. E. 1101, 32 N. E. 814.

[g] (App. 1895)

In an action on an accident policy it appeared that the policy was issued January 16th, to take effect January 20th, and that for the premium assured gave an order on his employer payable out of his wages for February and the succeeding months, his wages being due on the 18th of the month after that in which they were earned. The policy recited that it was issued in consideration of an order for moneys on the employer, and provided that, "in case of just claim before the first premium is due, if the sum due insured is less than the sum of all the payments called for by the order, it shall be credited thereon; if greater, the order shall be receipted and the balance paid the assured." The day before the policy went into effect assured left his employer and drew all his wages, and on February 3d, while still out of such employment, was killed. *Held*, that plaintiff could recover.—*Travelers' Life & Accident Ins. Co. of Hartford, Conn., v. Cash*, 14 Ind. App. 3, 42 N. E. 246.

[h] (App. 1899)

Payment of a premium is not a precedent condition to a valid oral contract to insure.—*Western Assur. Co. v. McAlpin*, 55 N. E. 119, 23 Ind. App. 220, 77 Am. St. Rep. 423.

[i] (App. 1905)

Upon an issue as to place of payment of premiums upon an industrial life policy, the court will consider the expense necessary in sending the premium to home office, number of premiums to be paid, and the fact that the insurance costs 40 per cent. more than the standard life rates, in ascertaining the intention of the parties, as forfeitures are odious to the law and will be enforced only upon the clearest evidence that they were intended, and

where the action of the insurance company is such as to induce belief that a right of forfeiture reserved in the contract will not be insisted on, and the insured has acted on such belief, forfeiture will not be permitted.—*Rutherford v. Prudential Ins. Co.*, 34 Ind. App. 531, 73 N. E. 202.

[j] (App. 1905,

An applicant for life insurance informed the soliciting agent that he would be unable to pay for the policy for some time after it was issued, and the agent stated that he would settle with the company and that the applicant could pay him later. The policy was issued, and sent, with directions to account for the premium, to the agent, who received it after the death of the applicant, retained it a few days, and returned it, the premium never having been paid by any one. The application provided that the policy should not be in force until actual payment of the premium during the lifetime and good health of the insured, and the policy declared that the contract was completely set forth in the policy and application, and that none of its terms could be varied except by agreement in writing by the company officers. *Held*, that the agreement with the agent did not constitute payment of the premium.—*Neff v. Metropolitan Life Ins. Co.*, 73 N. E. 1041, 39 Ind. App. 250.

Under a life policy providing that it shall not take effect until actual payment and acceptance of the first premium, the payment of the premium is a condition precedent to make it enforceable by the beneficiary.—*Id.*

[k] (App. 1906)

Where, as part of an oral contract for insurance in a mutual company, the latter agreed to issue a policy to insured, the form of which required insured to pay 8 cents on \$100 of the appraised property as a premium, and to pay all assessments in accordance with the rules and regulations of the society, insured was not bound to pay such premiums until the policy was issued and ready to be delivered.—*Posey County Fire Ass'n v. Hogan*, 77 N. E. 670, 37 Ind. App. 573.

[l] (App. 1908)

Where neither the application for a policy nor the policy required payment of the first premium before delivery of the policy, payment was not a condition precedent to the contract of insurance.—*New York Life Ins. Co. v. Greenlee*, 42 Ind. App. 82, 84 N. E. 1101.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 231-245.  
See, also, 19 Cyc. pp. 604, 605, 25 Cyc. pp. 724-730.

§ 138. Validity in general.

Insurance without interest, see ante, §§ 118, 119.

## [a] (Sup. 1880)

If there is nothing in the charter to prevent it, it is competent for an insurance company to make a contract in violation of its rules.—*New England Mut. Life Ins. Co. v. Hasbrook's Adm'r*, 32 Ind. 447.

## [b] (App. 1901)

A contract by a mutual accident insurance company reciting that, in consideration of the full annual premium, the company selected the insured as one of 500 policy holders to participate in a special renewal dividend on all insurance written during certain years,—the dividends to be credited on his ensuing premiums,—is void, as conferring unequal rights on the selected members.—*Robison v. Wolf*, 62 N. E. 74, 27 Ind. App. 683.

## [c] (Sup. 1907)

The necessity for the meeting of the minds of the parties essential to the ordinary contract does not obtain in a contract of insurance; the insured's assent thereto being a mere fiction of law.—*Glens Falls Ins. Co. v. Michael*, 167 Ind. 659, 74 N. E. 964, 79 N. E. 905, 8 L. R. A. (N. S.) 708.

## FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 246-252.

See, also, 19 Cyc. pp. 596, 625-629, 25 Cyc. pp. 731-739, 1526, 26 Cyc. pp. 566-570, 576-579; note, 2 L. R. A. (N. S.) 821.

## § 141. Estoppel or waiver as to defects or objections.

Mutual benefit insurance, see post, § 724.

## [a] (Sup. 1879)

Delivery of a policy without requiring payment of the premiums is a waiver of the condition of prepayment.—*Behler v. German Mut. Fire Ins. Co.*, 68 Ind. 347.

## [b] (Sup. 1884)

Where the charter of an insurance company provided that every person who shall become interested in the company by insuring therein shall be deemed a member during the term specified in his policy, and shall at all times be bound by the provisions of such act, an assured, by accepting his policy, became a member of the company, and as such knew, or had the means of knowing, that his policy of insurance was void for want of a corporate power in the company to issue such a policy.—*Leonard v. American Ins. Co.*, 97 Ind. 299.

## [c] (Sup. 1887)

Where a policy duly executed and delivered recites that the premium has been paid, the company will be estopped, in an action on the policy, from denying the same, in the absence of fraud or mistake.—*Home Ins. Co. v. Gilman*, 112 Ind. 7, 13 N. E. 118.

## [d] (App. 1893)

A life insurance agent, who has several times notified the applicant of the arrival of the policy, does not waive the payment of the

premium by his failure to specially urge the applicant to pay.—*Union Cent. Life Ins. Co. v. Pauly*, 8 Ind. App. 85, 35 N. E. 190.

## [e] (App. 1896)

Where insured pays the agent of an insurance company soliciting the insurance, on delivery of the policy, a portion of the premium, credit being given the insured by the agent for the balance, which constitute the commissions the agent is entitled to, the insurer is bound by the payment, though the policy provide that it shall not take effect until the money is paid at the home office of the insurer, and that no waiver of the provisions of the policy shall be claimed by reason of acts of any person unless such acts are specially authorized in writing over the signature of the president of insurer, and though the insurer cancel the policy for nonpayment of the premium before the loss, failing, however, to notify insured of such cancellation until after the loss.—*Terry v. Provident Fund. Soc. of New York*, 13 Ind. App. 1, 41 N. E. 18, 55 Am. St. Rep. 217.

## [f] (App. 1896)

A policy cannot be forfeited for nonpayment of the premium where no provision was made therefor in the policy, and where the policy was delivered with the understanding that the insured should have a reasonable time in which to pay the premium.—*Ohio Farmers' Ins. Co. v. Stowman*, 16 Ind. App. 205, 44 N. E. 558, 940.

## [g] (App. 1897)

Where the insured accepts his policy, with the knowledge of all its conditions and stipulations, and at the time of its acceptance he takes it with the knowledge of a breach on his part, and in the absence of knowledge on the part of the insurer he cannot afterwards be heard to complain.—*Shaffer v. Milwaukee Mechanics' Ins. Co.*, 46 N. E. 557, 17 Ind. App. 204.

## [h] (App. 1899)

In determining whether a premium for a fire insurance policy was to be credited or paid in cash, previous dealings between the same parties in similar transactions are admissible to show the intent.—*Western Assur. Co. v. McAlpin*, 55 N. E. 119, 23 Ind. App. 220, 77 Am. St. Rep. 423.

## [i] (Sup. 1904)

Where a life insurance policy was delivered, and a note taken by the agent delivering the same for the first premium, such delivery constituted a waiver of a provision in the policy that it should not take effect until the first premium should be actually paid; the company not having repudiated the agent's act after it had knowledge thereof.—*Penn Mut. Life Ins. Co. v. Norcross*, 72 N. E. 132, 163 Ind. 379.

## [j] (App. 1905)

A mutual fire company may waive provisions in its rules and by-laws, and continue in force a policy conflicting therewith.—*Far*

*mers' Mut. Fire Ins. Co. of De Kalb County v. Jackman*, 73 N. E. 730, 35 Ind. App. 1.

[k] (App. 1905)

The mailing of the policy to the agent did not constitute an implied delivery to the insured waiving immediate payment of the premium.—*Neff v. Metropolitan Life Ins. Co.*, 73 N. E. 1041, 39 Ind. App. 250.

[l] (App. 1908)

Where the agent of insurer is authorized to deliver the policy and collect the premium therefor, the cash payment of the premium may be waived, though the contrary is stipulated in the policy, and a collection of the policy can be defeated only by showing bad faith or collusion between the agent and insured.—*New York Life Ins. Co. v. Greenlee*, 42 Ind. App. 82, 84 N. E. 1101.

An insurance agent authorized to deliver a policy and collect the premium therefor waives payment of the entire premium by accepting a part and extending time for the payment of the balance.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 75, 253–262; 12 CENT. DIG. Corp. § 1556.

See, also, 19 Cyc. pp. 627–629; note, 67 L. R. A. 705.

§ 143. Reformation.

Mutual benefit insurance certificate, see post, § 725.

[a] (Sup. 1868)

In an action upon a policy of fire insurance the defendant set up a breach of warranty on the part of the assured in false answers to certain questions in the survey. The plaintiff replied, alleging that the answers had been written down by the agent of the company, and that he had made mistakes in recording the same, and prayed a reformation of the instrument. *Held*, that a mistake of the agent in recording the answers of the assured did not entitle him to a reformation of the contract, unless it was made to appear that it was not upon the faith of this warranty that the risk was accepted.—*Cox v. Aetna Ins. Co.*, 29 Ind. 586.

[b] (Sup. 1889)

Insurance policies as well as other contracts may be reformed on proper proof.—*Gray v. Supreme Lodge, Knights of Honor*, 118 Ind. 293, 20 N. E. 833.

[c] (Sup. 1891)

An insurance policy provided that the insured adopted as his own, admitted to be material, and warranted as full, complete, and true, each of the answers, whether written by his own hand or not. The agent, without the insured's knowledge, wrote a false answer to a question in the application. *Held*, that a reformation of the contract is not essential to a recovery on the policy.—*Germania Life Ins. Co.*

*of New York v. Lunkenheimer*, 127 Ind. 536, 26 N. E. 1082.

[d] (App. 1899)

An indorsement on a policy, reciting that it was issued by error to the person named therein as the insured, and declaring that it was made payable to another, who was the owner of the property, to whom the policy was delivered, and whom it was intended to insure, effects a reformation of the policy.—*Fireman's Fund Ins. Co. v. Dunn*, 53 N. E. 251, 22 Ind. App. 332.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 265–272.

See, also, 19 Cyc. pp. 651–655, 25 Cyc. p. 738, 26 Cyc. p. 613.

§ 144. Modification.

Mutual benefit insurance certificate, see post, § 725.

[a] (Sup. 1882)

A policy of insurance may be modified or abrogated by a new and distinct parol contract.—*Willcuts v. Northwestern Mut. Life Ins. Co.*, 81 Ind. 300.

[b] (App. 1899)

The correction of a mistake in a policy, four months after its issuance, by changing the name of the insured, being in effect the making of a new contract, is not binding on the insurer, unless made by an agent having the requisite authority.—*Fireman's Fund Ins. Co. v. Dunn*, 53 N. E. 251, 22 Ind. App. 332.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 273–275.

See, also, 25 Cyc. p. 783, 26 Cyc. p. 610.

(B) CONSTRUCTION AND OPERATION.

Actions on policies, see post, §§ 620–623.

Contract of reinsurance, see post, § 679.

Effect of provisions of policy as to powers of agent, see ante, § 99.

Effect of usage, see CUSTOMS AND USAGES, § 10.

Extent of liability of insurer, see post, §§ 477–532.

Instructions, see post, § 669.

Mutual benefit insurance contracts, see post, § 726.

Parol evidence to identify property insured, see EVIDENCE, § 460.

Provisions against forfeiture, see post, § 400.

Provisions as to waiver of stipulations, conditions, or forfeitures, see post, §§ 376, 386.

Provisions for adjustment of loss, see post, §§ 566–579.

Requirements as to notice and proof of loss, see post, §§ 533–561.

Right to proceeds, see post, §§ 580–594.

Risks and causes of loss within provisions of policy, see post, §§ 402–467.

Warranties as part of contract, see post, § 266.

### § 146. Application of general rules of construction.

To contract of reinsurance, see post, § 679.

#### [a] (Sup. 1854)

Insurance policies are to be liberally construed in favor of the assured, and an exception is to be strictly construed against the underwriters.—*Grant v. Lexington Fire, Life & Marine Ins. Co.*, 5 Ind. 23, 61 Am. Dec. 74.

[b] Without sacrificing the substantial limitations imposed upon the liability of an insurer by the contract between the parties, stipulations and conditions in policies of insurance are to be so construed, if possible, as to avoid forfeitures.—(Sup. 1854) *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96; (App. 1895) *Travelers' Life & Accident Ins. Co. of Hartford v. Cash*, 42 N. E. 246, 14 Ind. App. 3; (Sup. 1905) *Glens Falls Ins. Co. v. Michael*, 74 N. E. 964, 79 N. E. 905, 167 Ind. 659, 8 L. R. A. (N. S.) 708.

[c] A policy of insurance being a contract for indemnity, an ambiguity in it must be construed in favor of indemnity and against a forfeiture.—(Sup. 1854) *Indiana Mut. Fire Ins. Co. v. Conner*, 5 Ind. 170; (App. 1892) *Schmidt v. German Mut. Ins. Co.*, 30 N. E. 939, 4 Ind. App. 340; (1894) *Union Cent. Life Ins. Co. v. Woods*, 37 N. E. 180, 39 N. E. 205, 11 Ind. App. 335; (1897) *Same v. Jones*, 47 N. E. 342, 17 Ind. App. 592; (1898) *Hanover Fire Ins. Co. v. Dole*, 50 N. E. 772, 20 Ind. App. 333; (1899) *McElfresh v. Odd Fellows Acc. Co.*, 52 N. E. 819, 21 Ind. App. 557.

#### [d] (Sup. 1831)

A policy of insurance is governed by the same principles applicable to other agreements involving pecuniary obligations.—*American Ins. Co. v. Leonard*, 80 Ind. 272.

#### [e] (Sup. 1882)

Where an express condition or covenant relative to a particular matter exists in a policy of life insurance, none will be implied.—*Willcuts v. Northwestern Mut. Life Ins. Co.*, 81 Ind. 300.

[f] A contract of insurance prepared by an insurance company will be construed liberally as against the insured and strictly as against the company.—(Sup. 1885) *Penn Mut. Life Ins. Co. v. Wiler*, 100 Ind. 92, 50 Am. Rep. 769; (1890) *Ætna Life Ins. Co. v. Deming*, 24 N. E. 86, 375, 123 Ind. 384; (1893) *Standard Life & Acc. Ins. Co. v. Martin*, 33 N. E. 105, 133 Ind. 376; (1895) *Milwaukee Mechanics' Ins. Co. v. Niewedde*, 39 N. E. 757, 12 Ind. App. 145; (1896) *Ætna Ins. Co. v. Strout*, 44 N. E. 934, 16 Ind. App. 160; (1897) *Union Cent. Life Ins. Co. v. Jones*, 47 N. E. 342, 17 Ind. App. 592.

#### [g] (Sup. 1886)

Where, in an insurance policy, there are two inconsistent stipulations covering the same subject-matter, the one general, and providing that upon certain conditions the policy should

become void, and the other separate and distinct, and providing that upon the very same conditions the company might avoid the policy, the latter stipulation will govern, because specific.—*Northwestern Mut. Life Ins. Co. v. Hazelett*, 105 Ind. 212, 4 N. E. 582, 55 Am. Rep. 192.

#### [h] (Sup. 1887)

Where parties have, without fraud or mistakes, deliberately entered into a contract, that alone must be looked to as furnishing the measure of their respective rights and obligations.—*Havens v. Home Ins. Co.*, 12 N. E. 137, 111 Ind. 90, 60 Am. Rep. 689.

#### [i] (Sup. 1891)

Policies are strictly construed against the insurer wherever a strict construction is necessary to prevent a forfeiture.—*Continental Ins. Co. v. Vanlue*, 126 Ind. 410, 26 N. E. 119, 10 L. R. A. 843.

#### [j] (App. 1892)

In the construction of contracts of insurance, that interpretation is to be adopted which is most favorable to the insured.—*Germania Fire Ins. Co. v. Deckard*, 3 Ind. App. 361, 28 N. E. 868.

#### [k] (Sup. 1894)

An erroneous construction of the force and effect of a contract of insurance as made and stated by the soliciting agent to the applicant does not necessarily control the proper and legal construction of the contract.—*Fidelity & Casualty Co. of New York v. Teter*, 36 N. E. 283, 136 Ind. 672.

#### [l] (App. 1894)

Where a policy of insurance contains provisions which are contradictory or inconsistent, or so framed as to leave room for construction, the court will lean against that construction which imposes on the insured the obligation of a warranty.—*Indiana Farmers' Live Stock Ins. Co. v. Byrket*, 36 N. E. 779, 9 Ind. App. 443.

#### [m] (App. 1896)

Though the courts are averse to giving effect to forfeiture clauses, and will construe the contract most strongly against the company, resolving all doubts in favor of the policy holder, they cannot make a new contract for the parties or disregard that which they have themselves created.—*German Mut. Ins. Co. v. Niewedde*, 39 N. E. 534, 11 Ind. App. 624.

#### [n] (App. 1896)

No condition in a policy of insurance will be extended so as to cover matters not clearly and unmistakably within the meaning of the condition according to the usual and ordinary meaning of the words used.—*Germania Fire Ins. Co. v. Stewart*, 42 N. E. 286, 13 Ind. App. 627.

#### [o] (App. 1900)

An insurance policy is a contract, and the insured accepts it with knowledge of all its

conditions and stipulations. In the absence of any fraud or mistake, the insured is conclusively presumed to know its contents.—*Traders' Ins. Co. v. Cassell*, 56 N. E. 259, 24 Ind. App. 238.

[D] (App. 1902)

The provisions of insurance policies which operate upon the parties prior to the loss are regarded as matters of substance, upon which the liability depends, and should be construed fairly, according to the intention of the parties, while those prescribing formal requisites by which the previously vested right is made available should be construed liberally.—*Employers' Liability Assur. Corp. v. Light, Heat & Power Co.*, 63 N. E. 54, 28 Ind. App. 437.

[Q] (App. 1905)

All provisions for forfeiture are strictly construed against the company, and forfeitures will be prevented, when possible, without making a new contract.—*Farmers' Mut. Fire Ins. Co. of De Kalb County v. Jackman*, 73 N. E. 730, 35 Ind. App. 1.

Various slight circumstances will be seized on by the courts to prevent a forfeiture where the condition favors the company.—*Id.*

[R] (Sup. 1906)

Insurance policies are construed like other contracts.—*Ohio Farmers' Ins. Co. v. Vogel*, 166 Ind. 239, 76 N. E. 977, 3 L. R. A. (N. S.) 966.

[S] (App. 1906)

Provisions in a policy written by the insurer are construed most strictly in favor of the assured.—*Home Ins. Co. v. Gagen*, 38 Ind. App. 680, 76 N. E. 927.

[T] (Sup. 1907)

Where policies of insurance contain inconsistent provisions, or are so framed as to be fairly open to construction, a view which will sustain the policy should be adopted, if possible, in preference to one which will work a forfeiture thereof.—*Glens Falls Ins. Co. v. Michael*, 167 Ind. 659, 74 N. E. 964, 79 N. E. 905, 8 L. R. A. (N. S.) 708.

[U] (App. 1909)

Contracts are to be strictly construed against the company to prevent forfeiture; and where there is a question of warranty, and the words admit of two interpretations, that most favorable to insured will be adopted.—*Iowa Life Ins. Co. v. Houghton*, 87 N. E. 702.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 292, 294-298.

See, also, 1 Cyc. p. 243, 19 Cyc. pp. 635-658, 25 Cyc. pp. 739, 1527; note, 46 C. A. 287.

§ 147. What law governs.

[A] (App. 1908)

Where plaintiff paid the first premium on a life insurance policy when applying therefor

in Kentucky, and the terms of the policy were agreed upon and the application was accepted by the company in New York, and the policy mailed there to its agent in Kentucky for unconditional delivery to plaintiff, the contract was completed when the policy was mailed and hence was governed by the laws of New York.—*Equitable Life Assur. Soc. of United States v. Perkins*, 80 N. E. 682, 41 Ind. App. 183.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 293.

See, also, 19 Cyc. pp. 659, 661, 25 Cyc. pp. 746, 747-749, 26 Cyc. p. 583; note, 83 C. C. A. 100; note, 63 L. R. A. 833; note, 104 Am. St. Rep. 483-492.

§ 151. Construing together policy and accompanying papers.

Application for mutual benefit insurance as part of contract, see post, § 715.  
Warranties, see post, § 266.

[A] (App. 1893)

Where a clause in an application for insurance is so inconsistent with the conditions of the policy, as issued, that both cannot stand, and that in the application is one on which the issuing of the policy depends, it must control.—*Phenix Ins. Co. of Brooklyn v. Lorenz*, 7 Ind. App. 266, 33 N. E. 444, 34 N. E. 495.

[B] (Sup. 1906)

Where a life policy on its face insures against death generally, but assured executes a certificate exempting the company from liability for death from a certain cause, the policy and certificate together constitute the contract, and a death from that cause is not covered.—*Knights & Ladies of Columbia Ins. Order v. Shoaf*, 166 Ind. 367, 77 N. E. 738.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 308-311.

See, also, 1 Cyc. pp. 244, 245, 19 Cyc. p. 659, 25 Cyc. p. 743.

§ 152. Construing statutes and charter, by-laws, or rules of insurer as part of policy.

Constitution or by-laws of mutual benefit association, see post, §§ 717-719.

[A] (Sup. 1878)

Where a policy of insurance, issued in accordance with the application, makes the charter and by-laws of the company a part of the contract, the applicant will be presumed to have notice of the provisions of such charter and by-laws.—*American Ins. Co. v. Henley*, 60 Ind. 515.

[B] (App. 1892)

Every member of mutual insurance company is bound to know the contents of the articles of association and by-laws, and his policy must be construed with reference to them. They enter into and become part of the con-

tract to the same extent as if they were expressly written therein.—*Schmidt v. German Mut. Ins. Co.*, 30 N. E. 939, 4 Ind. App. 340.

[c] (App. 1905)

A statute creating a mutual insurance corporation becomes a part of the contract for the doing of an act, the mode of which it prescribes, and a member contracting therewith is bound to know thereof.—*Farmers' Mut. Fire Ins. Co. of De Kalb County v. Jackman*, 73 N. E. 730, 35 Ind. App. 1.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 312.

See, also, 1 Cyc. p. 231, 19 Cyc. p. 659, 25 Cyc. p. 744; note, 47 L. R. A. 681.

### § 155. Evidence to aid construction.

[a] (App. 1906)

The delivery of a life policy to the assured in disregard of the provisions of the policy is a material fact in determining the intent of the party.—*Neff v. Metropolitan Life Ins. Co.*, 39 Ind. App. 250, 73 N. E. 1041.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 313, 354.

See, also, 19 Cyc. pp. 660, 661.

### § 156. Parties to contract and relations between them.

Parties affected by avoidance or forfeiture of policy, see post, § 311.

[a] (App. 1892)

A certificate of membership in a mutual insurance company is a contract for insurance, and in most respects should be construed in the same manner as an ordinary insurance policy. While the insured is a member of the company and entitled to a voice in its management and control, the promise of indemnity is based on a valuable consideration, and the company, in respect to the insurance, is a distinct legal entity, occupying the contractual status towards the member.—*Schmidt v. German Mut. Ins. Co.*, 30 N. E. 939, 4 Ind. App. 340.

[b] (App. 1898)

A contract signed by an insurance company and defendant railroad company certified that decedent was insured against accidents so long as he remained in the employ of defendant, and that the contract was made in accordance with the policy issued by the insurance company to defendant for the benefit of its employees. The complaint alleged the taking out of a policy by defendant, the deduction of monthly premiums from decedent's wages, and the injury. It was not alleged that the wages deducted were not applied by defendant to the payment of premiums to the insurance company, or that defendant received or retained moneys from the insurance company due the estate of decedent under the policy. *Held*, that defendant was not liable, since decedent was the third party for whose benefit the insur-

ance was taken out, and hence his estate could enforce the contract against the insurance company.—*Carpenter v. Chicago & E. I. R. Co.*, 51 N. E. 493, 21 Ind. App. 88.

[c] (Sup. 1908)

The contracts of insurance, whereby an association agreed to furnish funds for the burial of its members, provided that a member should pay a sum upon every death in the membership occurring before his own, and in consideration thereof, upon his death, the association would pay a specified firm of undertakers a sum for burial goods and service for his funeral. The association's by-laws provided that the firm of undertakers, their heirs and assigns, should furnish all burial supplies and services, and that the association should pay them the full amount of the benefits accruing under the contracts, and no part to the members' surviving relatives and friends as death benefits. *Held*, that the firm of undertakers was sole beneficiary under the contract.—*State v. Willett*, 171 Ind. 296, 86 N. E. 68, 23 L. R. A. (N. S.) 197.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 316-322.

See, also, 19 Cyc. p. 663, 25 Cyc. p. 741, 26 Cyc. p. 583.

### § 161. Property covered by insurance against fire or other cause of loss.

Description in pleadings, see post, § 632.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 338-353.

See, also, 19 Cyc. pp. 664-670; note, 26 L. R. A. 237; note, 22 Am. Rep. 253.

### § 162. — In general.

[a] (App. 1894)

Where a policy insures a furniture company in the sum of \$1,000, and the amounts for which the factory, machinery, apparatus and furniture are insured are separately stated, and permission is granted to assured to erect a warehouse, "to be insured under the policy," the separate items constitute separate contracts of insurance, and the warehouse subsequently constructed is not insured.—*Nappanee Furniture Co. v. Vernon Ins. Co.*, 10 Ind. App. 319, 37 N. E. 1064.

[b] (Sup. 1907)

Where defendant insured certain property in which the insured had only a life estate, such life estate was the only interest covered by the policy, and the value of the property destroyed by fire, when tested by such interest, was the measure of the insurer's liability.—*Glens Falls Ins. Co. v. Michael*, 167 Ind. 639, 74 N. E. 964, 79 N. E. 905, 8 L. R. A. (N. S.) 708.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 338, 352, 354.

See, also, 19 Cyc. p. 664.

**§ 163. — Description of property.**

[a] (Sup. 1866)

The term "merchandise," in a policy of insurance against loss, etc., by fire, on grain and other merchandise, in each of two warehouses, which were kept by the assured, who were grain merchants, for the purpose of receiving and storing grain, does not include a platform scale, bedded in the floor of one of the warehouses, or belting, or a corn sheller, or a beam-scale, which things had been dispensed with in the business, but which had not been offered for sale, or tools, implements, or articles of property purchased for use in the warehouses, as being necessary or convenient in the business, and which were used as occasion required.—*Kent v. Liverpool & L. Ins. Co.*, 26 Ind. 294, 89 Am. Dec. 463.

[b] (App. 1896)

Carpets and bedclothing are covered by the terms "household furniture," in an insurance policy.—*Patrons' Mutual Aid Soc. of Vermillion County v. Hall*, 49 N. E. 279, 19 Ind. App. 118.

[c] (App. 1900)

Where a policy contained a clause, "\$800 on household and kitchen furniture, \* \* \* and \$—— on family wearing apparel," etc., insured was entitled to recover for loss of wearing apparel, since the use of the word "and" after the description of household furniture made the \$800 apply to both clauses.—*German Fire Ins. Co. v. Seibert*, 56 N. E. 686, 24 Ind. App. 279.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 339-346.  
See, also, 19 Cyc. pp. 664-670; note, 16 Am. Dec. 462.

**§ 165. — Description of location.**

[a] (App. 1896)

A policy insured "\$750 on \* \* \* building, \* \* \* situated on lot 6; \* \* \* \$250 on boiler and engine, while contained in above-described building; \$1,000 on machinery, tools, consisting of \* \* \*, and patterns and other tools." *Held*, that patterns, to be covered by the policy, need not necessarily be contained in the building insured.—*Ætna Ins. Co. v. Strout*, 16 Ind. App. 160, 44 N. E. 934.

[b] (App. 1909)

A lightning policy on grain "stacks" on a farm covers grain stacked under a shed.—*Farmers' Mutual v. Reser*, 43 Ind. App. 634, 88 N. E. 349; *Id.* 43 Ind. App. 738, 88 N. E. 353.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 351.  
See, also, 19 Cyc. p. 664, 25 Cyc. p. 1517.

**§ 170. Amount of insurance.**

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 355-361.  
See, also, 19 Cyc. pp. 670-672, 25 Cyc. p. 742.

**§ 171. — Amount fixed by policy in general.**

[a] (App. 1893)

A clause in an application for mutual accident indemnity, agreeing that the benefits to which the applicant shall become entitled shall be governed and paid in the same ratio that his income shall bear to the amount of indemnity insured, is binding on the insured, though the agent, by false statements as to his income, has put him in a higher class, paying larger premiums.—*Howe v. Provident Fund Soc.*, 7 Ind. App. 586, 34 N. E. 830.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 355-357.  
See, also, 15 Cyc. p. 1037, 19 Cyc. p. 670.

**§ 176. Term and duration of risk.**

Insurance for limited term after default in payment of premium, see post, § 367.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 372-383.  
See, also, 1 Cyc. p. 240, 15 Cyc. p. 1039, 19 Cyc. pp. 518, 519, 673, 25 Cyc. p. 742, 26 Cyc. pp. 595-601.

**§ 177. — Term fixed by policy in general.**

[a] (Sup. 1878)

A fire insurance company, having received an application for a policy, contracted to accept the risk for the term of 30 days from date, "unless the applicant is sooner notified of its rejection. If he receives no notice that the risk is rejected, the insurance will cease at the end of thirty days, unless a regular policy has been issued." After expiration of the 30 days, a loss occurred, no policy having been issued nor notice of rejection given. *Held*, that the company was not liable.—*Barr v. Insurance Co. of North America*, 61 Ind. 488.

[b] (App. 1907)

A continued employment of the principal in the fidelity bond by plaintiff furnished a valuable consideration for the continuing liability of the sureties on the bond which expressly provided for a continuous liability during the period of employment.—*Stamets v. Plano Mfg. Co.*, 40 Ind. App. 620, 82 N. E. 122, 923.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 372-378.  
See, also, 19 Cyc. p. 673.

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

**§ 178. — Voyage or time policies of marine insurance.**

[a] (Sup. 1854)

A policy of insurance was issued on two flatboats loaded with hay, for the voyage from Lawrenceburgh to New Orleans, and eight days thereafter. Three days after the boats reached Freeport, which is three miles above New Orleans, all the hands but two were paid off and discharged, according to the usage of the flatboat trade. Freeport is, in practice, the New Orleans hay market, as it is the custom for the boats to stop there to avoid the expense which would otherwise be incurred at the New Orleans wharf, and parties desiring to purchase hay are accustomed to resort there. After sale, the boats drop down to New Orleans to discharge their cargo. On the evening of the third day, after one of the boats arrived at New Orleans, the other being still at Freeport, the boats and their cargoes were destroyed by a storm. It appeared in evidence that such was the violence of the storm that the hay could not have been landed from the boats and saved. *Held*, that the terminus of the voyage was New Orleans, and not Freeport.—*Grant v. Lexington Fire, Life & Marine Ins. Co.*, 5 Ind. 23, 61 Am. Dec. 74.

FOR CASES FROM OTHER STATES.

SEE 28 CENT. DIG. Insurance, §§ 379-383.  
See, also, 26 Cyc. pp. 576, 592-601.

**§ 179. Entire or severable contract.**

[a] (Sup. 1889)

Where different classes of property are insured for separate and distinct amounts, the contract of insurance is severable.—*Phenix Ins. Co. of Brooklyn v. Pickel*, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393.

Where the property is so situated that the risk on one item cannot be affected without affecting the risk on the other items, the policy should be regarded as entire and indivisible; but, where the property is so situated that the risk on each item is separate and distinct from the others, so that what affect the risk on one item does not affect the risk on the others, the policy should be regarded as several and divisible.—*Id.*

[b] (Sup. 1890)

A policy of insurance covering several buildings is divisible.—*Rogers v. Phenix Ins. Co. of Brooklyn*, 121 Ind. 570, 23 N. E. 498.

[c] (Sup. 1890)

An insurance policy on several articles of personal property for separate sums is an entire contract.—*Geiss v. Franklin Ins. Co.*, 123 Ind. 172, 24 N. E. 99, 18 Am. St. Rep. 324.

[d] (App. 1895)

An insurance company may waive the indivisibility of one of its policies.—*Manchester Fire Assur. Co. v. Glenn*, 13 Ind. App. 365, 40 N. E. 926, 41 N. E. 847, 55 Am. St. Rep. 225;

*North British & Mercantile Ins. Co. v. Same*, Id. 699, 40 N. E. 927.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 384-390.  
See, also, 19 Cyc. pp. 674, 707; note, 30 C. C. A. 474; note, 19 L. R. A. 211; note, 74 Am. Dec. 498; note, 38 Am. Rep. 230.

**§ 179½. Loans on policies.**

[a] (App. 1894)

A contract between an insurance company and an applicant for life insurance, by which the company undertakes to loan the insured a sum of money which is to be deducted from the proceeds of the policy at the time of the maturity thereof, is not in violation of the principle of indemnity on which insurance is generally based, for the money may be needed for the payment of premiums and other purposes to enable the insured to secure the full benefit of the insurance.—*Union Cent. Life Ins. Co. v. Woods*, 11 Ind. App. 335, 37 N. E. 180, 39 N. E. 205.

[b] (App. 1910)

An agreement pledging a life policy containing a table of loan values, and authorizing insured to obtain loans thereon, to secure a loan from insurer, which stipulates that the loan shall become due on the nonpayment of any premium on the policy or interest on the loan in which event the pledge shall without demand or notice be foreclosed by insurer by deducting the amount due on the loan from the reserve on the policy, etc., gives insured time in which to pay the premium on the policy or to repay the loan, and it is valid, and a foreclosure under it is effective.—*Eagle v. New York Life Ins. Co.*, 91 N. E. 814.

An agreement of an insurer, making a loan to insured secured by pledge of the policy, to give insured and his wife, beneficiary in the policy, time after the maturity of the debt in which to pay it, was not violated where insurer waited nearly six months after the maturity of the loan before foreclosing the pledge in accordance with the agreement, which authorized foreclosure without notice or demand for payment, and, where the wife was not injured thereby, she could not claim that insurer waived its rights to proceed without demand for payment and notice.—*Id.*

**VI. PREMIUMS, DUES, AND ASSESSMENTS.**

By laws of mutual insurance company, see ante, § 54.

Demand, acceptance, or retention of premiums or assessments as ground of estoppel or waiver, see post, § 392.

Forfeiture for nonpayment, see post, §§ 349-370, 749-754.

Liability of wife's separate estate for premiums on policies on, see HUSBAND AND WIFE, § 156.

Mutual benefit insurance, see post, §§ 731-742.

Paid-up policy after default in payment of premiums, see post, § 368.

Payment as essential element of contract, see ante, § 137.

Payment of premium as fraud against creditors, see FRAUDULENT CONVEYANCES, § 39.

Pleading matters of fact or conclusions, see PLEADING, § 8.

### § 181. Right of insurer to premiums.

[a] (App. 1905)

A policy of life insurance was based on a written and printed application, and provided for the payment in advance of \$97.80, and the payment of the same amount yearly thereafter at the office of the company in Portland, Me., on the 15th day of July every year, etc. *Held*, that by the payment of the first premium the insured effected an insurance upon his life for one year, and purchased a right to continue that insurance from year to year, during life, at the same rate, and that whether he would continue or not was optional with him. The premium for the first year paid for the risk during that year, and for the right to subsequent insurance, but created no obligation to pay further premiums. They do not constitute a debt.—*Union Mut. Life Ins. Co. v. Adler*, 73 N. E. 835, 75 N. E. 1088, 38 Ind. App. 530.

FOR CASES FROM OTHER STATES.

SEE 28 CENT. DIG. Insurance, § 391.

See, also, 26 Cyc. p. 603.

### § 186. Payment of premiums.

Admissibility of evidence, see post, § 654½.

Extension of time for payment, see post, §§ 356-358.

Forfeiture of policy for nonpayment, see post, §§ 349-370.

Parol evidence to vary receipt of payment, see EVIDENCE, § 408.

Pleading, see post, § 629.

Questions for jury, see post, § 668.

Repayment of unearned premium on cancellation of policy, see post, § 230.

Sufficiency of payment to prevent forfeiture, see post, §§ 359-361.

[a] (Sup. 1877)

A note given for the premium on a life insurance policy issued by a mutual company specified no time for its payment, but provided for interest at a stipulated rate, payable annually, and recited that it was given as part of the premium on the policy, and should constitute a lien on such policy until it became due by limitation or by the death of the insured; further stipulating that the dividends on the policy were to be applied on the payment of the note. *Held* that, except in so far as it provided for the payment of an annual interest, the instrument was not a note, the payment of which was a condition precedent to a recov-

ery on the policy, but was in the nature of a receipt for money loaned or advanced out of a particular fund in which the assured had an interest.—*Northwestern Mut. Life Ins. Co. v. Little*, 56 Ind. 504.

A policy issued by a mutual life insurance company to L. on the life of S., her husband, purported to have been issued in consideration of a cash payment of \$148.10, and the annual premium note of \$110, and an annual cash premium of \$148.10 to be paid on a specified date in every year during the first 10 years of the continuance of the policy. The policy provided that the company would pay its face value within 90 days after due notice and proof of death, the balance of the year's premium, and all notes given for premiums, if any, to be first deducted therefrom; that in case of default in the payment of any premium they would pay, "as above agreed, as many tenth parts of the original sum assured as there shall have been complete annual premiums paid at the time of such default"; that, if the premiums or the interest on any premium not shown to be paid on or before the date fixed therefor, the company should not be liable for the payment of the whole sum assured, and for such part only as is expressly stipulated above; and that, in case the policy should determine or become void for other reasons than the nonpayment of premiums, all payments thereon should be forfeited to the company. A cash premium was paid at the time the policy was issued, and a premium note executed, specifying no time of payment, referring to the policy by its number, and reciting that it was given for a part of the premium on such policy, and should remain a lien on the policy until it became due by limitation or by the death of the assured, when it should be deducted from the policy, and that dividends on the policy should be applied to the payment of the note. Such note also provided for interest at the rate of 7 per cent., "which interest shall be paid annually or the policy forfeited." The assured made two payments of cash premiums in addition to the one made upon the issuance of the policy, and executed two other such premium notes, upon which he paid the interest for the first and second years. No other payments of premium or interest were made. After the date of the fourth payment, the company offered to renew and reinstate the policy upon payment of the arrearage of premiums and interest. *Held*, in an action brought on the policy by L. after the death of S., that the several cash payments made, together with the execution of the three premium notes, constituted the payment of three complete annual premiums on the policy, entitling the plaintiff to recover three-tenths of the original sum insured, subject to a deduction of the principal sums due on the premium notes.—*Id.*

[b] (Sup. 1882)

The fact that a life insurance policy in one instance allowed to the insured a credit on

premiums for a claim for services, and accepted the balance of the premium in money, does not show a custom on the part of the company to accept payment of premiums in services.—*Willcuts v. Northwestern Mut. Life Ins. Co.*, 81 Ind. 300.

[c] (Sup. 1884)

Where a note given for premiums on a policy issued by a mutual insurance company recited that it was given for a portion of the premium on a certain policy, and was to remain a lien thereon until the policy became due by limitation, or by death of the insured, when it was to be deducted from the policy unless sooner paid, such note will be deemed a payment of the premium, and regarded in equity as evidence of the loan of the money by the corporation to one of its members, and not as evidence that premiums remained unpaid.—*Franklin Life Ins. Co. v. Wallace*, 93 Ind. 7.

[d] (App. 1905)

Where a note given in payment of a premium on a life insurance policy provided that it was given on account of the policy, and, unless paid when due, the policy lapsed as for nonpayment of premium when due, the giving of the note was not payment of the premium for which it was given.—*Union Mut. Life Ins. Co. v. Adler*, 73 N. E. 835, 38 Ind. App. 530, 75 N. E. 1088.

A 20-payment life policy, providing for the payment of the first premium in advance and for a like amount annually thereafter for 20 years, requires such following annual premiums to be paid in advance.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 396-398.  
See, also, 1 Cyc. pp. 240-243, 19 Cyc. pp. 604-608, 25 Cyc. pp. 749-753, 1517, 26 Cyc. pp. 604, 605.

§ 187. Notes for premiums.

Forfeiture of policy for nonpayment, see post, §§ 349, 360, 362.

Noncompliance with laws by foreign insurance company as defense to, see ante, § 24.

Premium or deposit notes, see post, § 189.

[a] (Sup. 1857)

A note was given for a premium upon a policy of insurance, and the policy canceled before its expiration, by agreement and in consequence of the insolvency of the company. At the time of cancellation the company's agent indorsed on the policy the balance due the holders of the policy for the unexpired time. In an action by an indorsee against the maker it was held that the insolvency of the company did of itself constitute a failure of the consideration as to the balance due, and that the balance was a valid set-off.—*Tellon v. City Bank of Columbus*, 9 Ind. 119.

[b] (Sup. 1867)

Notes given for the premium due upon a policy of insurance upon property to which the

insured has no title, and in which he has no insurable interest, are void for want of consideration.—*Bersch v. Sinnissippi Ins. Co.*, 28 Ind. 64.

[c] (Sup. 1870)

If, at the time of the making of a contract of insurance, the agent, by the authority of the directors, represents that the company is entirely solvent and able to pay all losses and is then worth a certain considerable amount, and the insured relies on such representations, and is induced thereby to enter into said contract and execute the premium note, and said representations are false, these facts will constitute a good defense to a suit on the premium note.—*Boland v. Whitman*, 33 Ind. 64.

[d] (Sup. 1888)

Assured, under a contract for five years, paid the premium for the first year in cash, and gave notes for the others. During the first year the company became insolvent and suspended business. Held, that the consideration of the notes had failed.—*Home Ins. Co. of New York v. Daubenspeck*, 115 Ind. 306, 17 N. E. 601.

[e] (App. 1905)

Since the insurer could not compel the continuance of the insurance, nor the payment of subsequent premiums, it could not collect a note given therefor.—*Union Mut. Life Ins. Co. v. Adler*, 73 N. E. 835, 75 N. E. 1088, 38 Ind. App. 530.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 399-401.  
See, also, 19 Cyc. pp. 611, 612.

§ 188. Actions for premiums.

Applicability of instructions to pleadings and evidence, see TRIAL, § 251.

[a] (Sup. 1875)

A complaint in an action on a note given for a premium need not allege a demand of payment.—*Mitchell v. American Ins. Co.*, 51 Ind. 396.

In an action on a note given for the premium of insurance the policy, or a copy thereof, need not be filed with the complaint or made a part of it.—*Id.*

In an action on a note given for a policy of insurance, it is not necessary to file with or make part of the complaint a copy of the policy, since it was not the foundation of the action.—*Id.*

[b] (Sup. 1879)

In an action on a note given a life insurance company for premium, an answer is insufficient to raise the defense of failure of consideration which alleges that the note in suit was executed in consideration of a valid life policy to be issued by plaintiff, and for no other or different consideration, and that, though a reasonable time for such delivery had lapsed, plaintiff wholly neglected and refused to exe-

cute and deliver a valid life policy for the amount of the note.—*Franklin Life Ins. Co. of Indianapolis v. Cardwell*, 65 Ind. 138.

[c] (Sup. 1880)

Where there is no averment of the fact in the complaint, it will be presumed on appeal, in an action on a note given a foreign insurance company for insurance, that the company and its agent had complied with the laws of the state at the time the policy was issued and the note executed.—*Cassady v. American Ins. Co.*, 72 Ind. 95.

[d] (Sup. 1881)

In an action on a premium note absolute on its face, payable in annual installments, where the company seeks to recover for all the installments because insured has failed to pay the first, by a reference to the policy which referred to a provision in the charter, it is proper to sustain defendant's motion to strike out of the complaint all averments relating to the subsequent installments, as the statement in the note that its consideration was a policy of insurance did not change its legal effect or make the policy a part of the note, much less the charter.—*American Ins. Co. v. Gallahan*, 75 Ind. 168.

Where a note was in ordinary form, except for a statement that it was given for a policy of insurance, parol evidence of an agreement that the note should be governed by a provision of the payee's charter, that, if any installment of the premium should become due and unpaid, all installments should at once become due, was inadmissible.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 245, 402-407.

See, also, 25 Cyc. pp. 756-758.

§ 189. Premium or deposit notes.

Effect of noncompliance with law by foreign corporation, see ante, § 24.

Lien of premium note on property in hands of heirs, see DESCENT AND DISTRIBUTION, § 130.

Notes in payment of premiums, see ante, §§ 186, 187.

Return as condition precedent to rescission of policy by insurer, see post, § 247.

[a] (Sup. 1864)

It is competent for a mutual fire insurance company, organized under the laws of this state, to provide in its articles of association, or by its by-laws, that all premium notes shall be paid in installments as ordered by the directors, after notice, and that, if not so paid, the entire notes shall become due and collectible.—*German Mut. Fire Ins. Co. v. Franck*, 22 Ind. 364.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 408-413.

See, also, 1 Cyc. p. 241, 19 Cyc. pp. 611-616, 25 Cyc. p. 752.

§ 190. Grounds of assessment in general.

[a] (Sup. 1866)

A refusal to pay an assessment made to cover the expenses of the company, as well as losses sustained, gives no right of action upon the premium note.—*Sinnissippi Ins. Co. v. Taft*, 26 Ind. 240.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 414, 415.

See, also, 19 Cyc. pp. 618-620, 25 Cyc. pp. 754, 755.

§ 191. Power and duty to make assessment.

[a] (App. 1901)

Where the by-laws of a mutual fire insurance association made it the duty of the board of directors to make assessments on premium notes, the maker of a note given for a policy could not raise the objection that they had no such authority, as he was bound to take notice of the by-laws.—*Farmers' Ins. Co. v. Borders*, 60 N. E. 174, 26 Ind. App. 491.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 416.

See, also, 19 Cyc. p. 617, 25 Cyc. p. 754.

§ 192. Liability to assessment.

[a] (Sup. 1851)

A policy of insurance of a building against destruction by fire, given by the Indiana Mutual Fire Insurance Company, is rendered void, and the lien of the company on the building is lost, by a sale or mortgage of the property by the assured; but, though the lien be so annulled, still the assured is personally liable on the premium note until an actual surrender of the policy to the company and the payment of all assessments against him for losses sustained by the company before the surrender.—*Indiana Mut. Fire Ins. Co. v. Coquillard*, 2 Ind. 645.

[b] (Sup. 1854)

In an action by a mutual insurance company on a note, given by a person to whom a policy had been issued, brought to recover certain assessments alleged to be due thereon, the plea was that the property insured had been sold, which the insurance company well knew, and that the assessments sued for were assessed upon the note after said sale. *Held*, that the plea was a sufficient answer to the action, although the charter of the company provided that upon alienation of the property the policy should be void, and be surrendered to the directors of the company, to be canceled; and that, upon such surrender, the assured should be entitled to his premium note upon the payment of his proportion of all losses and expenses that have occurred prior to such surrender.—*Indiana Mut. Fire Ins. Co. v. Conner*, 5 Ind. 170.

[c] (Sup. 1870)

Where property insured by a mutual fire insurance company is sold and conveyed by the

insured, he is not liable to be assessed on his premium note for loss occurring after such sale and conveyance.—*Boland v. Whitman*, 33 Ind. 64.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 417-426.

See, also, 19 Cyc. pp. 617, 624.

**§ 193. Amount of assessment.**

[a] (Sup. 1866)

Under the law governing mutual insurance companies, the power to make assessments upon premium notes is limited by the amount of losses sustained and unpaid at the time of making the assessment.—*Sinnissippi Ins. Co. v. Taft*, 26 Ind. 240; *Same v. Wheeler*, Id. 336; *Same v. Farris*, Id. 342.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 430, 431.

See, also, 19 Cyc. p. 617, 25 Cyc. p. 754.

**§ 197. Enforcement of assessment.**

Action by foreign insurance company, see ante, § 26.

As waiver of forfeiture for nonpayment, see post, § 392.

By receivers, see ante, § 71.

Filing written instruments with pleading, see PLEADING, § 310.

Remedy and proceedings on policy of insurance company, see ante, § 44.

[a] (Sup. 1867)

A complaint in a suit by a mutual fire insurance company to recover an assessment on a premium note, which avers that the assessment was made to pay the liabilities of the company for losses and expenses, is sufficient if the exhibit required by the statute (1 Gav. & H. Rev. St. 1870, p. 396, § 67) shows that the assessment was made only for the purpose of paying the liabilities of the company for losses by fire, and not to defray its expenses.—*Bersch v. Sinnissippi Ins. Co.*, 28 Ind. 64.

[b] (Sup. 1867)

In an action upon a premium note, given upon a policy of insurance, defendant answered that the agent of the company had proposed to defendant, for the sum named, to insure his house against loss by fire; that defendant accepted the offer upon condition that for the sum named he should have an unconditional policy, which should not be subject to the payment of any further assessments for premiums; that the agent delivered a policy, which he falsely and fraudulently represented conformed to the contract, but that in fact said policy contained a condition which made the liability of the company depend upon the prompt payment by defendant of such assessments as might be made upon the premium note; that defendant was illiterate, able to read with great labor and difficulty, as the agent well knew, and relied upon the truth of said representations; that defendant was wholly ignorant of the condition in said policy until he received

notice of the assessments. *Held*, that the answer presented a good defense.—*Keller v. Equitable Fire Ins. Co.*, 28 Ind. 170.

[c] (Sup. 1870)

Where the agent of an insurance company, by the authority of the directors, falsely represented the company to be solvent, and in good condition, and the insured relied upon such assurances, and entered into a contract of insurance, and executed a premium note, *held*, that such facts constituted a good defense to an action on the note.—*Boland v. Whitman*, 33 Ind. 64; *Stroud v. Same*, Id. 71; *Briggs v. Same*, Id. 72.

[d] (Sup. 1870)

A suit on a premium note payable to "A. agent of E. Insurance Company," is properly brought in the name of the company.—*Black v. Enterprise Ins. Co.*, 33 Ind. 223.

An answer to a suit by a foreign insurance company on a premium note, alleging that plaintiff is a foreign insurance company, and that a contract of insurance was entered into in Indiana through an agent residing therein, but not also showing noncompliance with the act regulating foreign companies, is bad on demurrer.—*Id.*

[e] The complaint to collect an assessment on a premium note given to a mutual insurance company must show the time covered by the policy for which the note was given, and that the losses for which the assessment was made occurred during the existence of the policy.—(1871) *Embree v. Shideler*, 36 Ind. 423; (1871) *Manlove v. Curtis*, 38 Ind. 31; (1872) *Tippencanoe Tp., Carroll County v. Manlove*, 39 Ind. 249; (1873) *Hashagan v. Manlove*, 42 Ind. 330.

[f] (Sup. 1881)

In an action on premium note, an answer setting up false representations of existing facts relating to the condition and business of the company affecting its responsibility and made by the agent of the company and of which defendant was ignorant, and averring an injury sustained by reason of such false representations, presented a good defense.—*American Ins. Co. of Chicago v. Pressell*, 78 Ind. 442.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 436-453.

See, also, 25 Cyc. pp. 756-758; note, 1 L. R. A. (N. S.) 914.

**§ 198. Refunding or recovery of premiums or assessments paid.**

Conformity of judgment to findings in action to recover premiums paid, see JUDGMENT, § 256.

On cancellation of policy, see post, § 230.

Pleading in justice's court, see JUSTICES OF THE PEACE, § 91.

Pleading matters of fact or conclusions, see PLEADING, § 8.

Recovery from agent of foreign company unauthorized to do business, see ante, § 23.

## [a] (Sup. 1883)

Where the risk attaches, though the policy may be afterwards forfeited, the insured is not entitled to a return of the premium.—*Continental Life Ins. Co. v. Houser*, 89 Ind. 258.

A complaint to recover back premiums paid to an insurance company which fails to show that the refusal of the company to fulfill its contract was not fully justified by the terms thereof, and does not aver what the conditions of the contract were, or that they were performed by plaintiff, is insufficient.—*Id.*

## [b] (Sup. 1884)

Premiums paid cannot be recovered from a life insurance company after the risk has attached, though the company subsequently wrongfully declared the forfeiture of the policy.—*Standley v. Northwestern Mut. Life Ins. Co.*, 95 Ind. 254.

## [c] (Sup. 1887)

If there was a continuing valid risk up to the time the last premium was tendered and refused, premiums previously paid cannot be recovered in an action as for money had and received.—*Continental Life Ins. Co. v. Houser*, 111 Ind. 266, 12 N. E. 479.

## [d] (App. 1898)

Payments of premium on a policy of insurance which is void ab initio are not voluntary, and are recoverable as money had and received, in the absence of fraud on the part of the person to whom the policy was issued.—*Metropolitan Life Ins. Co. v. Bowser*, 50 N. E. 86, 20 Ind. App. 557.

The liability of an insurance company to return premiums paid depends on whether there is a contract of insurance under which a risk is run by the insurer in favor of the insured.—*Id.*

A complaint in an action against a life insurance company to recover premiums paid alleged that the policy was void because the application was not signed by insured. *Held*, that the complaint was sufficient to apprise defendant of plaintiff's claim, though it was not stated that there was any provision requiring such a signature contained in any rule or regulation or in the application or in the contract.—*Id.*

## [e] (App. 1901)

A member of a mutual insurance company is not entitled to recover a premium paid, on the ground that the company was reorganized under legislative authority without his consent, where the identity of the company, or its rights and liabilities, were not at all affected by the reorganization.—*Muller v. State Life Ins. Co.*, 60 N. E. 958, 27 Ind. App. 45.

Defendant became a member of the plaintiff mutual life insurance association, and, after having paid his premium, a special contract appointing the defendant one of the 500 vice counselors of the company, in consideration of the payment of the premium, was given defend-

ant. On the expiration of the policy, defendant gave his note for the renewal premium; and in an action on such note, brought after the policy had been returned, counterclaimed for the premium paid, on the ground of the illegality of the special contract. *Held* that, as there was no reference in the policy to the special contract, defendant could not recover the premium paid the previous year, and for which defendant had valid insurance during that time, though the special contract was void.—*Id.*

## [f] (App. 1903)

Under Burns' Rev. St. 1901, § 4905, the securing of policies of insurance on the lives of persons without their knowledge or consent is a felony. Decedent took out policies of insurance on the lives of persons in whom he had no insurable interest, and without their knowledge or consent. *Held*, that his administrator could not recover of the company the premiums paid by decedent, even though the company knew all the facts.—*Work v. American Mut. Life Ins. Co.*, 67 N. E. 458, 31 Ind. App. 153.

## [g] (Sup. 1904)

Defendant issued a policy to S., insuring the life of E., without her knowledge or consent, which was void for want of an insurable interest. S. thereafter assigned the policy to plaintiff, who was induced to accept the assignment by the false representations of defendant's agent, who had knowledge of its invalidity, that the same was valid and a good investment, and that plaintiff, who also had no insurable interest in insured's life, was entitled to take an assignment thereof. Thereafter, defendant's vice president and treasurer visited plaintiff, and, on being informed by her of the facts attending the assignment, ratified the same, and informed her that they were true; advising her to keep up her dues. Plaintiff thereafter continued to pay assessments on the policy until further tenders were refused, after which she ascertained that the policy was void, and sued to recover premiums paid. Act March 9, 1883, § 6 (Acts 1883, p. 204, c. 136), requires that when assessments on a policy, made by any person other than assured, are paid without his written consent, the beneficiary must have an insurable interest in insured's life; and section 9 makes it a felony for any person to knowingly issue a policy on the life of another without his knowledge or consent. *Held*, that the plaintiff was not in pari delicto with defendant, and was therefore entitled to recover the assessments paid by her on such policy.—*American Mut. Life Ins. Co. v. Bertram*, 70 N. E. 258, 163 Ind. 51, 64 L. R. A. 935.

Where an assignee of a void insurance policy paid premiums sought to be recovered, believing the policy to be valid, she was not entitled to interest prior to demand made by her for their repayment, under Burns' Rev. St. 1901, § 7045, declaring that interest shall be allowed on money had and received for the use

of another, and retained without his consent.—Id.

[h] (App. 1906)

In a complaint to recover money paid on a policy of insurance void at its inception for lack of insurable interest of the beneficiary in the life of insured, allegations that defendant solicited plaintiff to take a certificate of life insurance issued upon a person in whose life plaintiff had no insurable interest under representations that such certificate would be valid, which representations were believed by plaintiff, and that defendant knew at the time of the issuance of the certificate that it was void for lack of insurable interest, were insufficient to show that the parties were not in pari delicto, in the absence of an allegation showing why plaintiff relied upon defendant's representations.—*American Mut. Life Ins. Co. v. Mead*, 79 N. E. 526, 39 Ind. App. 215.

In an action to recover money paid under a policy of insurance which was void ab initio, it was unnecessary to make the contract a part of the complaint, since it was not the foundation of the action.—Id.

A complaint in an action to recover money paid under a policy of insurance void at its inception for lack of insurable interest of the beneficiary in the life insured did not show that the beneficiary and insurer were not in pari delicto, and hence did not state a cause of action, where from aught that appeared therein the beneficiary made his application for the policy of his own volition and without any inducement, except from motives of speculation, though it showed that after the first year of the contract he paid a larger monthly assessment upon the representations of the insurer that it would be necessary for him to do so, and that he believed that the contract of insurance was in full force and that defendant was liable thereon, in the absence of allegations showing what induced plaintiff to believe the contract was valid, since, if his belief was founded merely on his ignorance of the law, he would not be excused.—Id.

Premiums paid on a void policy of insurance may be recovered by the person paying the same, unless the parties were equally guilty in relation to such policy.—Id.

[i] (Sup. 1907)

Insured cannot recover the premium paid for a voidable insurance policy; the right of avoiding the policy being solely with the company.—*Glens Falls Ins. Co. v. Michael*, 167 Ind. 659, 74 N. E. 964, 79 N. E. 905, 8 L. R. A. (N. S.) 708.

[j] (App. 1907)

If a policy of insurance is wholly void without the option on the part of the insurer to consider it voidable, the insurer is liable for premiums received; there being no consideration received by the insured.—*Modern Woodmen*

of America v. Vincent, 40 Ind. App. 711, 80 N. E. 427, 82 N. E. 475.

[k] (App. 1908)

If a person paid a first premium to another whom he had authorized to secure life insurance, and the application was rejected by the company, such other person not being an agent thereof, the person paying the premium could not recover the money from the company if it had not received the money and had no knowledge of it; but, if it received the money, or had knowledge of its payment and acted upon the application, it would make the person receiving the premium its agent by ratification, and would be liable for the money.—*Michigan Mut. Life Ins. Co. v. Thompson*, 86 N. E. 503.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 457-467.

See, also, 19 Cyc. pp. 609, 610, 25 Cyc. pp. 758-764, 26 Cyc. pp. 606-610.

## VII. ASSIGNMENT OR OTHER TRANSFER OF POLICY.

Accrual of right of action by assignee to recover premiums paid on void policy, see LIMITATION OF ACTIONS, § 66.

Accrual of right of action by assignee under assignment as security for debt, see LIMITATION OF ACTIONS, § 50.

Accrual of right of action on debt of husband secured by assignment of policy payable by wife, see LIMITATION OF ACTIONS, § 46.

As fraud against creditors, see FRAUDULENT CONVEYANCES, § 39.

Assignment by husband and wife to secure debt of husband, see HUSBAND AND WIFE, § 87.

Assignment by married woman, see HUSBAND AND WIFE, § 79.

Assignment of claim to proceeds after loss, see post, § 594.

Assignment to person without insurable interest, see ante, § 122.

Breach of condition against assignment, see post, § 346.

Concealment of cause of action as affecting limitation of action to cancel assignment, see LIMITATION OF ACTIONS, § 104.

Consent to assignment as estoppel to deny insurable interest, see ante, § 117.

Effect of transfer of property insured on liability to assessment on premium note, see ante, § 192.

Equitable assignment of proceeds of life policy, assigned as security, see ASSIGNMENTS, § 48.

Evidence of knowledge of assignor, see EVIDENCE, § 109.

Insurable interest to sustain assignment, see ante, § 121.

Necessity of proof of assignment, see EVIDENCE, § 374.

Of mutual benefit certificates, see post, §§ 727, 728.

Parol evidence to show purpose of assignment, see EVIDENCE, § 462.

Pleading, see post, § 645.

Right of assignee to proceeds, see post, §§ 593, 594.

Waiver of forfeiture on assignment without consent of insurer, see post, § 386.

### § 199. Assignability of policies.

[a] (Sup. 1884)

A life insurance policy may be assigned by indorsement and delivery.—*Bushnell v. Bushnell*, 92 Ind. 503, 602.

[b] (App. 1894)

An insurance policy is a chose in action, and may be assigned in the same manner as a note, bill of exchange, or account, and, like an assignment of an open account, the assignment of the policy does nothing more than to transfer the property.—*Union Cent. Life Ins. Co. v. Woods*, 11 Ind. App. 335, 37 N. E. 180, 39 N. E. 205.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 468.

See, also, 19 Cyc. p. 631, 25 Cyc. pp. 764, 1518, 26 Cyc. pp. 611, 612.

### § 200. What law governs.

[a] An assignment of a life insurance policy is governed by the laws of the place where the assignment is made.—(App. 1894) *Union Cent. Life Ins. Co. v. Woods*, 11 Ind. App. 335, 37 N. E. 180, 39 N. E. 205; (1895) *Criswell v. Whitney*, 13 Ind. App. 67, 41 N. E. 78.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 469.

### § 203. Right of insured to assign life or accident policies.

[a] (Sup. 1875)

A party holding and owning a life policy, whether on the life of another or on his own life, has a valuable interest in it which he may assign either absolutely or by way of security, and it is assignable like any other chose in action.—*Hutson v. Merrifield*, 51 Ind. 24, 19 Am. Rep. 722.

[b] (App. 1894)

Where an endowment policy is for the benefit of insured, if living at its maturity, and, if not, is payable to his wife if living, otherwise to his estate or assigns, its delivery vests title in the whole of it in both husband and wife; and, though the wife's interest be in some sense contingent, the husband cannot afterwards divest it by any assignment or pledge of the policy.—*Union Cent. Life Ins. Co. v. Woods*, 11 Ind. App. 335, 37 N. E. 180, 39 N. E. 205.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 166, 471.

See, also, 25 Cyc. p. 764.

### § 207. Consent of insurer.

Consent requisite to prevent forfeiture of policy, see post, § 346.

Consent to assignment as ground of estoppel or waiver, see post, § 393.

On transfer of subject of insurance without policy, see post, § 215.

Waiver of forfeiture on assignment without consent, see post, § 386.

[a] (App. 1894)

In assigning a policy of insurance, any method of assent which the insurer leads the assured to consider sufficient is all that is required.—*Moffitt v. Phenix Ins. Co.*, 38 N. E. 835, 11 Ind. App. 233.

The parties to an insurance policy may stipulate how its assignment shall be made, and ordinarily the mode prescribed must be followed, but such conditions are for the benefit of the insurer, and may be waived by him.—*Id.*

[b] (App. 1895)

Defendant company issued a policy of insurance on a certain store building, owned by a partnership, and the fixtures and stock therein, owned by one of the members of the firm, knowing at the time that the ownership was thus divided. Subsequently the fixtures and stock were sold, and defendant's agent drew up a form of assignment, which was signed by the vendor, transferring his interest in the policy to his vendee. *Held*, that the assignee might recover on the policy.—*Manchester Fire Assur. Co. v. Glenn*, 13 Ind. App. 365, 40 N. E. 926, 41 N. E. 847, 55 Am. St. Rep. 225; *North British & Mercantile Ins. Co. v. Same*, 13 Ind. App. 699, 40 N. E. 927.

[c] (App. 1896)

The insured in a life policy payable to his executor or administrator may, without the consent of the insurer, designate his mother as his beneficiary, and she is entitled to receive the proceeds thereof.—*Prudential Ins. Co. of America v. Young*, 14 Ind. App. 560, 43 N. E. 253, 56 Am. St. Rep. 319.

[d] (App. 1897)

Stipulations as to the manner in which consent to an assignment of a policy may be given can be waived.—*German-American Ins. Co. v. Sanders*, 46 N. E. 535, 17 Ind. App. 134.

[e] (Sup. 1905)

The fact that a corporation insured in a fire policy transferred all its property, including the policy, to another corporation having the same stockholders, the original corporation continuing its existence, gave the latter corporation no rights under the policy, in the absence of the insurer's assent to such assignment according to the terms of the policy.—*Miles Lamp Chimney Co. v. Erie Fire Ins. Co.*, 73 N. E. 107, 164 Ind. 181.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 475-477;

6 CENT. DIG. Bankr. § 233.

See, also, 19 Cyc. pp. 633-635, 25 Cyc. p. 770.

**§ 208. Validity of oral assignment.**

[a] (App. 1897)

Where a life policy does not declare an assignment without the consent of the company void, it may be assigned by a husband orally to his wife.—*State ex rel. Wright v. Tomlinson*, 45 N. E. 1116, 16 Ind. App. 662, 59 Am. St. Rep. 335.

[b] (App. 1897)

A contract of insurance may be assigned by parol.—*Western Assur. Co. v. McCarty*, 48 N. E. 265, 18 Ind. App. 449.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 478.

See, also, 25 Cyc. p. 767.

**§ 209. Form and requisites of assignment in writing.**

[a] (Sup. 1875)

A fire policy provided that assignments must be made within 10 days after the sale of the property, and the policy sent to the company's office forthwith for consent of the company, with 50 cents recording fee, and a new installment note, signed by the assignee, when consent would be given to the assignment, and that it was made and accepted on such conditions, and the conditions in the charter and by-laws of the company, which were made a part of the policy. The charter provided that alienation of the property should render the policy void, with the proviso that the grantee, having the policy assigned to him, might have the same ratified and confirmed on application to the directors, and with their consent, within 30 days after alienation, on giving proper security to the satisfaction of such directors for such portion of the deposit notes as remained unpaid, etc. The assured sold the property and indorsed the policy to the vendee in the presence and by the consent and direction of the company's local agent, who had full knowledge of all the facts, and who, knowing that the assignee had agreed to assume the payment of certain unpaid installment notes made by the assured, received of the assignee the amount of the first installment, which was all that was due on the premium before the property was burned. Such agent, in the assignee's presence, also received from the assured such policy, to be properly indorsed by the company's secretary, the assignee telling him that when it was fixed up he would pay the company's charges thereon, and the agent promising to have it all attended to in due time. The agent did not forward the policy as promised. *Held*, that there was no assignment as required by the policy and charter.—*American Ins. Co. of Chicago v. Gallagher*, 50 Ind. 209.

[b] (Sup. 1890)

A debtor took out a policy on his life, and, after holding it for a short time, in good faith transferred it by indorsement to certain of his

creditors, and took from them an agreement by which they were to pay the premiums and from the proceeds, when paid, retain the amount due, and pay any surplus to his heirs or to his order. He died without making any further order as to the proceeds of the policy. *Held*, that there was a complete transfer of the policy. It was assigned by indorsement and delivered, and, when he died without making further orders for the distribution of the surplus, the creditors were bound to pay the surplus to his heirs.—*Johnson v. Alexander*, 25 N. E. 706, 125 Ind. 575, 9 L. R. A. 660.

FOR CASES FROM OTHER STATES.

SEE 28 CENT. DIG. Insurance, § 479.

See, also, 25 Cyc. p. 768.

**§ 212. Validity of assignment in general.**

[a] (Sup. 1890)

One who has assigned a policy of insurance on his life to a creditor to secure a debt, and has acquiesced in the assignment for many years, taking no steps to avoid it, and knowing that it was necessary to pay the premiums to keep it alive, cannot, in a suit thereon, avoid the assignment on the ground of duress.—*Walker v. Larkin*, 127 Ind. 100, 26 N. E. 684.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 481, 482.

See, also, 25 Cyc. p. 768; note, 3 L. R. A. (N. S.) 935.

**§ 213. Construction of assignment.**

[a] (Sup. 1888)

Where the assignee of a life insurance policy promises in consideration of the assignment of such policy to pay to a third person a debt due from the assignor, in the absence of any agreement that the debt is not to be paid until after the assignor's death, it is payable at once.—*Leake v. Ball*, 17 N. E. 918, 116 Ind. 214.

[b] (App. 1895)

The assignment of an insurance policy with the consent of the insurer ordinarily creates a new contract.—*Manchester Fire Assur. Co. v. Glenn*, 40 N. E. 926, 41 N. E. 847, 55 Am. St. Rep. 225, 13 Ind. App. 365; *North British & Mercantile Ins. Co. v. Same*, 40 N. E. 927, 13 Ind. App. 699.

[c] (App. 1895)

Since a policy to "K and Z and F. Z." on a building and merchandise,—the goods being owned by the last named insured,—constituted two contracts, one with K and Z, and one with F. Z., an assignment of the policy by the last passed only his interest in the goods.—*Manchester Fire Assur. Co. v. Koerner*, 13 Ind. App. 372, 40 N. E. 1110, 41 N. E. 848, 55 Am. St. Rep. 231; *North British & Mercantile Ins. Co. v. Same*, Id. 698, 40 N. E. 1112.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 483.

**§ 214. Transfer without formal assignment.****[a] (App. 1897)**

A complaint which avers that defendant was notified of a conveyance of the property insured, and agreed that the policy should become payable to the purchaser in case of loss, and to indorse such transfer on the policy, but that it neglected to do so, and waived such indorsement, and so notified plaintiff, sufficiently shows, as between the parties, an equitable assignment of the policy to the purchaser, and the making of a new contract with him.—*German-American Ins. Co. v. Sanders* (Ind. App.) 46 N. E. 535, 17 Ind. App. 134.

**[b] (App. 1908)**

Where an insurance policy, payable to the executors, administrators, and assigns of the insured, shows on its face that there has been no change of beneficiary or assignment of the policy under the requirements of the policy, and there is no showing of any waiver of the company's rules as to such change or assignment, or any facts showing an excuse for not complying with the rules, an administrator of the estate of insured is entitled to the possession of the policy as against one claiming ownership thereof.—*Stewart v. Gwynn*, 41 Ind. App. 320, 82 N. E. 1000, 83 N. E. 753.

An insurance policy is a chose in action, and may be transferred by delivery without writing; but where by its terms mere delivery will not give any right as against the beneficiary named therein, the presumptions from mere possession are rebutted.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 484.

See, also, 25 Cyc. p. 769.

**§ 215. Transfer of subject of insurance without policy.****[a] (App. 1894)**

A consent to the transfer of property insured, to be effective as an assignment or a new contract of insurance between the insurer and the vendee, must have been given with the knowledge that it was the purpose and agreement between the vendor and vendee to transfer the insurance as well as the property.—*Moffitt v. Phenix Ins. Co.*, 11 Ind. App. 233, 38 N. E. 835.

**[b] (Sup. 1905)**

Where an insured corporation transfers its property to a new corporation, but without becoming merged in the new one, and still continues to exist, unless the new corporation shows that it has, in some legal way, succeeded to the rights of the insured company in a policy, it can not recover from the insurance company thereon.—*Miles Lamp Chimney Co. v. Erie Fire Ins. Co.*, 164 Ind. 181, 73 N. E. 107.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 485.

See, also, 26 Cyc. p. 611.

**VIII. CANCELLATION, SURRENDER, ABANDONMENT, OR RESCISSION OF POLICY.**

Avoidance of forfeiture of policy for misrepresentation, fraud, or breach of warranty, covenant, or condition, see post, §§ 250-300, 304-370.

Cancellation of assignment in equity. see CANCELLATION OF INSTRUMENTS, § 37.

Cancellation on insolvency of mutual insurance company, see ante, § 63.

Failure to cancel or rescind ground of estoppel or waiver, see post, § 390.

Pleading, see post, § 640.

Questions for jury, see post, § 668.

Weight and sufficiency of evidence, see post, § 665.

**§ 226. Revocability of contract in general.****[a] (Sup. 1892)**

A contract providing for the cancellation of fire policies on certain conditions and for the refunding of unearned premiums paid is valid.—*Clark v. Manufacturers' Mut. Fire Ins. Co.*, 30 N. E. 212, 130 Ind. 332.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 498, 499.

See, also, 19 Cyc. p. 642, 25 Cyc. pp. 784-787, 1519, 26 Cyc. p. 610.

**§ 228. Right of insurer to cancel.****[a] (Sup. 1883)**

A condition in a fire policy that the insurer should have the right at any time to cancel the policy on returning to the insured the ratable proportion of the premium for the unexpired term of the policy is valid.—*Etna Ins. Co. v. Weissinger*, 91 Ind. 297.

**[b] (App. 1898)**

The directors of a fire insurance company, that pays its losses by assessments on its members, have no power to direct its secretary to cancel a policy in a different manner than that provided by the by-laws.—*Patrons' Mutual Aid Soc. of Vermillion County v. Hall*, 49 N. E. 279, 19 Ind. App. 118.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 498, 499.

See, also, 19 Cyc. pp. 642, 643, 25 Cyc. p. 788, 26 Cyc. p. 610.

**§ 229. Notice to cancel.****[a] (Sup. 1873)**

An entry upon the books of an insurance company, noting the rescission and cancellation of a policy of insurance, made without the knowledge or consent of the insured, will not bind the insured; nor will such entry be admissible as evidence of a rescission or cancellation of the policy.—*King v. Enterprise Ins. Co.*, 45 Ind. 43.

## [b] (Sup. 1885)

The question of whether an insurance agent is to be deemed an agent of the insured to whom notice of cancellation of the policy may be given depends on the facts, not, necessarily, on the stipulations in the policy.—*Indiana Ins. Co. v. Hartwell*, 100 Ind. 566.

## FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 500-503.

See, also, 19 Cyc. pp. 645-647.

**§ 230. Repayment of unearned premium on cancellation.**

Pleading, see post, § 640.

Questions for jury, see post, § 668.

Weight and sufficiency of evidence, see post, § 665.

## [a] (Sup. 1883)

One assured may agree to take less than the ratable portion of his premium upon a cancellation of his policy; and proof of the acceptance of the less amount in full satisfaction is a good defense to an action on the policy.—*Etna Ins. Co. v. Weissinger*, 91 Ind. 297.

## [b] (App. 1909)

An insurer, electing to rescind a policy for fraud or breach of warranty, must seasonably return, or offer to return, the premiums paid for the policy.—*American Central Life Ins. Co. v. Rosenstein*, 88 N. E. 97.

The death of insured does not excuse insurer, electing to rescind the policy for fraud or breach of warranty, from seasonably returning, or offering to return, the premiums paid for the policy.—*Id.*

An insurer electing to avoid a policy for fraud or breach of warranty need only after death of insured make such election known to the person entitled to sue on the policy, and, when such election involves the return of premiums, it may pay or tender the same to the beneficiary, when such beneficiary is the wife or a dependent member of the family of insured; but insurer is not precluded from rescinding because it did not procure the appointment of an administrator of the deceased insured, and then tender to him the premiums.—*Id.*

## FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 509-512.

See, also, 19 Cyc. pp. 650, 651, 25 Cyc. p. 791.

**§ 232. Acts constituting cancellation.**

## [a] (App. 1906)

A fire policy stipulated that it might be canceled by the insured at any time, and if canceled the insurer might retain the premium to the amount of the customary rate for the time lapsed from the date of the policy to the time it received notice of the cancellation. The insured executed notes for the premium, refused to pay them at maturity, returned the policy to insurer's agent, and wrote: "I send you my

policy, and I want you to send me my notes, and this will settle the matter with us." *Held* to show an intention on the part of insured to cancel the policy, relieving the insurer from liability thereon, notwithstanding its demand for the payment of the premium notes, which did not operate to render the insured liable for any part of the premium, except that earned prior to the cancellation.—*Ohio Farmers' Ins. Co. v. Hunter*, 77 N. E. 951, 38 Ind. App. 11.

## FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 500, 504.

See, also, 19 Cyc. pp. 643-645, 26 Cyc. p. 610.

**§ 233. Validity of cancellation.**

## [a] (Sup. 1873)

Where a steamboat is insured while running between certain points, and afterwards, for an additional premium, the terms of the policy are extended so as to extend the risk while running between other points, the cancellation of the latter agreement need not be in writing.—*King v. Enterprise Ins. Co.*, 45 Ind. 43.

## [b] (Sup. 1883)

Where a fire policy provided that the insurer has the right to terminate the policy on paying the ratable proportion of the premium for the unexpired term, the insured and insurer may agree on a specified sum as the unearned premium, and an acceptance of that sum in cancellation of the policy would be binding on the parties.—*Etna Ins. Co. v. Weissinger*, 91 Ind. 297.

## FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 505.

**§ 235. Evidence of cancellation.**

## [a] (Sup. 1873)

An entry upon the books of an insurance company, noting the rescission and cancellation of a policy of insurance, made without the knowledge or consent of the insured, will not bind the insured; nor will such entry be admissible as evidence of a rescission or cancellation of the policy.—*King v. Enterprise Ins. Co.*, 45 Ind. 43.

## FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 507.

See, also, 19 Cyc. p. 648.

**§ 237. Remedies for wrongful cancellation.**

## [a] (App. 1898)

In the absence of an agreement by the insurer to return premiums paid, the assured cannot recover therefor when the insurer refuses to receive any more premiums, and wrongfully cancels the policy; but he may recover the present value of the policy, or may sue in equity, and have it declared valid; or he may tender the premiums as they become due, and on his death the full amount of the policy may be recovered.—*Metropolitan Life Ins. Co. v. Mc-*

Cormick, 49 N. E. 44, 19 Ind. App. 49, 65 Am. St. Rep. 392.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 513-515.

See, also, 25 Cyc. pp. 792-795; note, 4 L. R. A. (N. S.) 870.

**§ 238. Right of insured to surrender in general.**

[a] (App. 1906)

Where assured is given the right of cancellation in a policy, she may exercise such right, regardless of insurer's assent.—Ohio Farmers' Ins. Co. v. Hunter, 38 Ind. App. 11, 77 N. E. 951.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 516, 517.

See, also, 19 Cyc. p. 649, 25 Cyc. p. 789.

**§ 239. Right to surrender life or accident policies.**

[a] (App. 1909)

A life policy giving insured the right under the policy to change the beneficiary may be surrendered by mutual agreement between insured and insurer, so as to terminate the rights and obligations of the parties.—Equitable Life Assur. Society of United States v. Stough, 89 N. E. 612.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 194, 518.

**§ 240. Acts constituting surrender and acceptance.**

[a] (App. 1906)

Whether the return of an insurance policy to the company was an exercise of the right of cancellation depends on the intent with which it was returned.—Ohio Farmers' Ins. Co. v. Hunter, 38 Ind. App. 11, 77 N. E. 951.

[b] (App. 1909)

Insured, in a life policy giving him the right to change the beneficiary, paid to the soliciting agent a small part of the first year premium, and gave a note to the soliciting agent for the balance. Insured voluntarily rescinded the contract of insurance, and surrendered the policy to the soliciting agent who returned the premium note. Insurer, at the home office, charged the general agent under whom the policy was issued a short rate of premium for the time the policy was outstanding without knowledge of the facts. *Held*, that the policy was surrendered by mutual agreement precluding a recovery by the beneficiary.—Equitable Life Assur. Society of United States v. Stough, 89 N. E. 612.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 519.

See, also, 19 Cyc. p. 650.

**§ 247. Rescission by insurer.**

[a] (Sup. 1870)

A policy of insurance and the premium notes given therefor constitute a contract between the company and the insured; and such contract may be rescinded by the mutual agreement of the insured and the corporation, the latter acting through its board of directors or an agent duly authorized by them. Such a power on the part of the board of directors is essentially necessary to the safe and proper transaction of the business of the company.—*Boland v. Whitman*, 33 Ind. 64; *Stroud v. Same*, Id. 71; *Briggs v. Same*, Id. 72.

[b] (App. 1908)

Tender of a bill of exchange for the amount of premiums received is insufficient as a return of such premiums, or as an offer to return them on which to base a valid rescission of the contract of insurance.—*United States Health & Accident Ins. Co. v. Clark*, 83 N. E. 760, 41 Ind. App. 345.

[c] (App. 1910)

In order that an insurance company may rescind a policy for alleged breach of condition or warranty it must restore, or offer to restore, the insured to his original situation within a reasonable time or with reasonable promptitude after knowledge of the facts relied on for a rescission, and a failure to pursue such course constitutes an affirmation of the contract.—*American Cent. Life Ins. Co. v. Rosenstein*, 92 N. E. 380.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 534-536.

See, also, 19 Cyc. p. 651, 25 Cyc. p. 788.

**§ 248. Rescission by insured or beneficiary.**

[a] (App. 1910)

An insurance agent offered an insurance policy and two shares of stock in an agency company for \$190, but the insured insisted on four shares. In order to get round this, the insured made an application for the two extra shares, the consideration being stated as services to be rendered, and paid the \$190, receiving a receipt therefor and for \$80 on account of the extra two shares. When the agency company failed, insured filed his claim for \$80 and was paid \$50 thereon. *Held*, that he could not rescind the whole transaction and recover the \$190 without restoring or offering to restore the \$50 received.—*State Life Ins. Co. of Indianapolis v. Nelson*, 92 N. E. 2.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 534-536.

See, also, 19 Cyc. p. 651, 25 Cyc. p. 788.

**§ 249. Actions for rescission.**

[a] (App. 1908)

An answer in rescission of an insurance policy, because of a breach of warranty, must show a tender of the money received upon such

policy.—United States Health & Accident Ins. Co. v. Clark, 41 Ind. App. 345, 83 N. E. 760.

[b] (**App.** 1910)

What is a reasonable time within which an insurer may rescind and restore or offer to restore, the insured to statu quo is ordinarily a question of fact, unless the facts have been ascertained or are undisputed, when it is a question of law.—American Cent. Life Ins. Co. v. Rosenstein, 92 N. E. 380.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 537.

See, also, 25 Cyc. pp. 788, 789.

## IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.

Admissibility of evidence, see post, §§ 654, 655.  
Breach of promissory warranty, covenant, or condition subsequent, see post, §§ 304–370.

Effect of reinsurance, see post, § 684.

Estoppel or waiver affecting right to avoid policy, see post, §§ 371–400.

Instructions, see post, § 669.

Misrepresentation or fraud in application for mutual benefit insurance, see post, § 723.

Pleading matters of fact or conclusions relating to, see PLEADING, § 8.

Pleading misrepresentation, fraud, or breach of warranty or condition, see post, § 640.

Pleading performance or waiver of conditions, see post, § 634.

Presumptions and burden of proof, see post, § 646.

Questions for jury, see post, § 668.

Repayment of unearned premium on cancellation by insured, see ante, § 230.

Verdict and findings, see post, § 670.

Weight and sufficiency of evidence, see post, § 665.

### (A) GROUNDS IN GENERAL.

#### § 252. Representations.

Distinction between warranties and representations, see post, § 265.

Pleading, see post, § 645.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 538–549.

See, also, 1 Cyc. pp. 246–248, 19 Cyc. pp. 677, 678, 26 Cyc. pp. 613–616.

#### § 253. — In general.

[a] (**Sup.** 1862)

A representation is a verbal or written statement by the assured to the insurer, before subscription of the policy, as to the existence of some fact tending to induce the insurer more readily to assume the risk, by diminishing the estimate he would otherwise form of it.—Commonwealth's Ins. Co., etc., v. Monninger, 18 Ind. 352.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 538–542.

See, also, 19 Cyc. p. 677, 25 Cyc. pp. 798–808, 1519, 26 Cyc. p. 613.

#### § 254. — Falsity.

[a] (**Sup.** 1872)

A representation need be true only as far as the representation is material to the risk.—Mutual Ben. Life Ins. Co. v. Miller, 39 Ind. 475.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 543–547.

See, also, 19 Cyc. p. 678, 25 Cyc. pp. 800–803.

#### § 255. — Materiality.

[a] (**Sup.** 1862)

A misrepresentation or concealment, to affect the policy, must be material to the risk.—Commonwealth's Ins. Co., etc., v. Monninger, 18 Ind. 352.

[b] (**Sup.** 1872)

A representation is material when knowledge of the truth would have caused the insurers to refuse the risk or to charge a higher rate of premium.—Mutual Ben. Life Ins. Co. v. Miller, 39 Ind. 475.

[c] (**App.** 1892)

In insurance contracts only that would be regarded as material which from a business standpoint may have influenced the insurer in undertaking the risk.—Germania Fire Ins. Co. v. Deckard, 28 N. E. 868, 3 Ind. App. 361.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 548.

See, also, 19 Cyc. p. 677, 25 Cyc. pp. 805, 806, 26 Cyc. p. 616.

#### § 256. — Effect of misrepresentation.

[a] (**Sup.** 1889)

Where a policy specifies different and separate amounts on individual pieces of property, a misrepresentation as to a single piece, unconnected with and not affecting the piece which is destroyed, is no defense to an action for the loss of the latter.—Phenix Ins. Co. of Brooklyn v. Pickel, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393.

[b] (**Sup.** 1899)

Where several buildings are insured in the same policy, which stipulates a separate amount on each, a misrepresentation or breach of warranty relating exclusively to one building cannot defeat a recovery of the insurance on another.—Rogers v. Phenix Ins. Co. of Brooklyn, 121 Ind. 570, 23 N. E. 498.

[c] (**App.** 1905)

False statements by assured in an application for fire insurance, and in proofs of loss, do not vitiate the insurance.—Home Ins. Co. of

New York v. Overturf, 74 N. E. 47, 35 Ind. App. 361.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 540, 549.  
See, also, 19 Cyc. p. 677, 25 Cyc. p. 808, 26 Cyc. pp. 614-616.

**§ 257. Concealment.**

Affecting contract of mutual benefit insurance, see post, § 723.

Of other insurance, see post, § 288.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 550-556.  
See, also, 19 Cyc. pp. 679, 680, 25 Cyc. p. 796, 26 Cyc. pp. 617-624.

**§ 258. — In general.**

[a] (Sup. 1885)

If an applicant for life insurance gives true answers to interrogatories propounded to him, it cannot be objected in an action on the policy that the answers were not full enough.—Penn Mut. Life Ins. Co. v. Wiler, 100 Ind. 92, 50 Am. Rep. 769.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 550, 551, 553, 554, 556.  
See, also, 19 Cyc. p. 679, 26 Cyc. p. 617.

**§ 263. Warranties.**

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 558-569.  
See, also, 19 Cyc. pp. 681-684, 25 Cyc. pp. 798, 1519, 26 Cyc. p. 634.

**§ 264. — In general.**

[a] (Sup. 1868)

An application which is made a part of the policy of insurance on a building has all the force and effect of a warranty.—Cox v. Ætna Ins. Co., 29 Ind. 586.

Where the policy stipulates that the survey shall be taken as "a part of the policy and warranty on the part of the assured," a false answer in the survey as to the incumbrances upon the property is "material to the risk," and constitutes a good defense to a suit upon the policy.—Id.

[b] Statements in an application for a policy of life insurance are in the nature of warranties, which, if untrue, will avoid the policy, though immaterial.—(Sup. 1872) Mutual Ben. Life Ins. Co. v. Miller, 39 Ind. 475; (1874) Same v. Cannon, 48 Ind. 264.

[c] (Sup. 1872)

Where a policy of life insurance on its face refers to the declaration made by applicant on applying for the policy, and the declaration refers to the particulars of the insured given by him in answer to questions, these, as one instrument, constitute the agreement of the parties to the policy. A covenant or agree-

ment, to become a warranty, need not appear on the face of the policy, but may be on a paper referred to and made a part of the policy.—Mutual Ben. Life Ins. Co. v. Miller, 39 Ind. 475.

[d] (Sup. 1882)

Where an application for insurance is made a part of the policy, its statements are warranties.—Phoenix Ins. Co. v. Benton, 87 Ind. 132.

[e] Statements made in the application for insurance are not deemed warranties, unless they are incorporated in the policy, or in some appropriate method referred to in that instrument.—(Sup. 1891) Citizens' Ins. Co. v. Hoffman, 27 N. E. 745, 128 Ind. 370; (App. 1893) Indiana Farmers' Live Stock Ins. Co. v. Rundell, 34 N. E. 588, 7 Ind. App. 426.

[f] When, considering both policy and application together, it is left uncertain whether statements are to be taken as warranties or representations, the construction most favorable to the policy holder is to be adopted.—(App. 1893) Union Cent. Life Ins. Co. v. Pauly, 35 N. E. 190, 8 Ind. App. 85; (1895) Supreme Lodge Knights of Pythias of the World v. Edwards, 41 N. E. 850, 15 Ind. App. 524.

[g] (App. 1893)

Warranties in insurance policies are not favored in law. The court will construe as a warranty that only which the parties have plainly and equivocally declared to be such.—Union Cent. Life Ins. Co. v. Pauly, 35 N. E. 190, 8 Ind. App. 85.

[h] (App. 1898)

It is not error to instruct the jury that warranties in insurance policies are not favored in law.—Masons' Union Life Ins. Ass'n v. Brockman, 50 N. E. 493, 20 Ind. App. 206.

[i] The word "void," as used in insurance policies making them void under certain circumstances, means voidable at the election of the insurer.—(Sup. 1907) Glen Falls Ins. Co. v. Michael, 167 Ind. 659, 74 N. E. 964, 79 N. E. 905, 8 L. R. A. (N. S.) 708; (App. 1907) Modern Woodmen of America v. Vincent, 40 Ind. App. 711, 80 N. E. 427, 82 N. E. 475.

[j] (App. 1908)

Warranties in insurance policies being strictly construed, if the answer given by insured to an interrogatory in the application be true in itself, though the question be such as to suggest a fuller and more detailed answer, yet if the insurer is content with the partial answer given, he cannot claim a warranty extending beyond such answer.—Houghton v. Ætna Life Ins. Co. of Hartford, Conn., 42 Ind. App. 527, 85 N. E. 125, 1050.

The rule requiring provisions for forfeiture in an insurance policy to be strictly construed must be applied in construing the language used in the application.—Id.

[k] (App. 1908)

The warranty of an answer in a medical examination for life insurance, "I am \* \* \* to the best of my knowledge and belief in sound physical condition," to be true, is one only of the bona fide belief.—*Iowa Life Ins. Co. v. Houghton*, 87 N. E. 702.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 538, 559, 562-566.

See, also, 19 Cyc. p. 681, 25 Cyc. p. 798, 26 Cyc. p. 634.

### § 265. — Distinction between warranties and representations.

[a] (Sup. 1872)

In a life insurance contract, the difference between a warranty and a representation is that a warranty must be true, while a representation must be true only so far as the representation is material to the risk.—*Mutual Ben. Life Ins. Co. v. Miller*, 39 Ind. 475.

[b] (Sup. 1890)

Where a policy recites that it is based on the "representations" contained in the application, and also recites that such statements are made warranties, a statement as to the age of the building insured will be construed to be a representation, and not a warranty; the rule being against the construction of ambiguous language so as to impose the obligation of a warranty on the insured.—*Rogers v. Phenix Ins. Co. of Brooklyn*, 121 Ind. 570, 23 N. E. 498.

[c] (Sup. 1892)

Though, by the terms of the policy, answers to interrogatories in the application are made warranties, answers as to the age and value of the building will be regarded as mere expressions of opinion.—*Phenix Ins. Co. of Brooklyn v. Wilson*, 132 Ind. 449, 25 N. E. 592.

[d] (App. 1893)

An insurance policy on a stallion provided that the policy was issued on the "warranties made in the application," and also provided that "this policy shall be void if any material fact or circumstance stated in writing has not been fairly represented." In the application the assured expressly stated, "I warrant the above answers to each of the foregoing questions to be true," and yet stipulated that he had "in no wise misrepresented or concealed any fact concerning said stock." *Held*, that statements in the application as to the value of the stallion, service fee, number of mares served during the season, and the number of colts obtained, would be construed as representations, the rule being against the construction of contradictory provisions so as to impose a warranty on the assured.—*Indiana Farmers' Live Stock Ins. Co. v. Rundell*, 7 Ind. App. 426, 34 N. E. 588.

[e] (App. 1894)

The material difference between a mere representation and a warranty in insurance is that warranties cannot be deviated from, whether material or immaterial, while representations may be false if of an immaterial fact without avoiding the policy, or, if of a material fact an immaterial deviation from the representation will not vitiate the policy.—*Indiana Farmers' Live Stock Ins. Co. v. Bogeman*, 36 N. E. 927, 9 Ind. App. 399.

[f] (App. 1894)

A provision in an application for insurance that the applicant "warrants" the application to contain a full and true description of the property to be insured is not a warranty, but a representation.—*Indiana Farmers' Live Stock Ins. Co. v. Byrket*, 9 Ind. App. 443, 36 N. E. 779.

[g] (App. 1895)

In an application for fire insurance, containing at its close a clause that "applicant warrants \* \* \* that the foregoing is a full and true exposition of all the facts and circumstances, conditions, situations, and value of and title to the property to be insured, and is offered as a basis of the insurance requested, and is made a special warranty," the answer "Yes" to the question, "Do you agree to keep merchandise and cash accounts?" is a mere representation, and not a warranty.—*Ætna Ins. Co. of Hartford, Conn., v. Norman*, 12 Ind. App. 652, 40 N. E. 1116.

[h] (App. 1896)

The law regards representations made by an applicant in an application for life insurance as a warranty to the insurer that the facts so stated are exactly as represented. They must be literally true, whether material or immaterial, or else the policy is void.—*Union Cent. Life Ins. Co. v. Hollowell*, 50 N. E. 399, 20 Ind. App. 150.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 560.

### § 266. — Warranties as part of contract.

[a] (Sup. 1862)

To make a stipulation an express warranty, so that on its literal fulfillment the entire contract depends, it should be inserted in writing on the face of the policy, or in a detached paper expressly made a part of the policy by the terms thereof.—*Commonwealth's Ins. Co., etc., v. Monninger*, 18 Ind. 352.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 561.

See, also, 26 Cyc. pp. 636-644.

### § 267. — Fulfillment or breach.

[a] (Sup. 1889)

To avoid a policy of insurance on account of the breach of a warranty, there must be a substantial breach.—*Phenix Ins. Co. of Brook-*

*lyn v. Pickel*, 21 N. E. 546, 119 Ind. 155, 12 Am. St. Rep. 393.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 567.

See, also, 26 Cyc. p. 634.

**§ 268. — Effect of breach.**

[a] (Sup. 1882)

When the written application is made part of the policy, a false statement therein as to the amount of insurance avoids the policy ab initio.—*Phoenix Ins. Co. v. Benton*, 87 Ind. 132.

[b] (Sup. 1889)

Where a fire insurance policy covering two buildings is a separate contract as to each building, breaches of warranty by the insured as to one building, constitute no defense to an action on the policy for a loss on the other.—*Phoenix Ins. Co. of Brooklyn v. Pickel*, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393; *Pickel v. Phoenix Ins. Co.*, 119 Ind. 291, 21 N. E. 898.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 568, 569.

See, also, 19 Cyc. p. 682, 25 Cyc. p. 808, 26 Cyc. p. 635.

**§ 269. Conditions precedent.**

Forfeiture by breach of condition subsequent in general, see post, §§ 306-308.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 570.

See, also, 25 Cyc. p. 798, 26 Cyc. p. 634.

**§ 270. — Effect of breach.**

[a] (App. 1907)

An insurance contract is not ipso facto invalidated by a breach of conditions on which it issued.—*Aetna Life Ins. Co. v. Bockting*, 39 Ind. App. 586, 79 N. E. 524.

[b] (App. 1908)

Though a contract of insurance provides that it shall be void in case of breach of warranty, yet in law it is only voidable at the election of the insurer.—*United States Health & Accident Ins. Co. v. Clark*, 83 N. E. 760, 41 Ind. App. 345.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 570.

See, also, 25 Cyc. p. 798, 801, 808, 26 Cyc. p. 634.

**(B) MATTERS RELATING TO PROPERTY OR INTEREST INSURED.**

Breach of promissory warranty, covenant, or condition subsequent, see post, §§ 312-336.

**§ 274. Description of building in general.**

[a] (App. 1892)

The facts that the insured represented the building to be a "one-story, shingle-roof, box and frame building," but that it was in reality "constructed of logs cut and laid one upon another, having but a slight box-frame addition thereto," and covered with "clapboards," instead of shingles, will not vitiate a policy conditioned to be void for any false representations, where it does not appear that the hazard was at all increased thereby, or that the underwriter would have refused the risk, or charged a higher premium, if it had known the truth.—*Germania Fire Ins. Co. v. Deckard*, 3 Ind. App. 361, 28 N. E. 868.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 589.

See, also, 19 Cyc. p. 684.

**§ 277. Condition of building.**

[a] (Sup. 1889)

In an action on a fire insurance policy covering a house and its contents as an entirety, the complaint alleging a total loss of both, allegations that warranties as to the age of the house, its value, and the amount of incumbrances on the land were false, constitute a good defense.—*Pickel v. Phoenix Ins. Co.*, 119 Ind. 291, 21 N. E. 898.

[b] (App. 1892)

Defendant's application for fire insurance stated the building insured to be 12 years old. In an action on the policy, the jury found that the frame part of the house was 6 years old, and the log part 24 years old, and that therefor the average age of the building was 15 years. The log building had been entirely reconstructed, and built of new materials, except that the old logs were used in the body. *Held*, that the jury had no right to consider the age of the materials of which the house was built in ascertaining the age of the house.—*Phoenix Ins. Co. v. Pickel*, 3 Ind. App. 332, 29 N. E. 432.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 592.

**§ 278. Use of building.**

Change in use of building as breach of promissory warranty, covenant, or condition subsequent, see post, § 319.

[a] (Sup. 1890)

The statement that the building insured was occupied as a hotel with bar and billiard room attached, inserted in the face of a policy of fire insurance thereon, is an express warranty that the building was so occupied at the time the policy was issued, and the fact that the building was occupied as a saloon was a breach of the warranty rendering the policy

invalid.—*Baker v. German Fire Ins. Co.*, 24 N. E. 1041, 124 Ind. 490.

[b] (App. 1892)

A statement in policy of fire insurance that the building insured is used for a specific purpose amounts to a warranty that it was so used at the time the policy was issued, but it does not warrant the continuance of such use during the existence of the insurance.—*Germania Fire Ins. Co. v. Deckard*, 28 N. E. 868, 3 Ind. App. 361.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 593.

See, also, 19 Cyc. p. 686.

§ 279. Occupation of building.

Building becoming vacant as breach of promissory warranty, covenant, or condition subsequent, see post, § 323.

Change in occupancy as breach of promissory warrant, covenant, or condition subsequent, see post, § 322.

Pleading, see post, § 634.

[a] (Sup. 1890)

Where assured was not called on to make any statement or representation as to the occupancy of a building on which he has applied for insurance, he has the right to assume that the insurer who procured such information as it desired elsewhere, and, when the policy is issued, that it has done so and is satisfied therewith and has written the policy in accordance with the information obtained.—*Indiana Ins. Co. v. Hartwell*, 24 N. E. 100, 123 Ind. 177.

[b] (Sup. 1890)

A statement in the policy that the building is occupied in a certain way is a warranty that it is occupied in that way at the time that the contract is entered into, and the fact that it was not so occupied at that time is a good defense to the action.—*Baker v. German Fire Ins. Co.*, 124 Ind. 490, 24 N. E. 1041.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 594.

§ 281. Amount or value.

Verdict and findings, see post, § 670.

[a] (Sup. 1868)

Where a policy which was not "a valued policy" contained a stipulation that "in a valued policy an overvaluation shall render absolutely void a policy issued upon such \* \* \* valuation," and in the survey a question was asked as to the value and erroneously answered, it was held that the overvaluation was not "material to the risk."—*Cox v. Aetna Ins. Co.*, 29 Ind. 586.

[b] (Sup. 1874)

In an open policy of insurance, an overvaluation of the property insured is immaterial.—*Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315; *Germania Ins. Co. v. Same*, Id. 331.

[c] (Sup. 1873)

A misrepresentation as to value will not avoid a policy in the absence of fraudulent intent.—*Citizens' Fire & Marine Ins. Co. v. Short*, 62 Ind. 316.

[d] (Sup. 1899)

If the valuation of the property insured is given as the result of an honest judgment and opinion of the applicant, it is sufficient, even though the statement as to value be regarded as a warranty.—*Pickel v. Phenix Ins. Co.*, 119 Ind. 291, 21 N. E. 898.

[e] (Sup. 1890)

A representation in an application as to the value of the buildings or the land on which they stand is a mere expression of opinion.—*Rogers v. Phenix Ins. Co. of Brooklyn*, 121 Ind. 570, 23 N. E. 498.

[f] (App. 1894)

Where the language of the application and policy construes the statements of the former as warranties, and also as representations, a false statement as to the amount paid by assured for the insured horse is to be deemed a representation, and is immaterial, where the policy is for one-half of the alleged value,—said value being equal to the price said to have been paid,—and provides that, "if the insurance shall be found to have been greater, the company shall be liable for no more than this proportion." *Gavin, J.*, dissenting.—*Indiana Farmers' Live Stock Ins. Co. v. Bogeman*, 9 Ind. App. 399, 36 N. E. 927.

[g] (App. 1900)

In an action on a policy, a defense that it was obtained by a concealment of facts as to the property's value, made by plaintiff, who was the company's agent when the policy was issued, cannot be sustained where the policy was not valued, but was an open policy, since in such a policy an overvaluation of the property is immaterial.—*Insurance Co. of North America v. Osborn*, 59 N. E. 181, 26 Ind. App. 88.

[h] (App. 1906)

In an application for fire insurance, statements as to the age and value of the buildings are expressions of opinion, not warranties.—*Home Ins. Co. of New York v. Overturf*, 74 N. E. 47, 35 Ind. App. 361.

FOR CASES FROM OTHER STATES.

SEE 28 CENT. DIG. Insurance, §§ 597-600.

See, also, 19 Cyc. p. 687; note, 29 Am.

Dec. 616; note, 25 Am. Rep. 74.

§ 282. Title or interest of insured.

Change of title or interest as breach of promissory warranty, covenant, or condition subsequent, see post, § 328.

Pleading, see post, §§ 632, 641.

Presumptions and burden of proof, see post, § 646.

Waver of forfeiture, see post, §§ 377, 389, 390.

Weight and sufficiency of evidence, see post, § 665.

## [a] (Sup. 1890)

Where the validity of the insurance is made to depend on the assured being the absolute and unconditional owner of the true title of the property insured, a failure to set forth the title with substantial accuracy renders the policy void, not only as to the property the title to which is not truly represented, but all other property covered by the same policy, and subject to the same risk. This is so, even though the owner had no intention to deceive. This rule has no application, however, in case it appears that the agent of the insurance company, who consummated the contract and issued the policy, was informed, or knew, of the true state of the title, or ownership of the property.—*Geiss v. Franklin Ins. Co.*, 24 N. E. 99, 123 Ind. 172, 18 Am. St. Rep. 324.

An insurance policy on several articles of personal property, for separate sums, aggregating \$1,000, provided that it should be void in case the insured was not the sole, absolute, and unconditional owner of the property. One of the articles, insured for \$350, had been bought on credit, and the insured had stipulated that the title should not pass until the price was fully paid. *Held*, that the entire policy was void; the contract being entire.—*Id.*

## [b] (App. 1897)

The insured's interest is "other than the entire, unconditional, and sole ownership," if he owns only the undivided half of the property when insured.—*Sisk v. Citizens' Ins. Co.*, 16 Ind. App. 565, 45 N. E. 804.

## [c] (App. 1897)

Until the death of the husband, leaving her surviving, the wife has no claim on realty owned by him in fee and conveyed by him alone after the marriage; and hence the husband's grantee becomes "absolute owner" of the property, within the meaning of a question in an application for insurance thereon, the answer to which was made a warranty.—*Ohio Farmers' Ins. Co. v. Bevis*, 18 Ind. App. 17, 46 N. E. 928.

## [d] (App. 1903)

A fire policy stipulated that it should be void if the interest of the insured in the property were otherwise than unconditional and sole ownership. Prior to the issuance of the policy the insured executed a deed conveying the property to a third person. The deed was without consideration, and prepared without the knowledge or consent of the grantee therein. It was never delivered, and the insured retained possession thereof except for the time it was recorded. The insured kept possession of the property, and exercised absolute dominion over it. The deed was not to have any effect except in the event of the insured's death before the death of her husband. *Held*, that the insured was the unconditional and sole owner of the property covered by the policy.—*Franklin Ins. Co. v. Feist*, 68 N. E. 188, 31 Ind. App. 390.

## [e] (App. 1905)

A policy insuring the "Crawfordsville Sanitarium" against loss or damage by fire to certain personal property was not void because the property was owned distributively by certain of the persons doing business under such trade-name, each of whom had an insurable interest therein.—*New Hampshire Fire Ins. Co. v. Wall*, 75 N. E. 668, 36 Ind. App. 238.

## FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 601-635.

See, also, 19 Cyc. pp. 689-699; notes, 18

L. R. A. 481, 2 L. R. A. (N. S.) 512, 4

L. R. A. (N. S.) 231.

## § 283. Incumbrances.

Admissibility of evidence of waiver of forfeiture, see post, § 664.

Pleading, see post, § 645.

Subsequent incumbrances as breach of promissory warranty, covenant, or condition subsequent, see post, § 330.

Waiver of forfeiture, see post, §§ 377, 388, 380.

## [a] (Sup. 1868)

Where a policy of insurance against loss by fire contained a stipulation that the survey should be taken as a part of the policy and a warranty on the part of the assured, a false answer in the survey as to the incumbrances on the property is material to the risk, and constituted a good defense to a suit on the policy.—*Cox v. Aetna Ins. Co.*, 29 Ind. 586.

## [b] (Sup. 1883)

A false representation by the insured in his application for insurance that there is no lien on the property against the loss of which he wishes to be insured avoids a policy issued upon the application.—*Indiana Ins. Co. v. Brehm*, 88 Ind. 578.

## [c] (Sup. 1884)

Where the charter of an insurance company contained a provision authorizing the company to make contracts of insurance in all cases where the insured had title in fee simple unincumbered, and declaring that if the insured had a less estate therein, or if the premises were incumbered, the policies should be void, unless the true title of the assured or the incumbrance on the premises be expressed therein, and in an action on a policy it was alleged and admitted by the assured that there were incumbrances on the premises which were not expressed in the policy in suit, the policy was void.—*Leonard v. American Ins. Co.*, 97 Ind. 290.

It is a good defense to an action on a fire insurance policy that it was represented in the application that the property was free from incumbrances, when in fact there were several judgment liens thereon.—*Id.*

## [d] (Sup. 1889)

An applicant for insurance is not bound unless inquired of to disclose whether or not the property insured is incumbered.—*Continental Ins. Co. v. ...*

tal Ins. Co. v. Munns, 22 N. E. 78, 120 Ind. 30, 5 L. R. A. 430.

[e] (Sup. 1891)

Where judgment creditors agreed to the appointment of a person to collect rents from property owned by the judgment debtor to be applied to the payment of the judgment, which rents were more than sufficient to satisfy the judgment, the judgment at once ceased to be a lien on the property within a provision in an insurance policy with reference to incumbrances.—Continental Ins. Co. v. Vanlue, 26 N. E. 119, 126 Ind. 410, 10 L. R. A. 843.

Where a mortgage was placed on insured property prior to the issuance of the insurance which constituted a breach of a condition in a policy against incumbrances, it was immaterial that the mortgagor acted in good faith, believing that the mortgage was not an incumbrance.—Id.

Payment of a judgment which is a lien on the property of a replevin bail of the judgment debtor, to an agent of the judgment creditors, extinguishes the lien within the meaning of a condition in an insurance policy that it shall be void if there is any legal incumbrance on the property, though no satisfaction is recorded.—Id.

[f] (Sup. 1892)

The discharge of an existing mortgage and the execution of a new one to a different party is not such a violation of a warranty relating to incumbrances in an insurance policy as forfeits the rights of the assured under the policy.—Bowlus v. Phenix Ins. Co., 32 N. E. 319, 133 Ind. 106, 20 L. R. A. 400.

Where a policy of insurance contains a warranty against incumbrances, increasing an existing incumbrance avoids the policy.—Id.

[g] (App. 1895)

A provision of forfeiture in an insurance policy if the property was incumbered unless so represented and expressed in the written part of the policy is valid and enforceable.—German Mut. Ins. Co. v. Niewedde, 39 N. E. 534, 11 Ind. App. 624.

[h] (App. 1897)

A condition in a policy of insurance on personal property that it shall be void if the property is or shall become incumbered by mortgage is valid.—Shaffer v. Milwaukee Mechanics' Ins. Co., 46 N. E. 557, 17 Ind. App. 204.

[i] (App. 1899)

Whether a mortgage on insured's chattels was ever delivered, so as to constitute an incumbrance, in violation of the policy, is a question for the jury, though O., the owner, signed and acknowledged the mortgage to D., and caused it to be recorded; it not appearing that D. or O. ever agreed that it should be given, or that D. ever requested O. to give it, and there being no testimony that it was ever delivered to D. or any one for him, but O. testify-

ing that he never delivered it or the note it was to secure, and D. that he knew nothing of it till after the fire, though O. had said he would give him a mortgage on some lots, and S. was to look after such a mortgage for him.—Phœnix Ins. Co. v. Overman, 52 N. E. 771, 21 Ind. App. 516.

[j] (App. 1899)

Where a policy provided that assured should notify the insurer of any incumbrance on the property either at the time the policy was issued or during its continuance, failure to give notice of an incumbrance existing at the time of issuance is a breach of condition avoiding the policy.—Indiana Ins. Co. v. Pringle, 52 N. E. 821, 21 Ind. App. 559.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 636-651.  
See, also, 19 Cyc. pp. 700-703; note, 35 Am. Rep. 629.

### § 288. Other insurance.

Allegations in pleadings, see post, § 636.

As affecting amount of insurer's liability, see post, § 504.

Breach of promissory warranty, covenant, or condition subsequent by procuring additional insurance, see post, § 336.

Insertion of false answer in application by agent, see post, § 379.

Pleading, see post, § 640.

Waiver of forfeiture, see post, § 375.

[a] (Sup. 1882)

Where, in an application for fire insurance on personal property, the question, "What other insurance is there on the property, in what office, and at what rate?" was answered "building in North America, \$4,000," the insured cannot claim that the question referred only to the personal property, so as to render immaterial his failure to mention other insurance on the building.—Phœnix Ins. Co. v. Benton, 57 Ind. 132.

[b] (App. 1905)

The fact that an applicant for fire insurance does not state that he has insurance on property other than that to be covered by the insurance applied for does not invalidate the policy.—Home Ins. Co. of New York v. Overturn, 74 N. E. 47, 35 Ind. App. 361.

Where a fire policy provides that it shall be void if the insured has other insurance, unless consent thereto is endorsed on the policy, the fact that insured had, at the time of application, other insurance which he did not disclose renders the policy unenforceable.—Id.

An answer, in an action on a fire policy, alleging a condition on such policy nullifying the same on account of undisclosed additional insurance, and further alleging that, immediately after the company ascertained such additional insurance, it elected to avoid the policy and return the unearned portion of the

premium, which plaintiff refused to accept, states a defense.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 660-669.

See, also, 19 Cyc. pp. 703-705, 26 Cyc. p. 601.

**(C) MATTERS RELATING TO PERSON INSURED.**

Breach of promissory warranty, covenant, or condition subsequent, see post, § 341.  
Pleading, see post, § 640.

**§ 291. Health and physical condition.**

Mutual benefit insurance, see post, §§ 723, 825.  
Pleading, see post, § 640.

Questions for jury, see post, § 668.

Verdict and findings, see post, § 670.

Waiver of forfeiture, see post, § 389.

**[a] (Sup. 1872)**

Questions propounded to and answered by the insured in his application for a policy are designed to induce a full and fair statement of the physical condition of the applicant, and the answers are warranties that the facts are as stated. Where the applicant, to a question in the application whether, since childhood, he had had "spitting of blood," answered, "No," which was untrue, *held*, that the answer was material, and also a warranty that he had not had "spitting of blood" from any cause.—*Mutual Ben. Life Ins. Co. v. Miller*, 39 Ind. 475.

**[b] (Sup. 1874)**

Answers made in an application for life insurance to questions touching the health, etc., of the person to be insured, are warranties. Knowledge on the part of the applicant as to the truthfulness of the answers is not material to an action on the policy, defended on the ground that the risk was increased by a disease the existence of which was denied by one of the answers.—*Mutual Ben. Life Ins. Co. v. Cannon*, 48 Ind. 264.

**[c] (Sup. 1884)**

A denial in an application for an insurance policy that assured had any of the specified diseases, though he had been once or twice temporarily attacked by one of them, will not avoid the policy.—*North Western Mut. Life Ins. Co. v. Heimann*, 93 Ind. 24.

**[d] (Sup. 1888)**

The court instructed that if assured had, at the time of his application, some affection or ailment of one or more of the organs inquired about therein, so well defined and marked as materially to derange for a time the functions of such organs, such ailment, whether known to him or not, would avoid the policy, and that this would be so of Bright's disease of the kidneys, if such a disease. *Held* correct.—*Continental Life Ins. Co. v. Yung*, 113 Ind. 159, 15 N. E. 220, 3 Am. St. Rep. 630.

**[e] (Sup. 1893)**

Where insured, while a boy, received injuries from which he recovered so that they did not increase his liability to accidental injury, or contribute to the accident which resulted in his death, his policy was not forfeited by a statement in his application that he had never been physically injured, or subject to bodily or mental infirmity or disease; the insured being entitled to a liberal construction in his favor.—*Standard Life & Acc. Ins. Co. v. Martin*, 133 Ind. 376, 33 N. E. 105.

**[f] (App. 1906)**

Under a life policy providing that no obligation is assumed unless on the date of delivery thereof the insured is alive and in sound health, the fact that between the dates of the application and the delivery of the policy insured was, on inquest, found to be insane, and was committed to an asylum, remaining insane until the time of his death, established such a breach of the contract as relieved the insurer of liability.—*Metropolitan Life Ins. Co. v. Willis*, 76 N. E. 560, 37 Ind. App. 48.

**[g] (App. 1908)**

"Insanity" in the question in an examination for life insurance as to whether insured's father had "insanity or other hereditary disease" refers to a disordered mind from a diseased or defective brain, and not necessarily to a mere temporary mental disturbance during a weakened condition from typhoid fever.—*Iowa Life Ins. Co. v. Haughton*, 87 N. E. 702.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 681-690, 694-696.

See, also, 25 Cyc. pp. 810-813; note, 53 L. R. A. 193; notes, 3 Am. St. Rep. 634, 10 Am. St. Rep. 242.

**§ 292. Medical attendance.**

Admissibility of evidence, see post, § 655.

Verdict and findings, see post, § 670.

**[a] (App. 1893)**

Where a life insurance policy provides that, if any statements in the application are in any material respect untrue, the company may cancel the policy, a false statement in the application that the applicant had not required the services of a physician for seven years will not be construed as a warranty so as to avoid the policy.—*Union Cent. Life Ins. Co. v. Pauly*, 8 Ind. App. 85, 35 N. E. 190.

**[b] (App. 1900)**

A statement, in an application for life insurance, that the insured had not consulted a physician within a certain period, was material to the risk, within the meaning of the laws of Pennsylvania, under which the policy was issued, which provides that the falsity of a statement in an application for life insurance shall be no defense to an action on the policy unless material to the risk; and hence, such statement being false, no recovery can be had

on the policy.—*Fidelity Mut. Life Ass'n of Philadelphia v. McDaniel*, 57 N. E. 645, 25 Ind. App. 608.

[c] (*App.* 1903)

Insured, in an application, was asked the name and residence of his physician, "the one whom you have personally employed or consulted," to which he answered, "I have none." In an action on the policy, it was found that he had previously personally consulted a physician with respect to his health, but that he had not "personally employed a physician." *Held*, that the finding did not establish a breach of warranty in the answer to such question.—*Haughton v. Aetna Life Ins. Co.*, 42 Ind. App. 527, 85 N. E. 125, 1050.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 691, 692.

See, also, 25 Cyc. p. 816.

### § 293. Family history.

Pleading matters of fact or conclusions relating to, see PLEADING, § 8.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 693.

See, also, 25 Cyc. p. 818.

### § 298. Interest of assured or beneficiary.

[a] (*Sup.* 1893)

The application for insurance contained the following: "Write policy payable in case of death \* \* \* to Mrs. [name of insured] whose relation to me is that of wife." *Held*, where insured was a single man, that the statement in the application was neither a warranty nor a material representation.—*Standard Life & Acc. Ins. Co. v. Martin*, 133 Ind. 376, 33 N. E. 105.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 677.

See, also, 25 Cyc. p. 821.

### § 300. Previous application for insurance.

Insertion of false answer in application by agent, see post, § 379.

Verdict and findings, see post, § 670.

[a] (*App.* 1908)

A breach of warranty in a negative answer to a question as to whether any proposal or application to insure made to any other company had not been granted or the policy or certificate had been issued for a different amount or of a different kind than that applied for, etc., was not shown by the fact that insured had previously applied for a policy in another company, as such company might have accepted the risk and issued the policy, and insured might either have refused to accept, cancelled or surrendered it.—*Haughton v. Aetna Life Ins. Co.*, 42 Ind. App. 527, 85 N. E. 125, 1050.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 679.

See, also, 25 Cyc. p. 819; notes, 55 L. R. A. 122, 4 L. R. A. (N. S.) 247.

## X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.

Admissibility of evidence, see post, § 654.

Construction against forfeiture, see ante, § 146.

Estoppel or waiver affecting right to forfeit policy, see post, §§ 371-400.

Instructions, see post, § 669.

Mutual benefit insurance, see post, §§ 744-763.

Pleading breach of promissory warranty, covenant, or condition subsequent, see post, § 640.

Pleading matters of fact or conclusions relating to, see PLEADING, § 8.

Pleading performance or waiver of conditions, see post, § 634.

Powers of mutual insurance company in general, see ante, § 57.

Presumptions and burden of proof, see post, § 646.

Questions for jury, see post, § 668.

Right to recovery of premium paid, see ante, § 198.

Weight and sufficiency of evidence, see post, § 665.

### (A) GROUNDS IN GENERAL.

Avoidance of policy for misrepresentation, fraud, or breach of warranty or condition, see ante, §§ 274-288.

### § 304. Continuing or promissory warranties.

[a] (*Sup.* 1854)

An executory stipulation or promissory warranty, inserted in a policy of insurance, becomes a binding condition on the assured, and requires a strict performance; and the breach of it, whether the thing warranted is material or not, renders the policy void from its inception.—*Grant v. Lexington Fire, Life & Marine Ins. Co.*, 5 Ind. 23, 61 Am. Dec. 74.

[b] (*App.* 1899)

An application for insurance, the medical examiner's report, and an "agreement" containing warranties were all one paper, executed at the same time. The agreement, reciting that it was part of the policy, was signed by insured; the medical report by the examiner followed; and the whole was indorsed, "Application to the N. Association." *Held*, that the "agreement" was part of the contract, and a promise therein was a promissory warranty.—*Northwestern Masonic Aid Ass'n v. Bodurtha*, 53 N. E. 787, 23 Ind. App. 121, 77 Am. St. Rep. 414.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 698.

See, also, 19 Cyc. p. 708, 25 Cyc. p. 821.

**§ 306. Conditions subsequent.**

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 699-702, 763, 828.

See, also, 25 Cyc. p. 821.

**§ 307. — Conditions in general.**

[a] (Sup. 1891)

Though a letter in which application for insurance was made stated that a certain amount of insurance would be maintained, still, there being no reference in the policy to an application, and it being provided by the policy that if an application was referred to therein it should be a part of the contract and a warranty by the assured, the policy was not issued on the condition that the amount of insurance named should be maintained.—*Citizens' Ins. Co. v. Hoffman*, 128 Ind. 370, 27 N. E. 745.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 699.

See, also, 25 Cyc. pp. 821, 1519.

**§ 308. — Fulfillment or breach.**

[a] (Sup. 1854)

A substantial compliance with the stipulations usually found in insurance policies is all that is requisite for the validity of the contract.—*Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 700, 701.

**§ 310. Notice and proceedings to give effect to forfeiture.**

Mutual benefit insurance, see post, § 756.

[a] (App. 1897)

An insurance policy provided that on failure to pay a premium the insurer might, at its election, avoid the policy, whereupon all premium notes not then due should be surrendered to insured. The premium notes provided that on such nonpayment the policy should be void at the insurer's option without notice; and conditions printed on the policy and made a part of it provided that on such nonpayment the policy became void without action by the insurer. *Held*, that the provision requiring an election and a surrender of the unmatured notes prevailed, being most favorable to the insured.—*Union Cent. Life Ins. Co. v. Jones*, 47 N. E. 342, 17 Ind. App. 592.

[b] (App. 1907)

The avoidance of an insurance policy because of a breach of a warranty therein contained constitutes an election and not a waiver.—*Modern Woodmen of America v. Vincent*, 40 Ind. App. 711, 80 N. E. 427, 82 N. E. 475.

[c] (App. 1910)

Where an insurance policy was payable to a third person as beneficiary, and after insured's death the beneficiary sued thereon, a tender of statu quo necessary to the enforcement of a forfeiture on facts alleged to have been first dis-

covered by the insurer after insured's death should have been made to the beneficiary, and not to the widow or legal representative of insured.—*American Cent. Life Ins. Co. v. Rosenstein*, 92 N. E. 380.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 703, 761, 780, 826, 840, 904.

See, also, 19 Cyc. p. 712.

**§ 311. Parties affected by forfeiture of policy.**

[a] (Sup. 1898)

The beneficiary of an insurance policy takes his interest subject to a condition of the policy that it shall be void unless premiums are paid when due.—*Forbes v. Union Cent. Life Ins. Co.*, 51 N. E. 84, 151 Ind. 89.

[b] (App. 1898)

The rights of the beneficiary under an ordinary life insurance policy cannot be impaired by any statement of the insured subsequent to the execution of the policy.—*Masons' Union Life Ins. Ass'n v. Brockman*, 50 N. E. 493, 20 Ind. App. 206.

[c] (App. 1899)

A mortgagee to whom, by consent of insurer, a loss is made payable as his interest may appear, is not an assignee of the policy in the sense that a new contract is created with insurer, but he is bound by an agreement in the policy against other insurance by insured.—*Franklin Ins. Co. v. Wolff*, 54 N. E. 772, 23 Ind. App. 549.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 704-708, 762, 781, 827, 841, 874, 890, 903.

See, also, 19 Cyc. p. 713, 25 Cyc. p. 822; note, 58 Am. St. Rep. 667.

**(B) MATTERS RELATING TO PROPERTY OR INTEREST INSURED.**

**§ 312. Subjects of marine insurance in general.**

[a] (Sup. 1854)

A stipulation in a policy of insurance on a flatboat, provided that the boat should be manned with a certain number of hands. *Held*, that this was an executory stipulation or promissory warranty, which required a strict performance, and for a breach of which the policy would be void from its inception, and that the cook was a competent hand under this stipulation.—*Grant v. Lexington Fire, Life & Marine Ins. Co.*, 5 Ind. 23, 61 Am. Dec. 74.

In an action on a policy of insurance issued on two flatboats and their cargoes of hay, wherein it was stipulated that the boats should be manned with a competent number of hands, and that it might be lawful for them to touch at intermediate points between L., the shipping point, and N., the point of destination, with the privilege of coasting, and transacting any law-

ful business connected with the voyage, evidence of a usage among hay shippers to land at F., a point between L. and N., and there remain until sales are made, and that flatboat hands have a right to demand their pay and be discharged at that point, is competent for the purpose of showing that the discharge of the hands was not in contravention of the terms of the policy, as the insurance company must be presumed to have contracted with relation to such usage.—Id.

[b] (Sup. 1861)

Notice to insurers of a uniform usage to carry particular goods on deck is not necessary to the implication that they insured a vessel with reference thereto, since they are bound to know the general usages of the particular trade in which the vessels insured by them are engaged.—Toledo Fire & Marine Ins. Co. v. Speares, 16 Ind. 52.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 709, 711-721.

See, also, 26 Cyc. pp. 625-630.

#### § 314. Deviation or other change of voyage.

[a] (Sup. 1854)

A policy of insurance was issued on two flatboats loaded with hay, for the voyage from Lawrenceburgh to New Orleans, and eight days thereafter. It contained a stipulation that they might touch at intermediate points, with the privilege of coasting and transacting any lawful business connected with the voyage, provided the delays caused thereby should not exceed 30 days in all. Three days after the boat reached Freeport, which is three miles above New Orleans, all the hands but two were paid off and discharged, according to the usage of the flatboat trade. Freeport is, in practice, the New Orleans hay market, as it is the custom for the boats to stop there to avoid the expense which would otherwise be incurred at the New Orleans wharf, and parties desiring to purchase hay are accustomed to resort there. After sale the boats drop down to New Orleans to discharge their cargo. On the evening of the third day after one of the boats arrived at New Orleans, the other being still at Freeport, the boats and their cargoes were destroyed by a storm. It appeared in evidence that such was the violence of the storm that the hay could not have been landed from the boats and saved. *Held*, that the stay at Freeport was within the stipulation in the policy, allowing "coasting," etc.—Grant v. Lexington Fire, Life & Marine Ins. Co., 5 Ind. 23, 61 Am. Dec. 74.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 722-737.

See, also, 26 Cyc. pp. 625-634; notes, 33 Am. Dec. 60, 58 Am. Dec. 673.

#### § 316. Buildings in general.

[a] (App. 1896)

Before there can be a forfeiture of the policy for a violation of the condition against increase of the hazard by means within the control of the insured, it must appear that the insured was guilty of some act or acts reasonably calculated to increase the risk, and that actually did increase it.—Germania Fire Ins. Co. v. Stewart, 42 N. E. 286, 18 Ind. App. 627.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 744-747.

See, also, 19 Cyc. p. 716.

#### § 319. Change in use of building.

Questions for jury, see post, § 668.

[a] (App. 1892)

Where a policy insures a building as a dwelling house only, a provision that the policy shall be void for any increase of hazard by change of use or occupancy is a continuing warranty on the part of the insured that the house shall be used for no other purpose increasing the risk.—Germania Fire Ins. Co. v. Deckard, 3 Ind. App. 361, 28 N. E. 868.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 751-756, 758.

See, also, 19 Cyc. pp. 719-723; note, 30 Am. St. Rep. 731.

#### § 320. Illegal use of building.

[a] (Sup. 1879)

Where a by-law of a mutual insurance company provides that, if buildings insured are appropriated to illegal purposes, the agent must insist upon the removal of the danger, or cancellation of the policy, the mere appropriation of an insured building to illegal purposes did not avoid the policy.—Behler v. German Mut. Fire Ins. Co., 68 Ind. 347.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 757.

See, also, 19 Cyc. pp. 722, 723.

#### § 322. Change in occupancy of building.

Pleading, see post, § 634.

Waiver of forfeiture, see post, §§ 389, 392.

[a] (Sup. 1883)

The change of sleeping apartments into a house of assignation and prostitution is within a condition of a fire insurance policy, making it void if assured failed to notify the company of any change in the nature or character of the occupancy of the insured property.—Indiana Ins. Co. v. Brehm, 88 Ind. 578.

[b] (App. 1892)

A statement in a fire insurance policy that the property insured was occupied by a tenant at the date of the contract amounted to a warranty that it was so occupied at that time, but not that it would continue to be so occupied.—Evans v. Queens Ins. Co., 5 Ind. App. 198, 31 N. E. 843.

## [c] (App. 1895)

The parties to a contract of insurance have a right to stipulate that a voluntary change in the use or occupation of the premises in which the insured goods are situated to one of the greater hazard, or one that will increase the risk, shall vitiate the policy, and the courts cannot judicially know that a particular change is not an increase of the risk which will avoid the policy.—*Ætna Ins. Co. of Hartford, Conn., v. Norman*, 40 N. E. 1116, 12 Ind. App. 652.

## FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 760.

See, also, 19 Cyc. p. 724; note, 33 Am. Rep. 832.

## § 323. Building becoming vacant.

Pleading, see post, §§ 632, 634, 645.

Waiver of forfeiture, see post, § 392.

## [a] (Sup. 1878)

A fire policy providing that so long as the building shall be unoccupied it shall cease, and be of no force or effect, does not become void by unoccupancy, but simply inoperative until re-occupied.—*Ætna Ins. Co. v. Meyers*, 63 Ind. 238.

A fire policy provided that so long as the building shall be "unoccupied \* \* \* these presents shall cease and be of no force or effect." *Held*, that no recovery could be had for a loss occurring during nonoccupancy, and that no notice of such nonoccupancy was required.—*Id.*

## [b] (Sup. 1890)

Where a policy of insurance provided that it should be void if the buildings became vacant, the insured is not excused from his breach of contract in allowing them to become vacant by the fact that the company's agent told him that a rule made by the company allowed the vacancy of the property for 30 days after the policy was issued, and formed part of the contract, and annulled the condition in the policy, since the representation of the agent as to the effect of the rule was only a misrepresentation as to the company's legal liability.—*Rogers v. Phenix Ins. Co.*, 121 Ind. 570, 23 N. E. 498.

## [c] (Sup. 1890)

A tenant moved out March 26th, after which one who had previously engaged the house made some repairs, and kept two or three planes in the house, and on March 30th put some hay in the stable, and buried some potatoes on the premises, intending to move in April 1st. A fire occurred March 31st. *Held*, that an insurance policy conditioned against the premises becoming "vacant or unoccupied" was avoided.—*Continental Ins. Co. of New York City v. Kyle*, 124 Ind. 132, 24 N. E. 727, 9 L. R. A. 81, 19 Am. St. Rep. 77.

## [d] (App. 1892)

A provision of a policy warranted that the building would continue to be occupied, except for a space not longer than 10 days, unless the company gave its consent to a longer period

of vacancy. *Held*, that if the building was not occupied at the date of the policy, but afterwards became occupied, the continuing warranty against vacancy would attach.—*Evans v. Queen Ins. Co.*, 5 Ind. App. 198, 31 N. E. 843.

Where a policy contained a condition of forfeiture in case of vacancy for more than ten days without the company's consent and the company alleged breach of such condition, a reply alleging that the building was vacant at the time the policy was issued, and that the company's agent had notice of such fact, and that insured did not know how long it would be vacant, was not demurrable, since the condition against vacancy did not attach until after the premises became occupied and subsequently became vacant.—*Id.*

## [e] (App. 1894)

Where an insurance policy stipulates that, if the buildings become vacant or unoccupied without consent endorsed on the policy, it shall be void, the fact that the premises were unoccupied at the time of the loss without the consent of the company in writing, or otherwise, that it might remain unoccupied for any time, defeated the right to recover the insurance.—*Phenix Ins. Co. v. Rogers*, 38 N. E. 865, 11 Ind. App. 72.

A provision in a policy of fire insurance that the premises shall not remain vacant more than 30 days allows a vacancy for a shorter time only when consent is given by the company.—*Id.*

## [f] (App. 1898)

A provision in a policy exempting the insurer from liability in case the property insured should become "vacant, unoccupied or uninhabited," must be construed to mean that, if the house should cease to be used as a place of human habitation or for living purposes, the policy should be null and void.—*Home Ins. Co. of New York v. Boyd*, 49 N. E. 285, 19 Ind. App. 173.

The tenant removed from the premises about a week before the fire, and the person who had charge had stored all his furniture in one of the rooms, intending to remove same. This person had not slept in the house for more than a month, and ate and had his wearing apparel elsewhere, although he went there occasionally to see if his goods were all right, and once to blacken his shoes. He did not intend returning to the house to live, and at the time of the fire was in another city. *Held*, that a fire policy, conditioned against the premises becoming vacant, unoccupied, or uninhabited, was avoided.—*Id.*

## [g] (App. 1898)

Where a policy provides that it shall "cease and determine" if the building covered should be vacant or unoccupied at the time of granting the insurance, or thereafter should become so, no recovery can be had if the premises were vacant at the time of the fire.—*Insurance Co.*

of North America v. Coombs, 49 N. E. 471, 19 Ind. App. 331.

The occupant of the house insured commenced to move out at 9 o'clock a. m., and intended to complete the removal of his household goods in the afternoon. At noon of the same day, the house was destroyed by fire. The goods that were not taken were not left because they were not needed. Defendant was notified that the house would be vacant that evening. There was nothing to show the occupant was not proceeding expeditiously in the act of removal. *Held*, that the building was not vacant, so as to avoid a policy, containing the condition that, in case the premises became vacant or unoccupied, the policy would be void.—*Id.*

[h] (Sup. 1906)

Where a fire policy contained a provision that it should be void if the building insured became unoccupied, and the policy was issued with knowledge that the building was occupied by a tenant and was to be used as a tenement, the removal of the tenant without the knowledge of the insured four hours before the fire did not render the policy void.—*Ohio Farmers' Ins. Co. v. Vogel*, 76 N. E. 977, 166 Ind. 239, 3 L. R. A. (N. S.) 966, 117 Am. St. Rep. 382.

Where a fire policy is taken on tenement property, a provision for forfeiture in case of vacancy must be presumed to operate only after a reasonable time to obtain other tenants.—*Id.*

Vacancy provisions in a fire policy are construed according to the character or lease of the property insured.—*Id.*

[i] (App. 1906)

A fire policy stipulated that if the "premises" described should become vacant the policy should be void. The property insured was a barn on a farm referred to in the policy as being owned by the assured. The contract was made on a form containing blanks adapted to many kinds of property, such as "farm implements \* \* \* on the premises," "grain \* \* \* on the premises," etc. The policy provided that it should not be construed to cover property located elsewhere than on the "premises" or in the buildings described. *Held*, that the provision that the policy should be void if the premises should become vacant had reference to the occupancy of the farm, the word "premises" meaning the farm, and the fact that the barn had never had anything in it did not defeat a recovery for its loss.—*Home Ins. Co. v. Gagen*, 76 N. E. 927, 38 Ind. App. 680.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 764-779.

See, also, 19 Cyc. pp. 725-733; notes, 2 L. R. A. (N. S.) 517, 3 L. R. A. (N. S.) 966; note, 10 Am. St. Rep. 390.

## § 326. Keeping or use of prohibited articles.

[a] (App. 1900)

A policy on a stock of hardware provided that, notwithstanding any usage or custom of trade or manufacture, the keeping, using, or allowing dynamite on the premises should render the policy void, unless otherwise provided by agreement indorsed on or added to the policy. An attached slip provided that the insurance should cover merchandise usually kept for sale in a retail hardware store. *Held*, that liability on the policy could not be avoided because dynamite was kept in stock, if it were usual to keep it where the stock was located.—*Phenix Ins. Co. v. Walters*, 56 N. E. 257, 24 Ind. App. 87, 79 Am. St. Rep. 257.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 782-791.

See, also, 19 Cyc. pp. 734-738; note, 97 Am. Dec. 798; notes, 24 Am. Rep. 150, 37 Am. Rep. 650.

## § 328. Change of title or interest.

Presumptions and burden of proof, see post, § 646.

Waiver of forfeiture, see post, § 378.

[a] (Sup. 1846)

Under the provision of the charter of the Indiana Mutual Fire Insurance Company that a policy issued by the company shall be void when any property insured shall be alienated by sale or otherwise, a policy is rendered void and the lien of the company on the property is lost by a sale or mortgage of the property by the insured.—*McCulloch v. Indiana Mut. Fire Ins. Co.*, 8 Blackf. 50.

[b] (Sup. 1864)

Where a condition of a policy of insurance upon partnership property is that, in case of any sale, transfer, or change of title of any property insured, or any undivided interest therein, such insurance shall be void and cease, a transfer by one partner of his interest in the property insured to a copartner avoids the policy, though made without the consent of the other members of the firm.—*Hartford Fire Ins. Co. v. Ross*, 23 Ind. 179, 85 Am. Dec. 452.

[c] (Sup. 1885)

The mere commencement of foreclosure proceedings is not in itself a "change of ownership or increase of hazard," avoiding an insurance policy for the benefit of the mortgagee, if made without notice to the insurer.—*Phenix Ins. Co. of Brooklyn v. Union Mut. Life Ins. Co. of Maine*, 101 Ind. 392.

[d] (Sup. 1890)

A provision in the by-laws and policy of an insurance company forbidding the transfer of the property, and making the policy void therefor, is not broken by the transfer made by law to the heirs of assured on his death.—*Pfister v. Gerwig*, 122 Ind. 567, 23 N. E. 1041.

A person taking a policy of insurance in a mutual company is bound by a by-law making a transfer, by a mortgage or otherwise, avoid the policy, unless ratified by the directors.—Id.

[e] (App. 1895)

A mortgage of the insured property is not within the condition against a change in title, interest, or possession.—Germania Fire Ins. Co. v. Stewart, 13 Ind. App. 627, 42 N. E. 286.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 794-822, 825.

See, also, 19 Cyc. pp. 742-755; notes, 38 L. R. A. 562, 3 L. R. A. (N. S.) 107; note, 28 Am. Dec. 154; notes, 49 Am. Rep. 22, 52 Am. Rep. 442.

### § 330. Incumbrances.

Pleading, see post, § 645.

[a] (Sup. 1889)

The policy provided that "if the property shall hereafter become mortgaged or incumbered \* \* \* this policy shall be null and void." Held, that the allegation of the answer that a judgment was recovered and entered against the insured, and became an incumbrance on the property, constituted no defense, as this was not the kind of incumbrance contemplated, nor did it show a continuing incumbrance.—Phenix Ins. Co. of Brooklyn v. Pickel, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393.

[b] (Sup. 1891)

An instrument whereby a vendee of land agrees to deliver to his vendor one-half of the net proceeds of the land annually, during his life, and which provides that in case of performance of the contract "this mortgage should be null and void," and that, upon failure to perform, "this mortgage may be foreclosed," is an incumbrance on the land during the vendor's life within the meaning of a provision in an insurance policy that it shall be void if there is any legal incumbrance on the property, though the vendee has always performed his contract.—Continental Ins. Co. v. Vanlue, 126 Ind. 410, 26 N. E. 119, 10 L. R. A. 843.

[c] (Sup. 1892)

A warranty against future incumbrances is not broken where, upon the death of one to whom the property is already mortgaged, the assured executes a renewal mortgage to the mortgagee's daughter, and through mistake the amount thereof is made too great.—Bowlus v. Phenix Ins. Co., 133 Ind. 106, 32 N. E. 319, 20 L. R. A. 400.

[d] (App. 1895)

An insurance company may rightfully insert in the policies, and enforce against the holders as a defense, a clause declaring the policy void if the property insured be then, or thereafter becomes, incumbered by mortgage.—Milwaukee Mechanics' Ins. Co. v. Niewedde, 39 N. E. 757, 12 Ind. App. 145.

Where an insurance policy provides that it shall be void if the property "be or become incumbered," the question whether the execution of a mortgage increased the risk is immaterial.—Id.

[e] (App. 1895)

The fact that property becomes incumbered by a judgment lien will not avoid a policy thereon providing that any change "in the title, interest, or possession of the subject of insurance" shall avoid it.—Germania Fire Ins. Co. v. Stewart, 13 Ind. App. 627, 42 N. E. 286.

[f] (App. 1903)

Where in an action on a policy defendant alleged that a valid judgment was a lien on the property, contrary to the terms of the policy, and plaintiff claimed that the property was exempt from the liability of the judgment, it must be shown that the judgment arose out of an action on contract, express or implied; the right to exemption applying only to such judgment.—Franklin Ins. Co. v. Feist, 68 N. E. 188, 31 Ind. App. 390.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 829-839.

See, also, 19 Cyc. pp. 756-759; note, 20 L. R. A. 400.

### § 335. Keeping books, papers, and safe.

Pleading refusal to produce book in action on policy, see post, § 640.

Production in proof of loss, see post, § 544.

Waiver of forfeiture, see post, § 383.

[a] (App. 1893)

A warranty by assured that an itemized inventory of merchandise, furniture, and fixtures shall be made once each year gives assured one year from the date of policy to make an inventory, and if the goods insured are burned two months, only, after said date, assured's failure to have made an inventory is no defense to his claim.—Citizens' Ins. Co. of Evansville v. Sprague, 8 Ind. App. 275, 35 N. E. 720.

[b] (App. 1898)

An insurance policy provided that the assured should take an inventory of the stock of goods covered at least once a year during the life of the policy, and should keep books of account, and keep said books and inventory in an iron safe during closing hours. Held, that under these provisions, which must be construed together, the assured was only obliged to take an inventory at some time within a year from the time the policy was issued, and thereafter to keep the books as provided.—Hanover Fire Ins. Co. v. Dole, 50 N. E. 772, 20 Ind. App. 333.

An agreement in an application for fire insurance to keep books of account is a promissory warranty, a failure to observe which renders the policy voidable.—Id.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 852, 853.

See, also, 19 Cyc. pp. 761-763; note, 51 L. R. A. 698.

**§ 336. Additional insurance.**

Allegations in pleadings, see post, §§ 636, 640.  
As affecting amount of insurer's liability, see post, § 504.

Presumptions and burden of proof, see post, § 646.

Waiver of forfeiture, see post, §§ 378, 390, 396.

**[a] (Sup. 1863)**

A policy conditioned to be void "if any prior or subsequent insurance is made without the consent of the company indorsed thereon" is not defeated by the taking of a foreign policy, void for want of compliance with statute regulations of this state.—*Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520.

**[b] (Sup. 1886)**

Where an insurance policy contains a stipulation that it shall be void if any other insurance is taken, "whether valid or not," and other insurance is taken, which is shown by extraneous facts to be invalid, the policy may be avoided by the company.—*Phenix Ins. Co. v. Lamar*, 106 Ind. 513, 7 N. E. 241, 55 Am. Rep. 764.

**[c] (Sup. 1887)**

Where insurance is apportioned in the policy, part to a building and part to the furniture and household goods therein, and the policy prohibits the taking of additional insurance on "the property insured, or any part thereof," without the written consent of the company, taking additional insurance merely on the building, without the knowledge or consent of the company, avoids the entire policy.—*Havens v. Home Ins. Co.*, 111 Ind. 90, 12 N. E. 137, 60 Am. Rep. 689.

**[d] (Sup. 1888)**

Where a second policy of fire insurance taken on insured property is invalid on its face, or if, by taking it altogether, there arises from the whole instrument a presumption of invalidity for want of power to issue the policy in the first instance, it will not constitute "other insurance" within the meaning of the first policy, providing that, if the insured shall thereafter obtain any other insurance on any part of the property thereby insured without the consent of the insurer indorsed thereon, then in every such case the policy shall be void.—*American Ins. Co. v. Replogle*, 15 N. E. 810, 114 Ind. 1.

Where a policy of insurance valid on its face has been issued presumably within the power of the insurer, and to void which proof of extrinsic facts is necessary, such policy accepted by the insurer for the purpose of obtaining other or additional insurance constitutes "other insurance" within the meaning of a prior policy providing that, if the insured shall thereafter obtain any other insurance on any part of the property thereby insured without the consent of the insurer indorsed thereon then in every such case the policy shall be void.—*Id.*

[e] Where the condition of an insurance policy that it shall be void if assured obtains other

insurance without the consent of the underwriter is broken, the facts that the second policy also contained a clause providing that the existence of other insurance should render it void, and the insured failed to notify the second insurer of the existence of the first policy, will not render the first insurer liable on the theory that the second policy was wholly void, and hence not a violation of the condition in the first, since by obtaining a second policy valid on its face, without giving notice to the first insurer, the insured has defeated the purpose of the condition.—(Sup. 1892) *Replogle v. American Ins. Co.*, 31 N. E. 947, 132 Ind. 360, affirming *American Ins. Co. v. Replogle* (1888) 114 Ind. 1, 15 N. E. 810.

A policy containing a condition avoiding it if the assured shall obtain other insurance without the consent of the company is avoided by the obtaining of additional insurance without consent, although such other insurance may not have been in force at the time of the loss.—*Id.*

**[f] (Sup. 1892)**

It is a defense to an action on an insurance policy that the assured, in violation of its terms, obtained other insurance without defendant's consent.—*Bowlus v. Phenix Ins. Co.*, 133 Ind. 106, 32 N. E. 319, 20 L. R. A. 400.

**[g] (App. 1896)**

In order to avoid a policy on the ground that the premises were insured for more than their value, a fraudulent intent must be shown, or circumstances warranting such an inference.—*Insurance Co. of North America v. Coombs*, 49 N. E. 471, 19 Ind. App. 331.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 856-873.

See, also, 19 Cyc. pp. 764-772; 26 Cyc. p. 601; note, 64 Am. Dec. 221; notes, 20 Am. Rep. 319, 27 Am. Rep. 601, 43 Am. Rep. 221.

**(C) MATTERS RELATING TO PERSON INSURED.**

Avoidance of policy for misrepresentation, fraud, or breach of warranty or condition, see ante, §§ 291-300.

**§ 341. Change in habits.****[a] (Sup. 1890)**

To work a forfeiture of a life insurance policy under a condition avoiding it if the assured "shall become so far intemperate as to impair his health seriously and permanently or induce delirium tremens," it is not sufficient that the assured indulged in the use of intoxicating liquors to the extent of impairing his health seriously, unless the impairment was permanent.—*Ætna Life Ins. Co. v. Deming*, 123 Ind. 384, 24 N. E. 86, 375.

**[D] (App. 1890)**

A promise, in an application for insurance, to abstain from the excessive use of liquor, was a promissory warranty.—*Northwestern Masonic Aid Ass'n v. Bodurtha*, 53 N. E. 787, 23 Ind. App. 121, 77 Am. St. Rep. 414.

The fact that drunkenness is a disease, and that a return to dissipation is a recurrence of a disease over which the person has no control, does not prevent such recurrence from being a breach of a promissory warranty in an insurance contract not to use liquor to excess.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 881.

See, also, 25 Cyc. p. 823; note, 38 Am. Rep. 615.

**(D) ASSIGNMENT OF POLICY.**

Right to assign, and validity and effect of assignment, see ante, §§ 190–215.

**§ 346. Sufficiency of consent of insurer.****[a] (App. 1892)**

An insurance policy provided that if the property insured should be sold or conveyed, or if the policy should be assigned, without written consent, then the policy should be void. The insured sold the property and assigned the policy without the company's consent, whereupon the assignee sent the policy to an agent, who returned it unindorsed, explaining that he had no authority to authorize a transfer, and suggesting that the policy be sent to the general agent, who would indorse thereon the company's consent. It was accordingly sent to the general agent, who returned it unindorsed, without explanation, but the assignee, supposing it to be properly indorsed, made no examination of it. *Held*, that there was no contract of insurance with the assignee, and no liability on the policy.—*New v. German Ins. Co. of Freeport*, 5 Ind. App. 82, 31 N. E. 475.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 886.

See, also, note, 9 Am. St. Rep. 236.

**(E) NONPAYMENT OF PREMIUMS OR ASSESSMENTS.**

Admissibility of evidence of waiver of forfeiture, see post, § 664.

Mutual benefit insurance, see post, §§ 749–754.

Notice and proceedings to give effect to forfeiture, see ante, § 310.

Provision in policy for forfeiture of membership in mutual insurance company, as affecting power of receiver to collect assessment, see ante, § 71.

Sufficiency of evidence of waiver of forfeiture, see post, § 665.

Waiver of forfeiture, see post, §§ 372, 378, 389, 392, 400.

Waiver of forfeiture of mutual benefit insurance, see post, § 755.

**§ 349. Default as ground of forfeiture in general.**

Proceedings to give effect to forfeiture, see ante, § 310.

**[a] (Sup. 1878)**

Under an insurance policy providing that on default of the payment of an installment on the premium the policy shall be void until the same is paid, when the liability of the company shall "again attach," the company is not liable for any loss occurring while a matured installment remains unpaid.—*American Ins. Co. v. Henley*, 60 Ind. 515.

An application for fire insurance stipulated that, if any installment shall remain unpaid for 30 days after its maturity, "then the policy issued upon the application in consideration of such installment shall be null and void until the same is paid." The policy provided that, if any loss should accrue to the property insured while any matured installment remained unpaid, the policy should be void, and that, on payment of all matured installments, the liability of the company should "again attach" and "the policy be in force," unless rendered "void and inoperative from some other cause." The policy also made the charter and by-laws part of the contract. *Held*, in an action on such installment note, that on the defendant's failure to pay any matured installment the policy became, not void, but voidable, at the option of the company, and that the note was valid, and, on collecting it, the policy would again be in force.—*Id.*

**[b] (Sup. 1881)**

In an action on a policy, an averment in the answer that the premium notes were unpaid at the time of the loss, and that by the terms of the policy it became thereby void, stated a good defense.—*American Ins. Co. v. Leonard*, 80 Ind. 272.

**[c] (Sup. 1891)**

A provision in a policy of insurance that the company shall not be liable for a loss occurring while any note given for premium is overdue and unpaid is valid, and exonerates an insurer from liability while the delinquency continues.—*Michigan Mut. Life Ins. Co. v. Custer*, 27 N. E. 124, 128 Ind. 25.

**[d] (App. 1894)**

A clause in an insurance policy providing that the company shall not be liable for losses occurring while any part of the premium is overdue and unpaid is valid.—*Continental Ins. Co. of New York v. Chew*, 11 Ind. App. 330, 38 N. E. 417, 54 Am. St. Rep. 506.

**[e] (App. 1896)**

The provision in an insurance policy relating to a forfeiture, and providing that where a note is given for premium and is not paid within a certain time after it becomes due the policy shall be void until it is paid, is not applicable where no note was given.—*Ohio Farm-*

ers' Ins. Co. v. Stowman, 44 N. E. 558, 940, 16 Ind. App. 205.

[f] (Sup. 1898)

On the maturity of notes given for a balance of an insurance premium, insured gave other notes in renewal, which recited that the sum therein named represented the premium on the policy, and on failure to pay them at maturity the policy was to be void. *Held*, that the notes were not a payment of the premium or of the original notes until paid, and that the policy was forfeited on their nonpayment.—*Forbes v. Union Cent. Life Ins. Co.*, 51 N. E. 84, 151 Ind. 89.

[g] (Sup. 1903)

A provision in a life policy that the premiums shall be paid by a certain hour on certain days, and, if not, that the policy shall cease and determine, is valid.—*Tibbits v. Mutual Ben. Life Ins. Co.*, 65 N. E. 1033, 159 Ind. 671.

[h] (Sup. 1904)

Where an insurance company delivered the policy under such circumstances that it became operative at once, and accepted in lieu of cash the note of insured, made payable to the company, for the first premium, and the note was delivered and accepted as payment, insured's failure to pay the note would not constitute a forfeiture of the policy.—*Penn Mut. Life Ins. Co. v. Norcross*, 72 N. E. 132, 163 Ind. 379.

[i] (App. 1908)

Where a statute required a life insurance company to give notice of the nonpayment of a premium before it could forfeit the policy, it cannot claim a forfeiture without showing the giving of the required notice, though the insured was unable to pay the premium and the absence of notice did not cause him to make default.—*Equitable Life Assur. Soc. of United States v. Perkins*, 80 N. E. 682, 41 Ind. App. 183.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 891, 895-902, 913.

See, also, 25 Cyc. p. 824.

### § 352. Notice of time for payment.

Notice to give effect to forfeiture, see ante, § 310.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 905-913, 1032, 1033.

See, also, 19 Cyc. pp. 774-776, 25 Cyc. p. 829; note, 59 C. C. A. 317.

### § 353. — Necessity.

[a] (Sup. 1890)

In the absence of any express agreement to do so, an insurance company need not give the insured notice of the maturity of the premium note in order to forfeit the policy for its nonpayment.—*Continental Ins. Co. v. Dorman*, 125 Ind. 189, 25 N. E. 213.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 905-907, 1032, 1033.

See, also, 19 Cyc. p. 774, 25 Cyc. p. 831.

### § 354. — Sufficiency.

[a] (Sup. 1882)

Notice by an insurance company, informing the insured of the time his premium falls due and calling his attention to the conditions of the policy, cannot be construed as a notice that such payment must be made in money, or a refusal to allow credit for services rendered by the insured under a contract with the company.—*Willcuts v. Northwestern Mut. Life Ins. Co.*, 81 Ind. 300.

[b] (App. 1892)

Where a policy in a mutual insurance company provides for notice of assessment to its members, such notice must be in substantial accord with the requirements of the contract, or it will be ineffectual. Even where constructive notice is provided for, personal notice will not be allowed as an efficient substitute.—*Schmidt v. German Mut. Ins. Co.*, 30 N. E. 939, 4 Ind. App. 340.

Where an insurance company's articles of association provide that members shall pay their assessments "within 30 days after receiving notice thereof," before a policy can be declared forfeited for nonpayment the company must show that actual notice was had by the member, though a by-law provided that notice of assessments "shall be given by publication in one or more newspapers."—*Id.*

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 908-911, 913.

See, also, 19 Cyc. p. 775, 25 Cyc. pp. 831-833.

### § 356. Extension of time for payment.

Acceptance of premium after knowledge of loss as waiver of forfeiture, see post, § 392.

Waiver of forfeiture of policy, see post, § 372.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 914, 915, 1034.

See, also, 25 Cyc. p. 831.

### § 357. — In general.

[a] (Sup. 1891)

An agreement made before default to extend the time of payment of a note given for an annual premium was upon a sufficient consideration to keep the policy in force.—*Michigan Mut. Life Ins. Co. v. Custer*, 128 Ind. 25, 27 N. E. 124.

[b] (Sup. 1903)

A provision in a life policy that the premiums shall be paid at or before 12 o'clock m. on certain days is not modified, so as to allow the payment after noon, by the provision that "in case said premiums shall not be paid on or

before the several days hereinbefore mentioned for the payment thereof, \* \* \* then and in every such case this policy shall cease and determine."—*Tibbits v. Mutual Ben. Life Ins. Co.*, 65 N. E. 1033, 159 Ind. 671.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 914, 1034.  
See, also, 25 Cyc. p. 831.

**§ 358. — By agent or broker.**

[a] (App. 1907)

Where defendant's general agent, who had power to bind it relative to the business with which he was intrusted, including the times of remittance of premiums collected, wrote insured, whose premium, due October 26, 1903, was in arrears, that, if the same was not paid by the last of March, the agent would be compelled to return insured's receipt to the company, such letter operated as an extension of time for the payment of such premium until April 1st, and insured, having died in the meantime, was not in default.—*Penn Mut. Life Ins. Co. v. Senhenn*, 81 N. E. 87, 40 Ind. App. 85.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 915, 1034.  
See, also, 25 Cyc. p. 831.

**§ 359. Sufficiency of payment or tender to prevent forfeiture.**

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 913, 916-922, 924.

See, also, 19 Cyc. p. 776, 25 Cyc. pp. 841-843; notes, 14 L. R. A. 283, 26 L. R. A. 112.

**§ 360. — In general.**

[a] (Sup. 1869)

The mere giving of a promissory note in payment of premium on a policy of life insurance cannot change the terms of the contract of forfeiture as expressed on the face of the policy. The policy and the notes must be taken as one contract, and construed accordingly.—*New England Mut. Life Ins. Co. v. Hasbrook's Adm'r*, 32 Ind. 447.

[b] (Sup. 1832)

A contract of insurance is indivisible. A payment of a part of a premium due will not prevent a forfeiture.—*Willcuts v. Northwestern Mut. Life Ins. Co.*, 81 Ind. 300.

[c] (Sup. 1884)

The holder of a policy issued by a mutual insurance company has the right to have dividends earned by the policy applied to the payment of his premiums to prevent a forfeiture of the policy.—*Franklin Life Ins. Co. v. Wallace*, 93 Ind. 7.

[d] (App. 1892)

A fire insurance policy contained a provision that the company should not be liable for a loss occurring while any note given for premium was overdue and unpaid. *Held* that,

when a note was overdue, and a tender was made before the loss, the fact that it was not made until after the maturity of the installment is immaterial, since the policy does not provide for a forfeiture in case of nonpayment at maturity.—*Continental Ins. Co. of New York v. Miller*, 4 Ind. App. 553, 30 N. E. 718.

[e] (App. 1893)

Plaintiff's application for accident insurance stated that the insurance should be "based on the orders given herewith" on the railroad company by which he was employed, to be paid from his wages each month, and agreed that the payments, in the orders above mentioned, should be premiums for four separate insurance contracts, and that each payment should apply only to its corresponding insurance period, and that no claim should be made for any injury received during any period not actually paid for before such injury. The policy was issued, and plaintiff delivered to the insurance company orders on the railroad company for the payment, for each of four successive months, of the premiums on the policy. *Held*, that the giving of the orders did not operate as a payment, whether they were collected or not; and when plaintiff drew his entire wages each month before the order for the corresponding month was paid he forfeited his rights under the policy, though he was not notified by the insurance company of the nonpayment of the orders.—*Landis v. Standard Life & Acc. Ins. Co.*, 6 Ind. App. 502, 33 N. E. 989.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 913, 916-924.

See, also, 25 Cyc. p. 841.

**§ 361. — To agent or broker.**

[a] (App. 1892)

A fire insurance policy contained a provision that the company should not be liable for a loss occurring while any note given for premium was overdue and unpaid, and provided that payments should be made at the company's office in Chicago or New York, "or to an authorized person having such note in possession for collection." The complaint alleged that assured gave a premium note payable in four yearly installments; that he paid the first two installments to defendant's agent; that when the third installment was due he called on defendant's authorized agent, who had the note in his possession for collection, and offered to pay him the amount due, but that the agent said he did not have the note. The building was subsequently destroyed by fire. *Held*, that there was a sufficient allegation of facts to show that defendant was estopped to claim a forfeiture.—*Continental Ins. Co. of New York v. Miller*, 4 Ind. App. 553, 30 N. E. 718.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 923.

See, also, 19 Cyc. p. 776, 25 Cyc. p. 841.

**§ 362. Excuses for nonpayment.**

[a] (Sup. 1881)

An insurance company wrongfully and in violation of the policy demanded payment of interest on outstanding premium notes at 7 per cent., when 6 per cent. only was payable thereon, and notified the insured that 6 per cent. would not be received, if tendered, and that no other or succeeding premiums would be received on the policy unless 7 per cent. were paid on said notes. *Held*, that this excused a subsequent nonperformance of the conditions by the insured.—*Phoenix Mut. Life Ins. Co. v. Hinesley*, 75 Ind. 1.

[b] (Sup. 1882)

The act of an insurance company in demanding a larger premium than it is entitled to receive, and notifying the insured that nothing but a compliance with the demand will be deemed performance, excuses the insured from tendering the premium.—*Willcuts v. Northwestern Mut. Life Ins. Co.*, 81 Ind. 300.

[c] (Sup. 1903)

That a policy dated April 25th is not delivered till five days later furnishes no excuse for the premiums not being paid on the days specified in the policy.—*Tibbits v. Mutual Ben. Life Ins. Co.*, 65 N. E. 1033, 159 Ind. 671.

[d] (App. 1905)

A policy of life insurance provided that "all premiums are payable at the home office of the Company, but may be paid to an authorized representative." *Held*, that the policy was not forfeited for nonpayment of premiums for several months, where the company's collector failed to call for the same as he had been doing, and as he agreed to continue to do.—*Rutherford v. Prudential Ins. Co.*, 73 N. E. 202, 34 Ind. App. 531.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 925-930.  
See, also, 19 Cyc. p. 776, 25 Cyc. pp. 844-847; note, 19 Am. Rep. 512.

**§ 363. Rights of insured after default.****FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 194, 931-940.  
See, also, 25 Cyc. pp. 847-849.

**§ 364. — In general.**

[a] (Sup. 1877)

A policy issued by a mutual life insurance company contained the condition that if the premiums on the policy, "or the interest upon any note given for premiums, shall not be paid on or before" the time fixed for such payment, "the company shall not be liable for the payment of the whole sum assured," but for as many tenth parts of the original sum insured as complete annual premiums have been paid at the time of the default. Another condition provided that, in case the policy "shall cease and determine or become null and void for other reasons than nonpayment of premiums, all pay-

ments thereon shall be forfeited to the company." One of the notes given for the premium on the policy, specifying no time for its payment, provided for interest at the rate of 7 per cent., "which interest shall be paid annually or the policy forfeited." *Held*, that the forfeiture so provided for did not apply to the paid-up premiums, but only to future benefits which might have been derived from the policy.—*Northwestern Mut. Life Ins. Co. v. Little*, 56 Ind. 504.

[b] (App. 1908)

Though a life insurance policy provided that at its maturity, in the absence of notice, within a specified time by the holder electing to withdraw in cash his share of the accumulated reserve the sum should be used to purchase an annuity, where the company was sued for the surrender value and denied liability on the specific ground that the policy was forfeited before maturity, it could not complain that such notice had not been given.—*Equitable Life Assur. Soc. of United States v. Perkins*, 80 N. E. 682, 41 Ind. App. 183.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 931.  
See, also, 25 Cyc. p. 847.

**§ 367. — Insurance for limited term or amount.**

Authority of mutual insurance company to contract for, see ante, § 57.

Effect of reinsurance, see post, § 679.  
Pleading, see post, § 629.

[a] (App. 1905)

Under a provision in a life insurance policy that on payment of three premiums in cash the policy should be continued in force for 7 years and 235 days, such period should be computed from the date of the policy, and not from the date of the lapse.—*Union Mut. Life Ins. Co. v. Adler*, 73 N. E. 835, 75 N. E. 1088, 38 Ind. App. 530.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 935, 938.  
See, also, 25 Cyc. p. 852.

**§ 368. — Paid-up policy or value.**

[a] (App. 1902)

Where a life insurance policy stipulates for annual premiums, and forfeiture if not then paid, but that after three payments the insured may return the policy within six months after default, and receive a paid-up policy for a stated amount, the right to such paid-up policy is lost by an unexcused delay in demanding it until after such six months has expired.—*Wells v. Vermont Life Ins. Co.*, 62 N. E. 501, 63 N. E. 578, 28 Ind. App. 620.

[q] (App. 1902)

A demand for a paid-up policy is properly made on the general agent of a life insurance company, though he has no authority to issue policies, the original policy not requiring its

surrender to any particular person when a paid-up policy is desired.—*Union Cent. Life Ins. Co. v. Whetzel*, 65 N. E. 15, 29 Ind. App. 638.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 194, 936, 939.

See, also, 25 Cyc. p. 853.

**§ 370. — Actions.**

**[a] (Sup. 1883)**

A daughter who took out a policy of life insurance on the life of her mother, and paid the premiums thereon, was entitled as the real party in interest to maintain an action thereon for specific performance of an agreement therein for the issue of paid-up insurance for as many fifteenth parts of the sum insured as there were complete annual premiums paid at the time of default.—*Continental Life Ins. Co. v. Volger*, 89 Ind. 572, 46 Am. Rep. 185.

**[b] (App. 1902)**

Where a life policy stipulated that after the payment of three annual premiums the insured might surrender the policy within six months after default, and receive a paid-up policy for a stated amount, an allegation that on receipt of the policy the insured paid three annual premiums in advance to secure insurance for the term of three years for the amount of the policy, and thereafter secure a paid-up insurance for the amount for which a paid-up policy would then be issued, and "that the main consideration for taking the policy and paying such premiums in advance was the agreement of the company to issue such paid-up policy on demand," was not equivalent to an averment of surrender of the policy at the expiration of the three years.—*Wells v. Vermont Life Ins. Co.*, 62 N. E. 501, 63 N. E. 578, 28 Ind. App. 620.

**[c] (App. 1902)**

In an action to recover the value of a paid-up life policy, which plaintiff claimed should have been issued to him, evidence considered, and held to sustain a finding that the time for payment of a premium on the original policy had been extended, during which extension the demand for the paid-up policy was made; and hence that the demand was made while the original policy was in force, and was in time.—*Union Cent. Life Ins. Co. v. Whetzel*, 65 N. E. 15, 29 Ind. App. 638.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 194, 940.

See, also, 25 Cyc. p. 857.

**XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.**

Admissibility of evidence, see post, § 664.

Estoppel or waiver as to adjustment of loss, see post, § 576.

Estoppel or waiver as to defects in or objections to policy, see ante, § 141.

Estoppel or waiver as to notice and proof of loss, see post, §§ 554-561.

Estoppel to deny insurable interest, see ante, § 117.

Instructions, see post, § 669.

Mutual benefit insurance, see post, §§ 724, 755.

Pleading, see post, § 641.

Pleading nonperformance of conditions, see post, § 640.

Pleading performance or waiver of conditions, see post, § 634.

Presumptions and burden of proof, see post, § 646.

Verdict and findings, see post, § 670.

Waiver of notice of election between rights of assured after default in payment of premium, see ante, § 364.

Waiver of provisions of policy as to time to sue, see post, § 623.

Weight and sufficiency of evidence, see post, § 665.

**§ 371. Application of doctrines of estoppel and waiver.**

**[a] (Sup. 1883)**

The fact that the insured has falsely answered certain questions in the application for a policy of life insurance, and has fraudulently concealed the truth with reference to other questions in such application, renders the contract voidable at the election of the insurance company; but such company may waive the forfeiture of the policy and continue it in force.—*Excelsior Mut. Aid Ass'n of Anderson v. Riddle*, 91 Ind. 84.

**[b] (Sup. 1906)**

Where an insurance company elects to disregard a breach of condition and to continue the policy in force, the policy is construed as if the condition had been omitted.—*Ohio Farmers' Ins. Co. v. Vogel*, 166 Ind. 239, 76 N. E. 977, 3 L. R. A. (N. S.) 966, 117 Am. St. Rep. 382.

**[c] (App. 1910)**

Though an insurance contract provides that it shall be void in case the applicant misrepresents a fact material to the risk, or in case of misrepresentations in the application which are made warranties, it is nevertheless voidable only at the election of the insurer, the insurer being entitled to waive or take advantage of the breach at its election.—*American Cent. Life Ins. Co. v. Rosenstein*, 92 N. E. 380.

Where insured breached his contract and the insurer did not learn thereof until after insured's death, it still was entitled to take advantage of the breach or waive it.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 943-946.

See, also, 15 Cyc. p. 1040, 19 Cyc. pp. 777-779, 25 Cyc. pp. 858-859, 26 Cyc. pp. 624, 634, 635.

**§ 372. What conditions may be waived.****[a] (Sup. 1891)**

A provision in a policy of insurance for the forfeiture thereof for nonpayment of premium is for the benefit of the insurer and may be waived.—*Michigan Mut. Life Ins. Co. v. Custer*, 27 N. E. 124, 128 Ind. 25.

**[b] (App. 1901)**

A condition in a life policy that the premium shall be paid in advance is for the benefit of the insurer, and may be waived by an agreement to extend the time of payment, and such waiver may be shown by parol.—*Prudential Ins. Co. v. Sullivan*, 59 N. E. 873, 27 Ind. App. 30.

**[c] (App. 1905)**

Since Acts 1881, p. 714 (*Burns' Ann. St. 1901, § 4932*), under which defendant insurance company was reorganized, does not specify the character of title or interest insured shall hold in the property insured, a by-law or regulation of the company providing that any policy issued to a person who does not own the property in fee simple shall be void may be waived by the company.—*Farmers' Mut. Fire Ins. Co. of De Kalb County v. Jackman*, 73 N. E. 730, 35 Ind. App. 1.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 941.

**§ 373. Liability of insurer to estoppel by acts, conduct, or statements of officers or agents.****[a] (Sup. 1890)**

Where a policy provides that it shall be void if the buildings become vacant, the insured is not excused from his breach of contract in allowing them to become vacant by the fact that before the policy was issued the company made a rule allowing the vacancy of property for 30 days, and that the company's agent told him that the rule formed part of the contract, and annulled the condition contained in the policy, as the existence of such a rule did not prevent the company from providing against vacancy by a condition in the policy.—*Rogers v. Phenix Ins. Co. of Brooklyn*, 121 Ind. 570, 23 N. E. 498.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 947.

See, also, 25 Cyc. p. 860.

**§ 374. Powers of officers or agents respecting waiver.**

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 948-965.

See, also, 19 Cyc. pp. 780-784, 25 Cyc. pp. 860, 861.

**§ 375. — In general.****[a] (Sup. 1879)**

Where a by-law of a mutual insurance company declared that a policy of said company would be void if the same property was in-

sured in another company without the consent of the directors, etc., the agent of the company had no authority to consent to the second policy so as to bind the company.—*Behler v. German Mut. Fire Ins. Co.*, 68 Ind. 347.

**[b] (Sup. 1882)**

A mere local agent of an insurance company cannot waive a condition in the policy that the premium shall be paid in money.—*Willcuts v. Northwestern Mut. Life Ins. Co.*, 81 Ind. 300.

A waiver of a condition of a life policy can only be made by an agent possessing competent authority.—*Id.*

**[c] (Sup. 1882)**

An insurance agent has authority to waive a condition requiring that, if the building stands on leased ground, that fact shall be expressed in the policy.—*Home Ins. Co. of New York v. Duke*, 84 Ind. 253.

**[d] (Sup. 1882)**

The existence of the relation of principal and agent is not sufficient to warrant a conclusion that the agent possessed authority to waive the conditions of a contract of insurance.—*Et-na Ins. Co. v. Shryer*, 85 Ind. 362.

**[e] (Sup. 1884)**

Where the charter of an insurance company provided that, "if the premises be incumbered, the policy shall be void, unless the true title of the assured and the incumbrance on the premises be expressed therein," *held*, that no officers or agents of the company could waive the provision.—*Leonard v. American Ins. Co.*, 97 Ind. 299.

**[f] (App. 1893)**

An agent of defendant insurance company represented to plaintiff that if he would make application to defendant for a policy, and state in the application that he desired to mortgage the property on which the insurance was to be taken, defendant would issue to him a policy permitting him to do so. Plaintiff made application accordingly, and received a policy. *Held*, that the fact that he mortgaged the property did not avoid the policy, though it contained a clause providing that any incumbrance placed on the property after the issuance of the policy should have that effect, and defendant's charter provided that none of its agents except the general agent at Chicago should have power to waive any of the conditions of a policy.—*Phoenix Ins. Co. of Brooklyn v. Lorenz*, 7 Ind. App. 266, 33 N. E. 444, 34 N. E. 495.

**[g] (App. 1894)**

An agent, with authority to solicit applications and collect premiums, can waive a condition for payment of the premium in quarterly installments, and accept payment of the entire annual premium in advance.—*Kerlin v. National Acc. Ass'n of Indianapolis*, 8 Ind. App. 628, 35 N. E. 39, 36 N. E. 156.

Where an insured tenders the collection agent of the company \$30, the full amount of his annual premium, and the agent accepts only \$20 thereof, and promises to pay the company the other \$10 in satisfaction of a debt owing by him to the insured, the company is bound by the agent's waiver of the cash payment.—*Id.*

[h] (App. 1899)

An agent authorized by a fire insurance company to accept risks and to collect premiums, and having power to make valid parol contracts to insure, may waive cash payment of premiums.—*Western Assur. Co. v. McAlpin*, 55 N. E. 119, 23 Ind. App. 220, 77 Am. St. Rep. 423.

[i] (Sup. 1904)

An agent of a foreign insurance company, having authority to issue policies and collect premiums thereon, has authority to waive a condition of the printed policy that an incumbrance on the property should render the policy void.—*German-American Ins. Co. v. Yeagley*, 71 N. E. 897, 163 Ind. 651.

[j] (App. 1906)

The agent of a life insurance company, the scope of whose duties was to write applications and collect premiums and turn them over to the company, could bind the company by the receipt of premiums with full knowledge on his part that the insured was not in good health at the time of the issuance of the policy, which provided that it should be void in case at the time of delivery thereof insured was not in sound health.—*Metropolitan Life Ins. Co. v. Willis*, 76 N. E. 560, 37 Ind. App. 48.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 948-951, 956-965.

See, also, 19 Cyc. pp. 780-783, 25 Cyc. p. 860.

§ 376. — Effect of provisions of policy.

Waiver of provisions as to mode of waiver, see post, § 396.

[a] (App. 1908)

An insurance agent, acting within his actual or apparent authority, may orally or in writing waive any written or printed condition in the policy, notwithstanding an express provision therein that no agent shall have such power, or that only some particular mode of waiver is possible.—*United States Health & Accident Ins. Co. v. Clark*, 83 N. E. 760, 41 Ind. App. 345.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 952-955.

See, also, 19 Cyc. p. 784, 25 Cyc. p. 861.

§ 377. Knowledge or notice of facts in general.

Mutual benefit insurance, see post, § 825.

[a] (App. 1895)

The record of a chattel mortgage does not charge an insurer with notice thereof, so as to render a failure to cancel a policy on the property a waiver of a condition against mortgage incumbrances.—*Milwaukee Mechanics' Ins. Co. v. Niewedde*, 12 Ind. App. 145, 39 N. E. 757.

[b] (App. 1895)

The issuance of a policy to "K. and Z. and F. Z.," on a building and merchandise, with knowledge by the agent that K. and Z. own the building and F. Z. alone the goods, is a waiver of the provision in such policy providing for a forfeiture "if the interest of the insured be other than unconditional and sole ownership."—*Manchester Fire Assur. Co. v. Koerner*, 13 Ind. App. 372, 40 N. E. 1110, 41 N. E. 848, 55 Am. St. Rep. 231; *North British & Mercantile Ins. Co. v. Same*, *Id.* 698, 40 N. E. 1112.

[c] (App. 1897)

The record of a chattel mortgage is not notice of the mortgage to a company issuing a policy on the property.—*Shaffer v. Milwaukee Mechanics' Ins. Co.*, 46 N. E. 557, 17 Ind. App. 204.

[d] (App. 1899)

A mortgage of record before the issuing of a policy providing against incumbrances is not notice thereof to the insurer.—*Phoenix Ins. Co. v. Overman*, 52 N. E. 771, 21 Ind. App. 510.

[e] (App. 1900)

The public record of a chattel mortgage on insured property is not notice thereof to the insurer.—*Traders' Ins. Co. v. Cassell*, 56 N. E. 259, 24 Ind. App. 238.

[f] (Sup. 1907)

Where no written application for insurance is required by the insurer, and it asks no questions of insured, and he makes no statements, as to the condition of his title, and the policy is accepted in good faith and in ignorance of the materiality of the question of title, it will be presumed that the insurer has knowledge of the state of insured's title, and by issuing the policy with the knowledge, thus imputed, that the insured has but a life estate, the insurer waives a provision thereof declaring the policy void if the insured's interest be other than unconditional and sole ownership in fee simple.—*Glens Falls Ins. Co. v. Michael*, 167 Ind. 659, 74 N. E. 964, 79 N. E. 905, 8 L. R. A. (N. S.) 708.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 942, 966, 967, 975-997.

See, also, 1 Cyc. p. 247, 19 Cyc. pp. 778, 806-819, 25 Cyc. pp. 862-865, 26 Cyc. pp. 624, 634, 635.

§ 378. Knowledge of or notice to officers or agents.

Admissibility of evidence, see post, § 655.

**[a] (Sup. 1881)**

Knowledge by a general agent of a foreign insurance company that the insured was in the habit of paying premiums some time after they were due is knowledge by the company of that fact.—*Phoenix Mut. Life Ins. Co. v. Hinesley*, 75 Ind. 1.

**[b] (Sup. 1890)**

When an insurance agent is aware of the facts relative to a risk before the contract is entered into, the insurer is charged with that knowledge, and is estopped from setting up an innocent mistake of the assured, either in setting forth the facts in the application or in omitting to state them. The insurer cannot be misled even by a warranty when at the time the contract is entered into he knew the actual condition of the risk.—*Indiana Ins. Co. v. Hartwell*, 24 N. E. 100, 123 Ind. 177.

**[c] (App. 1893)**

Where, at the time a policy of insurance is contracted, conditions existed which were in conflict with those of the policy, and the insurer or its agent knew of their existence, and agreed that as to them the conditions of the policy should not be effective, the insurer cannot take advantage of their existence to defeat a recovery after a loss has occurred.—*Phenix Ins. Co. of Brooklyn v. Lorenz*, 33 N. E. 444, 34 N. E. 495, 7 Ind. App. 266.

**[d] (App. 1897)**

The fact that the agent of an insurance company, authorized to issue and countersign policies, previous to the issuance of a policy on personal property had, as a notary public, filled out and taken the acknowledgment of a mortgage on the property insured, is not notice to the company of the mortgage.—*Shaffer v. Milwaukee Mechanics' Ins. Co. (Ind. App.)* 46 N. E. 557, 17 Ind. App. 204.

**[e] (App. 1898)**

Knowledge of the agent of the insurance company that the insured had procured additional insurance on the property was sufficient notice to the company, under the provision of the policy that it would be determined in such case, unless the company was notified, and their consent obtained.—*Insurance Co. of North America v. Coombs*, 49 N. E. 471, 19 Ind. App. 331.

**[f] (App. 1899)**

Knowledge of its agent for soliciting insurance and collecting premiums of facts justifying insurer in forfeiting a policy is binding on it, though not communicated.—*Northwestern Masonic Aid Ass'n v. Bodurtha*, 53 N. E. 787, 23 Ind. App. 121, 77 Am. St. Rep. 414.

**[g] (App. 1900)**

If the company's local agent at the time the policy was issued, or at any time before the loss, knows of the violation of conditions of the policy, the knowledge of the agent is the knowledge of the company, and, after the loss, the company cannot defend because of

such breach of the contract.—*Traders' Ins. Co. v. Cassell*, 56 N. E. 259, 24 Ind. App. 238.

**[h] (App. 1905)**

Where an agent is authorized to collect premiums, notice to such agent of a change of ownership of insured property is notice to the company.—*Farmers' Mut. Fire Ins. Co. of De Kalb County v. Jackman*, 73 N. E. 730, 35 Ind. App. 1.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 968-997.

See, also, 19 Cyc. pp. 807-812, 25 Cyc. p. 863; notes, 16 L. R. A. 33, 4 L. R. A. (N. S.) 758; note, 26 Am. Rep. 370.

**§ 379. Insertion of false answers in application by agent or under his direction.**

Verdict and findings, see post, § 670.

**[a] (Sup. 1887)**

Where the location of personal property was wrongly stated in the application for insurance by the company's agent, without the knowledge of the applicant, thus causing a misdescription of such location in the policy, the same may be alleged and proved in an ordinary action upon the policy, and the company will be estopped from setting up such misdescription as a defense.—*Phenix Ins. Co. v. Allen*, 109 Ind. 273, 10 N. E. 85.

**[b] (Sup. 1889)**

Where an insurance agent authorized to take applications writes into an application false answers to questions put to the applicant as to the amount of insurance, and deceives him into believing that the correct answer has been written, the company is estopped, in an action on the policy issued under such application, to deny the correctness of the answer as written.—*Pickel v. Phenix Ins. Co.*, 119 Ind. 291, 21 N. E. 808.

**[c] (Sup. 1889)**

Where the insurer alleges that the answers to questions put to the insured contained in the application were false, it is a sufficient reply that the answers were written by the insurer's agent after he had informed the insured that no answers were necessary, and without his knowledge.—*Phoenix Ins. Co. of Brooklyn v. Stark*, 120 Ind. 444, 22 N. E. 413.

**[d] (Sup. 1890)**

Where the agent of an insurance company, who takes an application, and writes out the answers contained therein, has full knowledge of the facts, and relies upon his own knowledge, well knowing that the applicant has no accurate knowledge in regard to the facts inquired about, and the applicant, an illiterate man, signs said application, relying upon the good faith of the agent, the company cannot avoid payment because of misrepresentations as to value, location, and incumbrances, as the statements will be construed, not as warranties, but representations.—*Rogers v. Phenix*

Ins. Co. of Brooklyn, 121 Ind. 570, 23 N. E. 498; Phenix Ins. Co. of Brooklyn v. Golden, 121 Ind. 524, 23 N. E. 503.

[e] (Sup. 1890)

Where an applicant signs the application in blank, and the agent of the company, without authority or direction from the applicant, fills out the blanks, misrepresentations made by him in thus filling out the application will not avoid the policy, though the application is afterwards signed by the applicant upon presentation to him by the agent who neither reads nor offers to read it to him.—Rogers v. Phenix Ins. Co. of Brooklyn, 121 Ind. 570, 23 N. E. 498.

Where an applicant signs the application in blank, and the agent of the company, without authority or direction from the applicant, fills out the blanks, he does not thereby become the agent of the applicant, but is the agent of the company.—Id.

[f] (Sup. 1891)

It cannot be said that an insured who has fully, truthfully, and in good faith answered all the required questions is guilty of negligence in signing without reading the application which is prepared by the agent, as he is justified in assuming that the agent has with equal good faith truthfully recorded the answers given.—Germania Life Ins. Co. of New York v. Lunkenheimer, 26 N. E. 1082, 127 Ind. 536.

When solicited to take a policy, the insured told the company's agent that his application had been rejected by another company. The agent filled out an application, and, to the question whether any former one had been rejected, he wrote the answer "No," without the knowledge of the insured, who signed the paper without reading it. The policy provided that the insured adopted as his own, admitted to be material, and warranted as full, complete, and true, each of the answers, whether written by his own hand or not. Held, that the company could not treat the answer as a warranty, and avoid the policy for its falsity.—Id.

[g] (Sup. 1892)

An insurance agent authorized to receive applications represents the company, and if he receives truthful information from the insured, and undertakes to correctly fill the application, but instead of doing so, inserts false statements, the insured will not be made to suffer from his wrongful act.—Bowlus v. Phenix Ins. Co., 32 N. E. 319, 133 Ind. 106, 20 L. R. A. 400.

Allegations of the answer that the assured knew that the agent did not have authority to issue the policy, and that it was stated in the application that the property was not incumbered, when in fact it was mortgaged, were bad, as the company was not relieved from liability because its agent authorized to receive the application made misstatements in filling

them in, although he had no authority to issue the policy.—Id.

[h] (App. 1893)

Where an agent acting within the general scope of his authority undertakes to make out an application for insurance, and fails to state therein such facts and circumstances as the applicant directs, which, if stated therein, would affect the rights of the assured under the policy issued thereon, such omissions must be imputed to the company, and not to the insured.—Phenix Ins. Co. of Brooklyn v. Lorenz, 33 N. E. 444, 34 N. E. 495, 7 Ind. App. 266.

[i] (App. 1893)

In an application for accident indemnity, when the applicant states his income truly, but the agent, without his knowledge or consent, increases the amount so as to place the applicant in another class of assured, an agreement that the society shall not be bound by any statement made to, or knowledge possessed by, the agent not written in the application, and that such person is the applicant's agent to enter his answer, does not relieve the insurer of its estoppel to contest the policy.—Howe v. Provident Fund Soc., 7 Ind. App. 586, 34 N. E. 830.

[j] (Sup. 1894)

If an applicant for life insurance in good faith gives truthful answers to such questions as are asked him by an agent of the insurer, but the agent, whether purposely or otherwise, but without the knowledge or connivance of the applicant inserts false answers, the wrong is that of the company, and not that of the applicant, and the insurer is estopped from attributing the wrong to the applicant.—Michigan Mut. Life Ins. Co. v. Leon, 37 N. E. 584, 138 Ind. 636.

An insurance company cannot, after assured has been fatally injured, avoid the policy on his life, issued on an application written out by a state agent, though the agent wrote therein "No," in place of applicant's answer "Yes," to the question whether he had been rejected for life insurance, and though a copy of the application was attached to the policy in assured's possession, neither assured nor the beneficiary having known of such change.—Id.

[k] (App. 1894)

Insurers cannot repudiate their policy, on the ground of a misstatement by the insured, if he truly stated the facts involved to the agent at the time of applying for the policy, and the agent drew up the application differently from the facts as stated.—Continental Ins. Co. v. Chew, 11 Ind. App. 330, 38 N. E. 417, 54 Am. St. Rep. 506.

[l] (App. 1908)

If an agent authorized to take applications for insurance without the knowledge of the applicant writes false answers to questions in the application contrary to directions of appli-

cant who makes true answers, the company will be estopped by the action of its agent.—United States Health & Accident Ins. Co. v. Clark, 83 N. E. 760, 41 Ind. App. 345.

[m] (App. 1909)

In making the examination for life insurance, interpreting, recording, and reporting to the company the answers, the examiner is the agent of the company; and that he and the soliciting agent, knowing the facts, put down wrong answers, would not avoid the policy.—Iowa Life Ins. Co. v. Houghton, 87 N. E. 702.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 999-1015.  
See, also, 1 Cyc. p. 247, 19 Cyc. p. 822;  
note, 4 L. R. A. (N. S.) 607; note, 7 Am.  
Rep. 128; note, 9 Am. St. Rep. 229.

### § 381. Form and requisites of express waiver.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1016-1025.  
See, also, 19 Cyc. pp. 785-789, 26 Cyc. pp.  
635, 636.

### § 383. — Oral waiver.

[a] (App. 1898)

A policy on a stock of merchandise provided that the assured should keep books, showing purchases and sales, in an iron safe; also, that no officer or agent should have power to waive any condition or provision, unless in writing attached thereto. *Held*, that the latter provision might be waived by parol by an agent having general authority to make contracts of insurance, and therefore a parol waiver of the former provision by such agent was binding on the company.—Hanover Fire Ins. Co. v. Dole, 50 N. E. 772, 20 Ind. App. 333.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1018.  
See, also, 19 Cyc. p. 785.

### § 386. — Waiver of provisions of policy as to mode of waiver.

[a] (App. 1894)

A policy provided that it should be void if the property were sold, or if the policy were assigned before loss, without the company's consent indorsed thereon; that in case of sale written notice should be given the company, and its assent thereto be indorsed on the policy; that if the policy should be canceled the company should refund a ratable proportion of the premium. *Held*, that the conditions as to the consent and notice were waived where the vendee of the property orally notified the company, which then had the policy in its possession, of the sale to him, and the company orally consented thereto, and retained the unearned premium on the policy, which had nearly five years to run.—Moffitt v. Phenix Ins. Co., 11 Ind. App. 233, 38 N. E. 835.

[b] (App. 1896)

A policy provided that no officer or agent should have power to waive any condition or provision, unless in writing attached thereto. *Held*, that this provision might be waived by parol by an agent having general authority to make contracts of insurance.—Hanover Fire Ins. Co. v. Dole, 50 N. E. 772, 20 Ind. App. 333.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1024.

### § 388. Implied waiver in general.

[a] (Sup. 1890)

The right to declare a forfeiture of a policy for the nonpayment of premiums may be waived, and the waiver may be manifested by conduct as well as by words.—Phenix Ins. Co. of Brooklyn v. Tomlinson, 25 N. E. 126, 125 Ind. 84, 9 L. R. A. 317, 21 Am. St. Rep. 203.

[b] (App. 1895)

The provisions of a contract of insurance may be waived by the conduct of the company, and, in determining whether an equitable forfeiture clause is to be deemed waived, the courts have generally applied the same liberal rule in favor of the insured as governs in the construction of the contract itself.—German Mut. Ins. Co. v. Niewedde, 39 N. E. 534, 11 Ind. App. 624.

[c] (App. 1896)

Where the insurer at no time prior to the death of insured claimed that premiums on the policy were unpaid, or claimed a forfeiture of the policy for such reason, but tacitly admitted payment to its agent by directing insured to send all further payments to the home office, it cannot, after insured's death, claim that the payments to the agent prior to the notice to make payments to the home office were unauthorized.—National Life Maturity Ins. Co. v. Whitacre, 15 Ind. App. 506, 43 N. E. 905.

[d] (App. 1900)

If the insurer, with knowledge of the facts constituting a forfeiture, continues to treat the contract as in force, and induces the insured to incur expenses and trouble while acting in that belief, the insurer is estopped to take advantage of the forfeiture.—Traders' Ins. Co. v. Cassell, 56 N. E. 259, 24 Ind. App. 238.

[e] (App. 1903)

Where a company insuring against liability for injuries to employes refused to undertake the defense of such an action against an employer because immediate notice of its commencement was not given, as required by the policy, until assured stipulated that its assumption of the defense should not be a waiver of any of its rights, the defense of such action by the company was not a waiver of the forfeiture.—London Guarantee & Accident Co. v. Siwy, 66 N. E. 481, 35 Ind. App. 340.

[f] (App. 1905)

The provision of a life insurance policy that "If for any reason the premium is not called for when due by an authorized representative of the company, it shall be the duty of the policy holder" to send same to the home office, may be waived, and, if not insisted on during the life of insured, the company cannot insist on a forfeiture because at death a few months' premiums were unpaid.—*Rutherford v. Prudential Ins. Co.*, 73 N. E. 202, 34 Ind. App. 531.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1026, 1027, 1030, 1035, 1040, 1057.

See, also, 19 Cyc. p. 789, 25 Cyc. pp. 865-872.

**§ 389. Insurance and delivery of policy without objection.**

Knowledge of or notice to officer or agent, see ante, § 377.

[a] (App. 1893)

Where the insured stated in his application, which was a part of the contract, that he applied for insurance on certain conditions, which in themselves were in direct conflict with the conditions of the policy issued under and pursuant to the application, it must be assumed that such conditions in the policy were waived by the company when it issued the policy.—*Phenix Ins. Co. of Brooklyn v. Lorenz*, 33 N. E. 444, 34 N. E. 495, 7 Ind. App. 266.

[b] (App. 1895)

Where application for insurance is orally made, and there are no questions asked concerning incumbrances, and the insured is unaware that the existence of a mortgage was fatal to his insurance, the insurer will be deemed to have waived a provision for forfeiture by reason of existing incumbrances.—*German Mut. Ins. Co. v. Niewedde*, 11 Ind. App. 624, 39 N. E. 534.

[c] (App. 1895)

The right to forfeit a policy under a condition that the policy shall be void if the property become "incumbered by a chattel mortgage" after the issue of the policy is not waived by a failure of the insurer to require an answer to a question in the application regarding pre-existing incumbrances.—*Milwaukee Mechanics' Ins. Co. v. Niewedde*, 12 Ind. App. 145, 39 N. E. 757.

[d] (App. 1895)

Whatever the rule may be as to forfeitures where fraud or misrepresentation is used to deceive or mislead the company, such rule has no application where all the facts are known to the company when it issues the policy.—*Manchester Fire Assur. Co. v. Koerner*, 13 Ind. App. 372, 40 N. E. 1110, 41 N. E. 848, 55 Am. St. Rep. 231; *North British & Mercantile Ins. Co. v. Same*, 40 N. E. 1112, 13 Ind. App. 698.

[e] (Sup. 1904)

Where a by-law of a mutual insurance association provides that all members using gas must have good regulators, and that the association is not responsible for any loss by fire if this requirement is not met, but the association issues a policy and accepts premiums thereunder, with full knowledge that the insured violates this condition, it will not be permitted to insist on a forfeiture therefor.—*Farmers' Ins. Ass'n of Madison County v. Reavis*, 163 Ind. 321, 70 N. E. 518, 71 N. E. 905.

[f] (Sup. 1904)

Where an insurance company issues a life policy containing a provision that the policy does not take effect until the first premium has been paid and does not deny the execution of the policy, the presumption is that the policy was delivered by some officer or agent of the company who represented the power of the company to waive all conditions precedent, or that the circumstances were such that as against the insured, the company was estopped to deny the validity of the policy.—*Penn Mut. Life Ins. Co. v. Norcross*, 163 Ind. 379, 72 N. E. 132.

[g] (Sup. 1904)

Where an insurance company issued a policy, and retained the premium, with knowledge that there was a chattel mortgage on the property, it thereby waived a condition in the policy that it should be void if the property insured was incumbered, and also provisions requiring the waiver to be indorsed on the policy.—*German-American Ins. Co. v. Yeagley*, 71 N. E. 807, 163 Ind. 651.

[h] (App. 1905)

Where insurer issued a policy, and retained the premium, knowing of a chattel mortgage on the property, it thereby waived a condition that the policy should be void if the property insured was so incumbered, and a provision requiring waiver to be indorsed on the policy, whether the waiver was by insurer itself, or by its agent issuing the policy.—*Fire Ass'n of Philadelphia v. Yeagley*, 72 N. E. 1035, 34 Ind. App. 387.

[i] (App. 1905)

In an action on a mutual insurance policy, it appeared that when plaintiff became a member she owned the property in fee simple; that afterward she conveyed the property to her son, retaining a life estate therein; that defendant's secretary was at once notified of the change in title, and he stated that no change in the policy was necessary; that afterward her insurance was readjusted, when the company's officers were again notified as to the condition of title to the property, and a new policy was issued containing a condition that a policy issued on property not owned by insured in fee simple would be void; that insured continued to pay assessments until the property was destroyed by fire. *Held*, that the condition as to the character of insured's title was waived, and defendant is estopped to deny liability on

the policy because of such title.—*Farmers' Mut. Fire Ins. Co. of De Kalb County v. Jackman*, 73 N. E. 730, 35 Ind. App. 1.

[J] (Sup. 1906)

Where a fire policy intended to cover property occupied by the owner, and providing that it shall be void if the property becomes unoccupied, or occupied by a tenant, is used to insure a house exclusively used by tenants, with the knowledge of the company, the provisions for forfeiture are not applicable.—*Ohio Farmers' Ins. Co. v. Vogel*, 166 Ind. 239, 76 N. E. 977, 8 L. R. A. (N. S.) 966, 117 Am. St. Rep. 382.

[K] (App. 1906)

Where, in an action on a life policy providing that the same should be void in case the insured was not in sound health at the time of delivery of the policy, evidence that, though insured was insane at the time the policy was delivered, defendant's agent, who took the application, delivered the policy and collected the premiums, received from insured's wife nearly 100 weekly payments after being informed that insured was insane and in an asylum, telling the wife, in response to her inquiry as to whether under the circumstances she should pay the premiums, that defendant company had paid many a claim "that died in the insane hospital," and that she was not responsible for what happened to insured after the policy was written up, showed a waiver of the condition.—*Metropolitan Life Ins. Co. v. Willis*, 76 N. E. 560, 37 Ind. App. 48.

[L] (Sup. 1907)

The provision of an insurance policy which is violated, to the knowledge of the insurer, at the time it takes effect, is waived.—*Glens Falls Ins. Co. v. Michael*, 167 Ind. 659, 74 N. E. 964, 79 N. E. 905, 8 L. R. A. (N. S.) 708.

Where an insurance policy is issued to life tenants who pay the premiums, it is presumed that the parties intended to effect a valid insurance contract.—*Id.*

Where an insurance policy was issued to a life tenant without objections, it is presumed that the insurer was satisfied as to the condition of the title of the property.—*Id.*

Where no written application for insurance is required by the insurer, and it asks no questions of insured, and he makes no statements, as to the condition of his title, and the policy is accepted in good faith and in ignorance of the materiality of the question of title, it will be presumed that the insurer has knowledge of the state of insured's title, and by issuing the policy with the knowledge, thus imputed, that the insured has but a life estate, the insurer waives a provision thereof declaring the policy void if the insured's interest be other than unconditional and sole ownership in fee simple.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1028-1031.  
See, also, 25 Cyc. p. 865; note, 57 Am. Rep. 514.

§ 390. Failure to assert forfeiture or to cancel or rescind policy.

Mutual benefit insurance, see post, §§ 724, 755.

[a] (App. 1891)

Where an insurance company has knowledge, prior to loss, of additional insurance contrary to the conditions of the policy, neglecting to cancel the policy because thereof is a waiver of such conditions.—*Phenix Ins. Co. of Brooklyn v. Boyer*, 1 Ind. App. 329, 27 N. E. 628; *Home Ins. Co. of New York v. Marple*, 1 Ind. App. 411, 27 N. E. 633.

[b] (App. 1896)

The record of a chattel mortgage does not charge an insurer with notice thereof, so as to render a failure to cancel a policy on the property a waiver of a condition against mortgage incumbrances.—*Milwaukee Mechanics' Ins. Co. v. Niewedde*, 12 Ind. App. 145, 39 N. E. 757.

[c] (App. 1898)

Where an insurance company fails to terminate a policy, for failure of the assured to observe a condition, on receiving knowledge of such fact, the condition will be deemed waived.—*Hanover Fire Ins. Co. v. Dole*, 50 N. E. 772, 20 Ind. App. 333.

[d] (Sup. 1907)

A provision of a policy of insurance declaring the same void in case the interest of the insured be other than unconditional and sole ownership in fee simple, in effect, renders the policy voidable, instead of absolutely void, in the contingency specified, and requires the insurer, in case the insured's title is not one in fee simple, to act promptly on discovery of that fact and notify the insured of its decision to avoid the policy, and tender or manifest its willingness to restore the unearned premium, or the provision will be deemed to have been waived by it.—*Glens Falls Ins. Co. v. Michael*, 74 N. E. 964, 79 N. E. 905, 167 Ind. 659, 8 L. R. A. (N. S.) 708.

[e] (App. 1907)

Where defendant's agent, who solicited the insurance in question, had knowledge that insured was intemperate in the use of liquor, and knew before he delivered the policy that insured had falsely stated in his application that he did not use spirituous liquors habitually, the insurer, not having offered to rescind and return the premiums, paid within a reasonable time, could not resist payment of the insurance because of insured's fraud, in which the agent participated.—*Ætna Life Ins. Co. v. Bockting*, 79 N. E. 524, 39 Ind. App. 586.

[f] (App. 1910)

Whether insured's agreement to comply with a fire insurance association's rule, providing that it would not insure barns, etc., with stoves in them, constituted a continuous warranty of compliance with the rule, or whether the rule was merely for the guidance of the association's agents, insured's violation of the rule

would not prevent recovery on the policy where the association did not rescind the contract or offer to return the assessments paid.—*Farmers' Mut. Fire Ins. Co. v. Hill*, 91 N. E. 361.

[g] (App. 1910)

Defendant issued a policy on deceased's life December 29, 1905, and insured died January 19, 1906. In March following defendant knew the facts on which it might base a rescission of the contract, and then inquired whether letters of administration had been issued. Suit on the policy was commenced in June, 1906, and on September 15th defendant answered on the theory that the contract was absolutely void, without returning or offering to return the premiums. On October 31st the property of the insured was set off to the widow, and on November 1st the money received by insurer on the policy was tendered to the widow. On March 15, 1907, insurer pleaded a tender of the premium, and paid the same into court for the use of the party entitled thereto. *Held*, that insurer's election to rescind and offer of statu quo was not made within a reasonable time, and constituted an election to waive the forfeiture.—*American Cent. Life Ins. Co. v. Rosenstein*, 92 N. E. 380.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1037, 1038.

See, also, 19 Cyc. pp. 791-793, 25 Cyc. p. 868.

§ 392. Demand, acceptance, or retention of premiums or assessments.

By mutual benefit insurance association, see post, § 755.

[a] (Sup. 1876)

In an action on a life policy, providing that, in case of nonpayment of the first annual premium when due, the policy should be absolutely forfeited, the fact that it was the custom of defendant to receive payment of premiums after due was inadmissible to control the terms of the policy or as importing an inference that in the case in question defendant received the premium after it was due, and thereby waived the forfeiture.—*Franklin Life Ins. Co. v. Sefton*, 53 Ind. 380.

Under a life policy providing that, in case the first renewal premium was not paid by a certain date, the policy should be absolutely forfeited, and having indorsed thereon "agents of the company will receive premiums when due but are not authorized to make, alter, or discharge contracts," the acceptance of a renewal premium by an agent of the company after it became due could not bind the company without ratification of the act.—*Id.*

[b] (Sup. 1890)

An insurance policy contained this clause: "In case the assured fails to pay the premium note, this policy shall cease, and remain void during the time said note remains unpaid after

its maturity, and no legal action on the part of this company to enforce payment shall be construed as reviving the policy. The payment of the premium, however, revives the policy, and makes it good for the balance of its term." The premium note not being paid at maturity, the company brought suit on it and obtained judgment, which judgment was paid and satisfied after the property had been destroyed by fire. *Held*, that the company was liable for the loss, since the acceptance of such payment revived the policy.—*Phoenix Ins. Co. of Brooklyn v. Tomlinson*, 125 Ind. 84, 25 N. E. 126, 9 L. R. A. 317, 21 Am. St. Rep. 203.

[c] (App. 1891)

An insurance company accepted payment of the premium due, after notice that the conditions of the policy had been broken by reason of the building becoming vacant. Afterwards the insured requested the company to cancel the policy and return the unearned premium, but the company refused to do so. *Held*, that it had waived the forfeiture, and was liable for a loss afterwards occurring.—*Phenix Ins. Co. of Brooklyn v. Boyer*, 1 Ind. App. 329, 27 N. E. 628.

[d] (App. 1892)

The forfeiture for nonpayment of assessments is waived if, while the member was so delinquent, the association should make an assessment against him to pay losses sustained by other members.—*Farmers' Mut. Relief Ass'n of Kosciusko County v. Koontz*, 4 Ind. App. 538, 30 N. E. 145.

[e] (App. 1894)

Acceptance of a premium by an insurance company after knowledge of a loss occurring while the premium was in default waives the forfeiture, and does not merely revive the policy as to the future.—*Continental Ins. Co. of New York v. Chew*, 11 Ind. App. 330, 38 N. E. 417, 54 Am. St. Rep. 506.

[f] (App. 1894)

A life policy provided for forfeiture on failure to pay premiums as earned. The company took judgment on an overdue premium note, and collected it by levy and sale. *Held* a waiver of the forfeiture.—*Union Cent. Life Ins. Co. v. Woods*, 11 Ind. App. 335, 37 N. E. 180, 39 N. E. 205.

[g] (App. 1897)

Forfeiture of a mutual fire policy for nonpayment of assessments is waived if the company, with knowledge of the loss, collects from the insured, and retains, the amount of the delinquent assessments.—*Marshall Farmers' Home Fire Ins. Co. v. Liggett*, 45 N. E. 1062, 16 Ind. App. 598.

[h] (App. 1897)

A forfeiture of an insurance policy, providing that on forfeiture all premium notes not then due shall be surrendered to insured, is waived by collecting, after forfeiture, by foreclosure of a mortgage given to secure the notes, a note not due at the time of the forfeiture.—

Union Cent. Life Ins. Co. v. Jones, 47 N. E. 342, 17 Ind. App. 592.

[l] (App. 1902)

A life insurance company, which accepts overdue premiums, cannot say that its agent had no authority to extend the time for a payment of premiums beyond maturity, though the policy forbids its modification, or the waiver of a forfeiture, except in writing, signed by certain officials.—Union Cent. Life Ins. Co. v. Whetzel, 65 N. E. 15, 29 Ind. App. 658.

[j] (App. 1905)

Where a company knows of a breach of condition in a policy, but receives and retains premiums thereafter, it is estopped to deny liability for a loss on account of such policy.—Farmers' Mut. Fire Ins. Co. of De Kalb County v. Jackman, 73 N. E. 730, 35 Ind. App. 1.

An instruction that, if the jury should find that defendant company had retained premiums on a fire policy in question, with knowledge of a breach of condition, there was an election to treat the contract as valid, fairly stated the law.—Id.

[k] (Sup. 1906)

Where an insurance company accepts a premium on a fire policy, which provides that it shall be void if the building now is or shall hereafter become occupied by a tenant, with knowledge that at the time of the issuance of the policy the building was occupied by a tenant, it cannot assert the invalidity of the policy for breach of that condition.—Ohio Farmers' Ins. Co. v. Vogel, 70 N. E. 977, 166 Ind. 239, 3 L. R. A. (N. S.) 966, 117 Am. St. Rep. 382.

[l] (Sup. 1907)

The retention of the premium paid for an insurance policy with full knowledge of a breach of a condition therein is an election not to insist on a forfeiture of the policy.—Glens Falls Ins. Co. v. Michael, 167 Ind. 659, 74 N. E. 964, 79 N. E. 905, 8 L. R. A. (N. S.) 708.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1041-1056, 1058-1070.

See, also, 1 Cyc. p. 243, 19 Cyc. pp. 796-801, 25 Cyc. pp. 869-871; note, 33 C. C. A. 369.

**§ 393. Consent to assignment of policy.** Consent requisite to validity of assignment, see ante, § 207.

[a] (Sup. 1889)

On a sale of insured property and an assignment of the policy to the purchaser, duly assented to by the company, a new contract of insurance arises between the company and the assignee, which is not affected by a default of the assignor before the assignment amounting to a forfeiture of the policy.—Continental Ins. Co. v. Munns, 120 Ind. 30, 22 N. E. 78, 5 L. R. A. 430.

[b] (App. 1892)

Where a policy provided that, if the property should be sold or conveyed or the policy assigned without the written consent of the company indorsed thereon, the policy should be void, a purchaser of the property was not entitled to rely on the suggestion of an agent to whom he sent the policy to procure the company's consent to the transfer that the general agents of the company would indorse the company's consent thereon.—New v. German Ins. Co. of Freeport, 31 N. E. 475, 5 Ind. App. 82.

[c] (App. 1895)

Where the agent of the insurance company with full knowledge of all the facts prepared the policy and the assignment, this constitutes a waiver of the right to insist that a portion of the policy could not be assigned.—Manchester Fire Assur. Co. v. Glenn, 40 N. E. 926, 41 N. E. 847, 13 Ind. App. 365; North British & Mercantile Ins. Co. v. Same, Id. 699, 40 N. E. 927.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1039.

See, also, 19 Cyc. pp. 795, 796.

**§ 396. Requiring, accepting, or retaining proofs of loss.**

[a] (App. 1891)

Where an insurance company's duly-authorized adjuster, after learning that the insured had procured additional insurance without consent of the company, causes him to procure duplicate bills of purchase and other data for adjusting the loss, the jury may find from these facts a waiver of the forfeiture occasioned by such additional insurance.—Home Ins. Co. of New York v. Marple, 1 Ind. App. 411, 27 N. E. 633.

[b] (Sup. 1892)

An insurance company after notifying the insured that additional proofs of loss will be required, and putting him to the expense of making them out, cannot claim a forfeiture of the policy because of the breach of a condition therein known to them before requiring such additional proofs.—Replogle v. American Ins. Co., 132 Ind. 360, 31 N. E. 947.

[c] (Sup. 1894)

The fact that plaintiff was put to expense in obtaining proof of the insured's death does not estop the insurance company from avoiding the payment, where it did not request the proofs, and informed plaintiff that it would contest payment.—Sharpe v. Commercial Travelers' Mut. Acc. Ass'n of America, 139 Ind. 92, 37 N. E. 353.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1071-1077.

See, also, 19 Cyc. p. 801, 25 Cyc. p. 872; note, 9 Am. St. Rep. 236.

**§ 397. Participating in adjustment of loss.**

[a] (App. 1892)

The constitution of a mutual fire insurance association provided that insurance in the association should be perpetual, unless a member should withdraw, which he could only do by paying his proportion of all prior losses, and notifying the secretary; and, further, that, should any member fail to pay his assessments for more than 60 days, he should forfeit his protection as a member until all dues should be paid. *Held* that if, while a member was delinquent in the payment of assessments for more than 60 days, he suffered a loss, and the association, instead of declaring his protection as a member forfeited, should adjust the loss and allow the same, this would be a waiver of the forfeiture.—*Farmers' Mut. Relief Ass'n of Kosciusko County v. Koontz*, 4 Ind. App. 538, 30 N. E. 145.

[b] (App. 1900)

A policy provided for its forfeiture in case of incumbrance without insurer's consent, and withheld from the agent issuing the policy power to waive any of its terms. Before loss, insured executed chattel mortgages on stock covered by the policy. Neither the local agent nor the company knew of the mortgages before the fire. The local agent learned of the mortgages after the fire, and told insured that the policy was voided by execution of the mortgages, and that the insurer would send an adjuster to adjust the loss. The local agent notified the company of the loss, but said nothing about the mortgages. After proceeding with the adjustment for some time, the adjuster, without being informed by insured of the existence of the incumbrances, learned of the mortgages, and denied the company's liability. *Held*, that there was not a waiver of the forfeiture condition in the policy.—*Traders' Ins. Co. v. Cassell*, 56 N. E. 259, 24 Ind. App. 238.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1078-1082.

See, also, 19 Cyc. pp. 803-805.

**§ 399. Payment of loss.**

[a] (Sup. 1904)

Where a life insurance company delivered a check to the beneficiary, which was received in full payment and in satisfaction of the policy, which was surrendered, the company was thereby estopped from denying that the beneficiary was the real party in interest when the check was executed.—*Northwestern Mut. Life Ins. Co. v. Kidder*, 70 N. E. 489, 162 Ind. 382, 66 L. R. A. 89.

[b] (App. 1905)

Where defendant insurance company executed certain drafts in final settlement of a loss on certain personal property insured by a trade-name, it was thereby estopped, in the absence of fraud, from denying that those who owned the business conducted under such name

were the real parties in interest.—*New Hampshire Fire Ins. Co. v. Wall*, 75 N. E. 668, 36 Ind. App. 238.

A settlement of the liability under a fire policy is a waiver of any warranty in the policy, in the absence of fraud.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1085.

**§ 400. Provisions of policy against forfeiture.**

[a] (Sup. 1884)

A mutual insurance policy, marked "Non-forfeitable," the premiums on which were paid by a note given for part of the premium, and "to remain a lien upon said policy until it becomes due by limitation or by the death of A. B., when the note shall be deducted from the said policy unless sooner paid. The dividends on the policy to be applied to the payment of the note," is not forfeited by nonpayment of the note.—*Franklin Life Ins. Co. v. Wallace*, 93 Ind. 7.

[b] (App. 1896)

A certificate of life insurance was indorsed, "Incontestable after one year from date, as provided in the by-laws," and the by-laws provided that "all deaths which shall occur within three years from the date of the approval of the application, \* \* \* or from date of last revival of said certificate, shall be incontestable." *Held*, that a claim for a death occurring over three years from the approval of the application, or revival of the certificate, is contestable.—*People's Mut. Ben. Soc. v. Templeton*, 44 N. E. 809, 16 Ind. App. 126.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1086.

See, also, 25 Cyc. p. 872; note, 107 Am. St. Rep. 99.

**XII. RISKS AND CAUSES OF LOSS.**

Admissibility of evidence, see post, §§ 658, 659.

Commencement, term, and duration of risk, see ante, §§ 176-178.

Instructions, see post, § 669.

Mutual benefit insurance, see post, §§ 786-788.

Pleading loss and cause thereof, see post, §§ 635, 640.

Presumptions and burden of proof, see post, § 646.

Questions for jury, see post, § 668.

Weight and sufficiency of evidence, see post, § 665.

**(A) MARINE INSURANCE.**

Extent of loss, see post, §§ 477-489.

Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent, see ante, §§ 312, 314.

Term and duration of risk, see ante, § 178.

**§ 402. Marine risks in general.**

[a] (Sup. 1854)

A stipulation in the policy provided that the company should not be liable for loss or damage in any case if the boats were towed by a steamboat. *Held*, that this applied only to a loss arising from such towing.—*Grant v. Lexington Fire, Life & Marine Ins. Co.*, 5 Ind. 23, 61 Am. Dec. 74.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1088-1090, 1093, 1103-1105.

See, also, 26 Cyc. p. 650.

**§ 404. Perils of rivers, lakes, and inland waters.**

[a] (Sup. 1879)

An insurance company issued a policy upon a wharf boat lying at the wharf of the city of E., on the Ohio river, against loss or damage by fire, etc. The loss, if any, was to be adjusted according to the following conditions, among others: "Touching the adventures and perils which the said insurance company is contented to bear and take upon itself in this voyage, they are of the seas, lakes, rivers, canals, fires, jettisons, rovers, and assailing thieves." The boat having been destroyed by ice, *held*, that this was a loss covered by the policy.—*Franklin Ins. Co. of Indianapolis v. Humphrey*, 65 Ind. 549, 32 Am. Rep. 78.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1092.

See, also, 26 Cyc. p. 653.

**§ 405. Fire.**

[a] (Sup. 1890)

Under a marine insurance policy against "any loss occasioned by fire, except when caused by explosion of boiler," and except as limited by warranties therein contained, such as "bursting of boilers, collapsing of flues, \* \* \* or the consequences of any character resulting from either of the foregoing exceptions," the insurer is liable for all losses occasioned by fire, except from explosion of boilers.—*Louisville Underwriters v. Durland*, 123 Ind. 544, 24 N. E. 221, 7 L. R. A. 390.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1094, 1105.

See, also, 26 Cyc. p. 656.

**§ 417. Wrongful acts of owners, master, or crew.**

[a] (Sup. 1879)

Where a wharf boat was insured while lying in the wharf, and described in the policy as being so situated, the fact that it was negligent to leave the boat there exposed to the dangers of floating ice by which it was finally destroyed did not constitute fraud preventing recovery on the policy, even though insured de-

sired the boat to be destroyed.—*Franklin Ins. Co. of Indianapolis v. Humphrey*, 65 Ind. 549, 32 Am. Rep. 78; *Mississippi Val. Ins. Co. v. Same*, 66 Ind. 600.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1114.

See, also, 26 Cyc. p. 661.

**(B) INSURANCE OF PROPERTY AND TITLES.**

Avoidance of policy for misrepresentation, fraud, or breach of warranty or condition, see ante, §§ 274-288.

Extent of loss, see post, §§ 498-505.

Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent, see ante, §§ 312-336.

Instructions, see post, § 669.

Proof of loss or damage, and cause thereof, see post, § 658.

**§ 418. Limitations of risk as to place.**

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1122-1125.

See, also, 19 Cyc. p. 832.

**§ 419. — Situation of property insured.**

[a] (App. 1892)

Insurance on a barn, and the "contents therein," does not cover horses, which, though stabled in the barn, were killed by lightning outside.—*Farmers' Mut. Fire Ins. Ass'n of Allen County v. Kryder*, 5 Ind. App. 430, 31 N. E. 851.

Where assured read a policy insuring his barn and the "contents therein," a representation by the agent that it covered the horses when outside the barn did not render the company liable, since the representation was on a question of law, and not of fact.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1122-1124.

See, also, 19 Cyc. p. 832.

**§ 421. Fire.**

Marine risks, see ante, § 405.

[a] (App. 1892)

The policy stipulated that it should not cover "any loss or damage by fire caused by means of an invasion, insurrection, riot," etc. Rev. St. 1881, § 1981, provides that, "if three or more persons shall do an act in a violent and tumultuous manner, they shall be deemed guilty of a riot." *Held*, that where five masked men at night forcibly break into a dwelling house, and compel the occupant to vacate under threats of personal violence, and then burn down the building, this constitutes a riot.—

Germania Fire Ins. Co. v. Deckard, 3 Ind. App. 361, 28 N. E. 868.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1126, 1133, 1134, 1136, 1140-1143.

See, also, 19 Cyc. pp. 827-829; note, 72 C. C. A. 3; note, 45 Am. Dec. 637; note, 23 Am. St. Rep. 915, 132 Am. St. Rep. 437, 133 Am. St. Rep. 1087.

**(C) GUARANTY AND INDEMNITY INSURANCE.**

Extent of loss, see post, § 513.

Notice and proof of loss, see post, § 539.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 1144.

**(D) LIFE INSURANCE.**

Avoidance of policy for misrepresentation, fraud, or breach of warranty or condition, see ante, §§ 291-300.

Extent of liability of insurer, see post, §§ 518-523.

Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent, see ante, § 341.

Instructions in action on policy, see post, § 669.

Mutual benefit insurance, see post, §§ 786-788.

Proof as to death and cause thereof, see post, §§ 659, 665.

**§ 443. Death in violation of law.**

[a] (Sup. 1884)

A life insurance policy provided that it should be forfeited if the assured should die "by reason of intemperance," or in "known violation of the laws" of the states of the United States. The assured, while drunk, committed an assault and battery on a married woman, and while so engaged was killed by her husband. *Held*, that the policy was forfeited.—*Bloom v. Franklin Life Ins. Co.*, 97 Ind. 478, 49 Am. Rep. 469.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 1149.

See, also, 25 Cyc. p. 875; note, 21 Am. Rep. 542; note, 60 Am. St. Rep. 160.

**§ 444. Suicide.**

Admissibility of evidence, see post, § 659.

Instructions, see post, § 669.

Of member of mutual benefit insurance association, see post, § 788.

Presumptions and burden of proof, see post, § 646.

Questions for jury, see post, § 668.

Sufficiency of evidence, see post, § 665.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1152-1161.

See, also, 25 Cyc. pp. 876-881; note, 16 C. C. A. 623, 28 C. C. A. 284; note, 17 L. R. A. 89, 35 L. R. A. 262; note, 59 Am. Dec. 487; note, 3 Am. Rep. 454, 19 Am. Rep. 628; note, 84 Am. St. Rep. 539.

**§ 445. — In general.**

[a] (Sup. 1886)

Where a clause in an insurance policy provides that, if the person insured shall die by his own hand, the policy shall be void, intentional and voluntary self-destruction is meant, and not death from accident or unexpected causes.—*Northwestern Mut. Life Ins. Co. v. Hazelett*, 105 Ind. 212, 4 N. E. 582, 55 Am. Rep. 192.

In an action on a policy of life insurance claimed to be forfeited by death from the assured's own hand, it is proper to refuse an instruction "that, if the act which actually resulted in the death of the assured was voluntarily performed, and the probable result of the act was such that, owing to his enfeebled condition, death was likely to ensue, then the policy would be avoided."—*Id.*

[b] (Sup. 1891)

The condition in a life insurance policy that it shall be void if the insured die by his own hand has no application where the insured killed himself by accidentally taking an overdose of laudanum.—*Michigan Mut. Life Ins. Co. v. Naugle*, 130 Ind. 79, 29 N. E. 393.

[c] (App. 1896)

In an action on a life policy, making "self-destruction by the insured, whether sane or insane," an avoidance thereof, it is error to instruct that death from poison self-administered would not avoid the policy unless it was shown that it was "willfully and deliberately" taken by the insured with intent to commit suicide.—*Union Cent. Life Ins. Co. v. Hollowell*, 14 Ind. App. 611, 43 N. E. 277.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1152-1158.

See, also, 25 Cyc. pp. 876-881.

**§ 446. — Effect of insanity.**

[a] (Sup. 1891)

The condition in a life insurance policy that it shall be void if the insured die by his own hand has no application, where the insured killed himself by intentionally taking an overdose of laudanum, if at the time he was of unsound mind and incapable of judging the moral consequences of the act.—*Michigan Mut. Life Ins. Co. v. Naugle*, 130 Ind. 79, 29 N. E. 393.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1159-1161.

See, also, 25 Cyc. p. 787; note, 35 L. R. A. 258.

**§ 447. Proximate cause of death.**

Accident insurance, see post, § 406.  
 Questions for jury, see post, § 608.  
 Verdict and findings, see post, § 670.  
 Weight and sufficiency of evidence, see post, § 665.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 1151.  
 See, also, 25 Cyc. p. 876; note, 17 L. R. A. 753; note, 36 Am. St. Rep. 832.

**(E) ACCIDENT AND HEALTH INSURANCE.**

Extent of liability of insurer, see post, §§ 524-532.  
 Mutual benefit insurance, see post, §§ 786-788, 815.  
 Notice and proof of loss, see post, § 539.  
 Proof as to injury and cause thereof, see post, §§ 659, 665.  
 Questions for jury, see post, § 668.  
 Verdict and findings in action on benefit of mutual benefit certificate, see post, § 827.  
 Weight and sufficiency of evidence, see post, § 665.

**§ 449. What constitutes accident in general.****[a] (Sup. 1897)**

An involuntary death by drowning is a death by accident.—*Peele v. Provident Fund Soc.*, 44 N. E. 661, 46 N. E. 990, 147 Ind. 543.

**[b] (App. 1908)**

The word "accident," in accident policies, means an event which takes place without one's foresight or expectation. A result, though unexpected, is not an accident; the means or cause must be accidental. Death resulting from voluntary physical exertions or from intentional acts of insured is not accidental, nor is disease or death caused by the vicissitudes of climate or atmosphere the result of an accident; but where, in the act which precedes an injury, something unforeseen or unusual occurs which produces the injury, the injury results through accident.—*Schmid v. Indiana Travelers' Acc. Ass'n*, 42 Ind. App. 483, 85 N. E. 1032.

**[c] (App. 1908)**

An accident within a policy of accident insurance is an event which takes place without one's foresight or expectation, and which proceeds from an unknown cause, or an unusual effect of a known cause not within the expectation of the person injured.—*Phoenix Accident & Sick Ben. Ass'n v. Stiver*, 42 Ind. App. 636, 84 N. E. 772.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 1162.  
 See, also, 1 Cyc. p. 248; note, 30 L. R. A. 206; note, 54 Am. Rep. 302.

**§ 451. Risks and exceptions in policy in general.****[a] (Sup. 1894)**

Where a policy insures the holder against accidental injuries received within the term, "subject always to the conditions indorsed," the fact that one of these conditions states that this covers only the hazard of travel on the public conveyance of a common carrier, shows no ambiguity or conflict between the general insuring clause and the limiting condition, such as to require its interpretation in favor of the assured to cover risks other than those of a passenger.—*Fidelity & Casualty Co. v. Teter*, 136 Ind. 672, 36 N. E. 283.

**[b] (App. 1895)**

In an action on an accident policy providing that the company should not be liable if the accident happened while insured was "upon a railroad bridge, trestle, or roadbed (railway officers and employes, while engaged in their prescribed duties as such, excepted)," where the undisputed evidence shows that insured was killed while walking on the roadbed of a railroad company, of which he was not an officer or employé, plaintiff cannot recover.—*Pacific Mut. Life Ins. Co. of California v. Howell*, 13 Ind. App. 519, 41 N. E. 968.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1171, 1172.

See, also, 1 Cyc. pp. 257-269; note, 1 L. R. A. (N. S.) 422, 5 L. R. A. (N. S.) 926, 932.

**§ 452. Risks of travel, railroads, and other conveyances.****[a] (Sup. 1894)**

Where a policy plainly limits the risk covered to that of a passenger on a common carrier's public conveyance, and there is no mistake or fraud, representations of the general agent issuing the policy that it will cover as well all accidents happening to insured while caring for and selling horses which he is taking by railroad to market transgress the agent's apparent authority, and do not bind the company.—*Fidelity & Casualty Co. v. Teter*, 136 Ind. 672, 36 N. E. 283.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1164, 1173, 1174.

See, also, 1 Cyc. pp. 255, 256, 265, 266, 268.

**§ 455. External, violent, and accidental means of injury.**

Death by suicide as accident, see post, § 465.  
 Pleading, see post, § 635.

**[a] (Sup. 1905)**

An accident policy, insuring "against loss of business time \* \* \* resulting from bodily injuries \* \* \* through external, violent, and accidental means," covered loss of business time

by disease proximately caused by a bodily injury occurring through external, violent, and accidental means.—*Ætna Life Ins. Co. v. Fitzgerald*, 75 N. E. 262, 165 Ind. 317, 1 L. R. A. (N. S.) 422, 112 Am. St. Rep. 232.

[b] (App. 1909)

An injury occurring as the direct result of intentional acts is not produced by accidental means, within an accident policy, providing for liability for injuries sustained by accidental means, but an injury results from accidental means when it is produced by something unforeseen, unexpected, or unusual in the act preceding it.—*Schmid v. Indiana Travelers' Acc. Ass'n*, 42 Ind. App. 483, 85 N. E. 1032.

A person may do certain acts; the result of which may produce unforeseen consequences, and may produce what is commonly called accidental death, but when the means are exactly what he intended to use and used, the means are not accidental within an accident policy, providing for liability for death caused by accidental means.—*Id.*

An accident policy which indemnifies only for injuries arising from physical bodily injury through external, violent, and accidental means is not a contract of indemnity against injury effected by all means, but embraces only cases where the elements of force and accident concur in effecting an injury.—*Id.*

Where insured, in an accident policy indemnifying only for injury or death arising from physical bodily injury through external, violent, and accidental means, died as a result of physical exertions in climbing steps at a hotel carrying heavy satchels, because of the rarified condition of the atmosphere, he died from doing what he intended to do, though the result was not anticipated, and his death was not the result of accidental means.—*Id.*

[c] (App. 1908)

Where insured was stabbed by an insane person while insured was on a public highway on his way from a neighbor's premises to his own home, which stabbing was without provocation, wholly unexpected and unforeseen by deceased, and resulted in his death, it constituted an accident within the terms of a policy insuring deceased against death from injuries resulting solely and exclusively from external violent and accidental means.—*Phoenix Accident & Sick Ben. Ass'n v. Stiver*, 42 Ind. App. 636, 84 N. E. 772.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1166-1169.

See, also, 1 Cyc. p. 248.

**§ 461. Voluntary or unnecessary exposure to danger.**

Mutual benefit insurance, see post, § 815.

Verdict and findings, see post, § 670.

[a] (App. 1897)

An answer in an action on an accident policy to recover for the death of one who was drowned, which alleges that deceased, at the time of his death, was seining in a river in which there were sink holes, that he could not swim, and that he stepped into one of such holes and was caught in an eddy, but does not allege that deceased knew of the dangers and voluntarily exposed himself thereto, does not bring the case within a clause in the policy excepting the company from liability for injuries resulting from "voluntary exposure to unnecessary dangers or perilous venture."—*Conboy v. Railway Officials' Employés' Acc. Ass'n* (Ind. App.) 46 N. E. 363, 17 Ind. App. 62, 60 Am. St. Rep. 154.

[b] (App. 1900)

Though one insured under a policy declaring that it should not cover injuries received from a voluntary exposure to unnecessary danger was clearly guilty of negligence at the time of his injury, yet, where the jury found that he had no knowledge of the danger, such injury was not caused from a voluntary exposure, within such provision.—*Commercial Travelers' Mut. Acc. Ass'n v. Springsteen*, 55 N. E. 973, 23 Ind. App. 657.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1180, 1181.

See, also, 1 Cyc. pp. 258-261; note, 40 L. R. A. 432, 5 L. R. A. (N. S.) 657.

**§ 462. Violation of law.**

[a] (Sup. 1896)

An insurance company will not be absolved from liability under a clause in an accident policy providing that the policy should not cover death while insured was engaged in any unlawful act, unless the natural and reasonable consequence of violating the law was to increase the risk.—*Conboy v. Railway Officials' & Employés' Acc. Ass'n* (App.) 43 N. E. 1017.

[b] (App. 1897)

A policy excepting the company from liability if death results from an unlawful or vicious act is not avoided, though the death took place while deceased was committing such act, if it did not increase the risk.—*Conboy v. Railway Officials' Employés' Acc. Ass'n* (Ind. App.) 46 N. E. 363, 17 Ind. App. 62, 60 Am. St. Rep. 154.

In an action on an accident policy excepting the company from liability for death resulting from any "unlawful or vicious act," where the complaint alleged that deceased was drowned in a river, an answer stating that the death took place in Texas, while the insured was seining in a river, and setting up a statute of Texas making it unlawful to seine in any waters above tide water which do not belong to the person seining, but not stating that the

waters in which deceased was seining were "above tide water," is demurrable.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 1182.

See, also, 1 Cyc. p. 266.

**§ 464. Intentional injuries.**

Weight and sufficiency of evidence, see post, § 665.

[a] (App. 1901)

One may become so intoxicated as to be incapable of having an intention, so as to authorize a party injured by such person while in such intoxicated condition to recover on an accident policy declaring against a recovery thereon where the injuries were inflicted intentionally.—*Northwestern Benev. Soc. v. Dudley*, 61 N. E. 207, 27 Ind. App. 327.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 1184.

See, also, 1 Cyc. pp. 257, 258.

**§ 465. Suicide or self-inflicted injuries.**

[a] (App. 1907)

Death by suicide while insane is an accident within the meaning of a policy of insurance.—*Hutchens v. Covert*, 39 Ind. App. 382, 78 N. E. 1061.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 1185.

See, also, 1 Cyc. p. 265.

**§ 466. Proximate cause of injury or death.**

Questions for jury, see post, § 668.

[a] (Sup. 1905)

The causes referred to in an accident policy limiting recovery to "bodily injuries effected through external, violent, and purely accidental causes—such injuries as shall, solely and independently of all other causes, necessarily result in death," are proximate causes.—*Continental Casualty Co. v. Lloyd*, 73 N. E. 824, 165 Ind. 52.

In an action on a policy of accident insurance, the jury had the right to conclude that decedent's death resulted from a fall, though death might not have resulted except for an artery impaired by a tumor, since the jury might conclude that the tumor was at most a remote, and not a proximate efficient, cause of the death.—Id.

[b] (Sup. 1905)

Plaintiff placed his hand on edge, with the thumb next to his head, in order to rest easier at night, and while asleep in such position moved so that his hand, with his head thereon as before, rested on the edge of the bed rail, in which posture he continued for several hours, when he awoke, finding his hand wholly numb, with a black mark thereon where it rested on the rail. Inflammation of the periosteum of the metacarpal bones resulted, necessitating a sur-

gical operation and causing a protracted illness. Held that, in the absence of evidence that the inflammation was due to any other cause than the long-continued force exerted by the weight of plaintiff's head on his hand, such cause was an efficient proximate cause of the injury, within an accident policy insuring against loss of business time from bodily injuries effected through external, violent, and accidental means.—*Ætna Life Ins. Co. v. Fitzgerald*, 75 N. E. 262, 165 Ind. 317, 1 L. R. A. (N. S.) 422, 112 Am. St. Rep. 232.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1178, 1186.

See, also, 1 Cyc. p. 273; note, 36 Am. St. Rep. 352.

**§ 467. Limitations as to time of death or disability caused by accident.**

[a] (App. 1904)

In an accident policy, agreeing to pay a certain indemnity for the immediate, continuous, and total loss of time necessarily resulting from injuries, the word "immediate" will be construed as applying to causation.—*Pacific Mut. Life Ins. Co. v. Branham*, 70 N. E. 174, 34 Ind. App. 243.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 1187.

See, also, 1 Cyc. p. 272.

**XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.**

Admissibility of evidence, see post, § 661.

Benefits under mutual benefit insurance, see post, § 791.

Construction of policy as to amount of insurance, see ante, §§ 170, 171.

Instructions, see post, § 669.

On reinsurance, see post, § 684.

Verdict and findings, see post, § 670.

**(A) MARINE INSURANCE.**

Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent, see ante, §§ 312, 314.

Risks and causes of loss, see ante, §§ 402–417.

**§ 477. General average contribution.**

Verdict and findings, see post, § 670.

[a] (Sup. 1861)

There can be no recovery against the insurer, under the liability for general average contribution, where the losses or expenditures are not subjects of general average.—*Toledo Fire & Marine Ins. Co. v. Speares*, 16 Ind. 52.

In a suit to recover of an insurance company a sum which the insured had been compelled to pay for goods carried on deck, as his share of a general average, it was held that

the defendants were liable without first having been notified of a local custom subjecting goods to carried to general average.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1248-1249.

See, also, 26 Cyc. p. 671.

**§ 481. Duties of owners, master, or crew after loss.**

[a] (Sup. 1858)

A policy insuring property on a flatboat stipulated that, in case of disaster, the assured should not sell the property except at the port of destination without express authority from the insurer, but should forward it, if recoverable, to the port of destination without unnecessary delay. *Held*, that it was the duty of the master when the boat became disabled to forward the cargo, unless he had express authority from the insurer to do otherwise, in the earliest, cheapest, and most convenient mode.—*Indianapolis Ins. Co. v. Mason*, 11 Ind. 171.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1250-1261.

**§ 487. Expenditures.**

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1254-1256.

See, also, 26 Cyc. p. 684.

**§ 488. — In general.**

[a] (Sup. 1858)

Underwriters, not liable for damage to a memorandum article, are yet liable for expenses for its preservation, etc.—*Indianapolis Ins. Co. v. Mason*, 11 Ind. 171.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1254, 1256.

See, also, 26 Cyc. p. 684

**§ 489. — Under sue and labor clause of policy.**

[a] (Sup. 1858)

A memorandum article (hay, 20 per cent.) was insured on a flatboat. By a peril of the river it was damaged less than 20 per cent., but, the boat being disabled, was transhipped at an extra freight; this being for the benefit of all concerned, considering the nature of the cargo insured. *Held*, that the underwriters were not liable for any damage to the hay, but that, under a clause making it the duty of the assured, in case of misfortune, to use all reasonable means for the preservation, etc., to which the underwriters agree to contribute, they were liable for the extra freight and expenses.—*Indianapolis Ins. Co. v. Mason*, 11 Ind. 171.

**FOR CASES FROM OTHER STATES.**

SEE 28 CENT. DIG. Insurance, § 1255.

See, also, 26 Cyc. pp. 683, 684.

**(B) INSURANCE OF PROPERTY AND TITLES.**

Avoidance of policy for misrepresentation, fraud, or breach of warranty or condition, see ante, §§ 274-288.

Construction of policy as to property or title covered, see ante, §§ 161-165.

Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent, see ante, §§ 312-336.

**§ 498. Value of property destroyed.**

Proof of value, see post, § 660.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1274-1276.

See, also, 19 Cyc. pp. 835-838.

**§ 499. — In general.**

[a] (App. 1894)

Where a policy of insurance provides for \$450 of insurance on the house, and \$150 on the contents, the amount as to each item is separable, and in no event can there be a recovery on account of the loss of the personalty of more than the amount of insurance distributed to it in the policy.—*Continental Ins. Co. v. Chew*, 38 N. E. 417, 11 Ind. App. 330, 54 Am. St. Rep. 506.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 1214.

See, also, 19 Cyc. pp. 835-838.

**§ 502. Amount of damage to property.**

[a] (Sup. 1880)

In an action on a policy of insurance, obtained by the mortgagee of the insured property for the benefit of the mortgagor under an agreement that in case of loss any sum paid should be credited on the debt, it is no defense either to allege that the land was ample security for the debt after the buildings were destroyed, or that such buildings had been repaired and rebuilt by the mortgagor so that they were as valuable as before the fire.—*Ætna Ins. Co. of Hartford, Conn., v. Baker*, 71 Ind. 102.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1278, 1279.

**§ 504. Effect of other insurance.**

[a] (Sup. 1891)

A policy of insurance for \$1,500 on different pieces of property gave an itemized statement of the pieces, with a sum of money following each item, amounting in all to \$90,000.

and declared that the company only insured one-sixtieth part of each of said sums, and that it was only liable for such proportion of the loss as the amount insured thereby bore to the whole amount of insurance. The property was damaged by fire to the amount of \$51,000, the total insurance being \$60,000. *Held*, that the company issuing said policy was liable for one-fortieth of the loss.—*Indiana Ins. Co. v. Hoffman*, 128 Ind. 250, 27 N. E. 561; *Citizens' Ins. Co. v. Same*, 128 Ind. 370, 27 N. E. 745.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1285-1290.

See, also, 19 Cyc. pp. 840-842; note, 15 L. R. A. 127, 26 L. R. A. 107.

### § 505. Duties of insured after loss.

[a] (App. 1896)

In an action on an insurance policy providing that the best endeavor of the insured shall be used in protecting the property from damage after the fire, and, in case of failure to do so, the company shall not be liable for damage caused by such failure, an answer alleging that the property became wet from water thrown on it to extinguish the fire, and that plaintiff used no endeavor to dry it, but suffered it to remain in a wet condition, and that, if it had been properly cared for, the damage would not have exceeded \$100, and admitting a damage to that extent, presented a good defense to an amount claimed in excess to that sum.—*Sisk v. Citizens' Ins. Co.*, 45 N. E. 804, 16 Ind. App. 565.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1291, 1292.

See, also, 19 Cyc. p. 843.

### (C) GUARANTY AND INDEMNITY INSURANCE.

Notice and proof of loss, see post, § 539.

### § 513. Expenditures.

[a] (App. 1902)

Where an employer's liability insurance policy provided that notice of any accident should be "immediately" given by the employer to the insurer, and that, if the accident was sufficiently serious to necessitate "immediate" medical assistance, such assistance might be rendered at the cost of the insurer, the insurer was liable for medical attention rendered within a reasonable time after the accident; such time in no event extending beyond the period within which the notice of the accident was or should have been forwarded, and such further interval as might be necessary to enable the insurer to act in the matter.—*Employers' Liability Assur. Corp. v. Light, Heat & Power Co.*, 63 N. E. 54, 28 Ind. App. 437.

The liability of the company for medical services could in no case extend to and include

living expenses of the injured employé during his sickness.—*Id.*

### (D) LIFE INSURANCE.

Avoidance of policy for misrepresentation, fraud, or breach of warranty or condition, see ante, §§ 291-300.

Classification of risk affecting amount payable under policy, see post, § 531.

Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent, see ante, § 341.

Liability on death of insured under accident insurance policy, see post, § 529.

### § 518. Limitation of liability to amount of assessment.

[a] (App. 1893)

In an action against a mutual life insurance company on a death claim for \$3,000, testimony by its secretary that the assessment levied to meet plaintiff's claim produced only \$600 does not preclude a recovery for a larger sum, where the circulars issued by the company and the statement of its officers show that it had a large membership and reserve fund at or about the time plaintiff's claim matured.—*Wabash Val. Protective Union of Crawfordsville v. James*, 8 Ind. App. 449, 35 N. E. 919.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1304.

### § 523. Deductions and offsets.

Necessity of pleading, see PLEADING, § 139.

[a] (App. 1894)

A husband insured his life for the benefit of his wife, and thereafter procured a loan from the insurance company, the wife signing the note given therefor as his surety. The policy was at that time forfeited for nonpayment of premiums, but such premiums were paid out of the loan, and the forfeiture was waived. The insurance was payable to the wife upon the husband's death, "the balance of the year's premium, if any, and all other indebtedness, being first deducted." *Held*, that the loan should not be deducted from the amount of the insurance upon the death of insured.—*Union Cent. Life Ins. Co. v. Woods*, 11 Ind. App. 335, 37 N. E. 180, 39 N. E. 205.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1307, 1308.

See, also, 25 Cyc. p. 883.

### (E) ACCIDENT AND HEALTH INSURANCE.

### § 524. Total disability.

[a] (Sup. 1867)

In an action upon a policy of insurance, providing compensation in case of an accident

occurring to the assured "not fatal, but which absolutely and totally disables him from prosecuting his usual employment," a hernia which did not so incapacitate him, if wearing a truss, was not such a disability as would entitle him to recover.—*Potter v. Accident Ins. Co. of Columbus*, 29 Ind. 210.

[b] (App. 1904)

An injury to an insured, which prevents him from doing substantially all of the necessary and material things in his occupation requiring his own exertions in substantially his customary and usual manner, constitutes a total disability within the meaning of an insurance policy.—*Pacific Mut. Life Ins. Co. v. Branham*, 70 N. E. 174, 34 Ind. App. 243.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1310.

See, also, 1 Cyc. pp. 269–271; note, 38 L. R. A. 529.

**§ 528. Immediate, continuance or permanent disability.**

Instructions, see post, § 669.

[a] (App. 1904)

An accident policy insured against injuries resulting in immediate, continuous, and total loss of business time. Insured was injured, and some days thereafter underwent an operation which confined him to bed for four weeks, at the end of which time he was able to go to his office and perform a portion of his labor, which he did for nearly a month, when he again discontinued labor, and was treated for his injuries for over two months. He was then able to move about on crutches, with his injured limb in a plaster cast, but at the end of the month was compelled to remove this and take treatment for two months and a half, and after another period, during which he was able to use crutches and a cane, he took treatment steadily for several months, and was again operated upon. *Held*, that his disability was continuous, within the meaning of the policy.—*Pacific Mut. Life Ins. Co. v. Branham*, 70 N. E. 174, 34 Ind. App. 243.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1314.

See, also, 1 Cyc. p. 272.

**§ 529. Death from accident.**

[a] (App. 1896)

Where an accident policy prepared in blank for insuring in a principal sum for death, and in a weekly indemnity, not exceeding 52 weeks, for total disability, and with separate provisions for payment in each case, was filled out and executed only for the weekly indemnity, and this made payable to the insured, and the insured died within 24 hours after an accident, his personal representative was not entitled to recover indemnity for the balance of the period.—*Rosenberry v. Fidelity & Casualty Co. of New York*, 14 Ind. App. 625, 43 N. E. 317.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1315.

See, also, 1 Cyc. p. 303.

**§ 531. Classification of risk.**

[a] (Sup. 1893)

It is competent for a life and accident policy to provide that, if the insured shall be injured in any occupation rated by the company as more hazardous than that given by the insured, his insurance shall only be as much as the premium paid will purchase at the rate fixed in the company's tables for such increased hazard; and, if the policy does not name the increased hazard, it is for the jury to determine whether a change in the risk has taken place, and the degree the risk has been increased.—*Standard Life & Acc. Ins. Co. v. Martin*, 133 Ind. 376, 33 N. E. 105.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1318.

See, also, 1 Cyc. pp. 254, 256.

**§ 532. Deductions and offsets.**

[a] (App. 1895)

Under an accident policy insuring a person "against the loss of the money value of his time, not exceeding \$25 per week, nor for more than 32 consecutive weeks," a recovery may be had for time actually lost, within the limits prescribed, though the employer of the insured continued his pay during his disability.—*Globe Acc. Ins. Co. v. Helwig*, 13 Ind. App. 539, 41 N. E. 976, 55 Am. St. Rep. 247.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1319.

**XIV. NOTICE AND PROOF OF LOSS.**

Admissibility of evidence, see post, § 662.

As condition precedent to action on policy, see post, § 612.

Instructions, see post, § 669.

Mutual benefit insurance, see post, § 789.

Pleading nonperformance of conditions, see post, § 640.

Pleading performance of conditions, see post, § 634.

Questions for jury, see post, § 668.

Requiring, accepting, or retaining proofs of loss as ground of estoppel or waiver, see ante, § 396.

Verdict and findings, see post, § 670.

Weight and sufficiency of evidence, see post, § 665.

**§ 533. Effect of requirements of policy in general.**

[a] (Sup. 1897)

Where the liability under an insurance policy has accrued, such conditions as relate to the giving of notice, making proof of loss, etc., which are conditions subsequent to the capital fact of liability, in general have been interpreted as requiring what is reasonably pos-

sible on the part of the beneficiary.—*Peele v. Provident Fund Soc.*, 44 N. E. 661, 46 N. E. 990, 147 Ind. 543.

[b] (*App.* 1903)

Forfeiture of indemnity insurance by failure to give "immediate notice" of a claim under a policy cannot be relieved against in equity.—*London Guarantee & Accident Co. v. Siwy*, 66 N. E. 481, 35 Ind. App. 340.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1320.

See, also, 1 Cyc. pp. 274-276, 15 Cyc. p. 1038, 19 Cyc. p. 843, 25 Cyc. p. 883.

### § 535. Necessity of notice.

[a] (*App.* 1904)

Where a policy of burglary insurance provided that the assured, on the occurrence of a burglary, should give immediate notice to the company's agent, or to the home office, and police authorities, and that a claim for loss should be forthwith made in writing, etc., such provisions were conditions precedent, and a compliance therewith was essential to insured's right to recover on the policy, unless waived.—*Fidelity & Casualty Co. of New York v. Sanders*, 70 N. E. 167, 32 Ind. App. 448.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1322.

See, also, 1 Cyc. p. 274, 19 Cyc. pp. 843, 890, 25 Cyc. pp. 883, 1502, 26 Cyc. p. 708.

### § 536. Necessity of statement or proof of loss.

[a] (*Sup.* 1864)

Where, in a policy of insurance on a vessel, there is a stipulation "that the master and crew, so soon as practicable after the disaster and the property is secured or recovered, shall repair to the nearest convenient notary, and there make a protest, setting forth the cause of such disaster, as near as practicable, and the extent of the damage," such stipulation is a binding condition upon the insured, and must be performed to entitle him to recover.—*Peoria Marine & Fire Ins. Co. v. Walser*, 22 Ind. 73.

[b] (*Sup.* 1886)

There can be no recovery upon an insurance policy unless its conditions as to proof of loss are complied with or waived.—*Indiana Ins. Co. v. Capehart*, 108 Ind. 270, 8 N. E. 285.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1323.

See, also, 19 Cyc. pp. 843, 890, 25 Cyc. pp. 883, 1520, 26 Cyc. p. 708.

### § 537. Persons who may give notice or make proof.

[a] (*Sup.* 1892)

Where a policy of fire insurance provided that the assured should give written notice of loss, and that payment would be made on receipt of proof of loss, but did not state in what

manner the proofs should be made, nor by or to whom the notice should be given, it was sufficient that the company's local agent immediately notified it of the loss, and that it thereupon sent an adjuster, who investigated the loss, and made an estimate of the same.—*Phoenix Ins. Co. of Brooklyn v. Perry*, 131 Ind. 572, 30 N. E. 637.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1324-1326.

See, also, 1 Cyc. pp. 275, 277, 19 Cyc. p. 844, 25 Cyc. p. 884.

### § 538. Persons to whom notice or proof may be given or made.

[a] (*Sup.* 1886)

Evidence of a tender by the assured of his proofs of loss to the agent of a foreign insurance company, who countersigned and issued the policy, and who, so far as appears, was the only officer or agent of such company in the state, and the unexplained refusal of the agent to accept such proofs without objection, is sufficient, upon demurrer to the evidence, to show a compliance with the terms of the policy requiring notice and proof of loss to be given to the company.—*North British & Mercantile Ins. Co. v. Crutchfield*, 108 Ind. 518, 9 N. E. 458.

[b] (*App.* 1896)

An insurance agent authorized to make contracts of insurance has authority to receive proofs of loss.—*Germania Fire Ins. Co. v. Stewart*, 42 N. E. 286, 13 Ind. App. 627.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1327.

See, also, 1 Cyc. p. 277, 19 Cyc. p. 845, 25 Cyc. p. 884.

### § 539. Time for notice and proof.

Questions for jury, see post, § 668.

Verdict and findings, see post, § 670.

[a] (*Sup.* 1864)

Neither the want of knowledge of the master and crew that the vessel was insured, nor the casual remark of the agent of the insurance company, before the policy was issued, that if the owner insured he would send him (the master) word, which he failed to do, will excuse the performance of a stipulation in a marine policy requiring a protest to be made on the occasion of a loss.—*Peoria Marine & Fire Ins. Co. v. Walser*, 22 Ind. 73.

[b] (*Sup.* 1867)

A policy on the life of A. stipulated for payment to B. 90 days after notice of the death of A., given "as soon thereafter as possible" at the company's office in C. A. died of a gunshot wound at a place so near C. that the notice might have been given in one day, but the policy being in the trunk of A. at C. and unseen by B., B. did not give notice till eight days afterwards, when he received the

blank affidavit, and filled out and returned it in the form and as soon as he had been instructed. *Held*, that the notice was sufficient.—*Provident Life Ins. & Inv. Co. v. Baum*, 29 Ind. 236.

[c] (Sup. 1873)

An accident insurance policy provided that "in case of death or personal injury immediate notice must be given to the company." *Held*, that the word "immediate" should not be literally construed, but that notice must be given within a reasonable time, according to the circumstances of the particular case, and that a notice given six days after the alleged injury, which happened in the city where the policy was due, and where the company had a resident agent, came too late; no excuse being shown for the delay.—*Railway Pass. Assur. Co. of Hartford v. Burwell*, 44 Ind. 460.

[d] (Sup. 1887)

In an action on a fire policy, an instruction that the provision of the policy requiring immediate notice of loss thereunder was void, that if plaintiff, taking into consideration all the circumstances, gave notice within a reasonable time, the provisions of the policy in that regard were complied with, and that it was a question of fact for the jury to determine under all the circumstances, though incomplete, is not erroneous, as Rev. St. 1881, § 3770, prohibits the insertion in a policy of a provision requiring notice of loss to be given forthwith, or within less than five days, and construed in connection with the law, the condition in the policy requiring immediate notice must be held to mean that the insured shall use reasonable diligence in giving notice of the loss.—*Insurance Co. of North America v. Brim*, 12 N. E. 315, 111 Ind. 281.

[e] (Sup. 1889)

An unexplained delay of 50 days in giving notice of loss is unreasonable, under a policy issued by a foreign insurance company requiring notice to be given forthwith, though such requirement is invalid as to such companies, under Rev. St. 1881, § 3770.—*Pickel v. Phenix Ins. Co.*, 119 Ind. 291, 21 N. E. 898.

[f] (Sup. 1890)

The requirement of an insurance policy that particular proof of loss shall be made under oath as soon as possible imposed on the insured the duty of making the proof within a reasonable time, and without unnecessary delay.—*Baker v. German Ins. Co.*, 24 N. E. 1041, 124 Ind. 490.

An unexplained delay from August 24th to December 12th in furnishing proofs of loss under a policy of insurance requiring proof to be furnished as soon as possible is unreasonable, and is not a compliance with the condition of the policy.—*Id.*

[g] (App. 1892)

Under Rev. St. 1881, § 3770, which makes conditions inserted in policies issued by for-

eign insurance companies, requiring notice of loss to be given forthwith or within less than 5 days, null and void, the insured must use reasonable diligence in giving notice of loss; and 15 days was a reasonable time within which to give the notice.—*Germania Fire Ins. Co. v. Deckard*, 3 Ind. App. 361, 28 N. E. 868.

[h] (App. 1894)

Under Rev. St. 1894, § 4923 (Rev. St. 1881, § 370), insurance companies will not be permitted to insert in their policies any condition requiring the insured to give notice forthwith or within a period of less than five days of the loss of the property, and any such condition is void, but, if such a condition is nevertheless inserted, the most that can be required by the insurer of the insured is that he shall give notice of the loss within a reasonable time.—*Phenix Ins. Co. v. Rogers*, 38 N. E. 865, 11 Ind. App. 72.

[i] (App. 1894)

Under Rev. St. 1894, § 4923, a condition in an insurance policy requiring immediate notice of loss is void, but notice must be given within a reasonable time.—*Germania Fire Ins. Co. v. Columbia Encaustic Tile Co.*, 39 N. E. 304, 11 Ind. App. 385.

[j] (Sup. 1896)

In an action on a life and accident policy which required, under penalty of forfeiture, notice of accidental injury or death to be given within 10 days, with "full particulars of the accident and injury," it appeared that the insured was drowned; that his wife, the beneficiary, did and could not know until the finding of a coroner's jury, 11 days after his death, that he had died of accident; that, within 5 days afterwards, she gave the required notice; and that the company admitted that he was accidentally drowned. *Held*, that the notice was sufficient. *McCabe, J.*, dissenting.—*Peele v. Provident Fund. Soc.*, 44 N. E. 661, 46 N. E. 990, 147 Ind. 543.

[k] (App. 1902)

Where policies insuring employers against liability to their employes for accidental injuries provide for immediate notice of any such accident to the insurance company, the requirement is of the essence of the contract, and not merely a notice intended to bring home to the company knowledge of a loss, as in fire and life insurance.—*Employers' Liability Assur. Corp. v. Light, Heat & Power Co.*, 63 N. E. 54, 28 Ind. App. 437.

[l] (App. 1903)

Where an employer failed to notify his insurer of an action by an employe for injuries until issue had been joined, and the cause noted for trial, more than three months after the action was commenced, he did not comply with the terms of the policy, requiring immediate notice.—*London Guarantee & Accident Co. v. Siwy*, 66 N. E. 481, 35 Ind. App. 340.

Where an employer's liability policy provides that assured shall give immediate notice of any claim on account of an accident to an employé, such notice is a condition precedent to the insurer's liability, and a failure to give it immediately works a forfeiture of the insurance.—*Id.*

A condition in an indemnity policy that "immediate notice" of any claim shall be given the indemnity company by assured means notice within a reasonable time.—*Id.*

[m] (App. 1904)

Under Burns' Rev. St. 1901, § 4923, relating to foreign insurance companies doing business in this state, prohibiting such company from inserting a condition in its policy that the insured shall give notice of loss forthwith or within a period of time less than five days, provisions in a burglary insurance policy that the insured shall give immediate notice of the burglary and forthwith furnish proof of loss are invalid, and the most that can be required is that the insured shall use reasonable diligence in giving the notice and furnishing proof of loss.—*Fidelity & Casualty Co. of New York v. Sanders*, 70 N. E. 167, 32 Ind. App. 448.

Where a foreign insurance company inserted a provision in a burglary insurance policy requiring notice of loss to be given forthwith, in violation of Burns' Rev. St. 1901, § 4923, the insured was required to give notice and furnish proofs of loss within a reasonable time after the burglary.—*Id.*

[n] (App. 1904)

Where an insured under an accident policy was injured on March 8th and sent notice on March 30th, the notice was a sufficient compliance with a provision of the policy requiring "immediate notice of any accident," especially where the insured did not at first think his injury was serious.—*Pacific Mut. Life Ins. Co. v. Branham*, 34 Ind. App. 243, 70 N. E. 174.

[o] (Sup. 1905)

An accident policy requiring immediate notice of injury is complied with by the giving of notice within a reasonable time.—*Ætna Life Ins. Co. v. Fitzgerald*, 75 N. E. 262, 165 Ind. 317, 1 L. R. A. (N. S.) 422, 112 Am. St. Rep. 232.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 132S-1336.

See, also, 1 Cyc. pp. 275-277, 19 Cyc. pp. 846-848, 25 Cyc. p. 884; note, 55 C. C. A. 376; note, 18 L. R. A. 85.

#### § 543. Proofs of death of or injury to insured.

[a] (App. 1903)

A life policy provided that the insurer would pay the insurance "immediately upon re-

ceipt and approval of proofs of the death and cause of death." It also stipulated that the "proofs of death" should be furnished the insurer, at its home office, within one year after the death of the assured, and should comply with the insurer's forms. The policy covered death from any cause. *Held*, that proof of the cause of death was not a condition precedent to the payment of the policy.—*Life Assur. Co. of America v. Houghton*, 67 N. E. 950, 31 Ind. App. 626.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1347.

See, also, 25 Cyc. p. 884.

#### § 544. Production of documentary evidence.

[a] (Sup. 1874)

Where an answer to a suit on a policy of insurance alleges a failure on the part of the insured to produce his books and bills of purchases, etc., a reply that they were destroyed by fire shows a good excuse.—*Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315; *Germania Ins. Co. v. Same*, *Id.* 331.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1348.

See, also, 19 Cyc. p. 851.

#### § 546. Certificate of magistrate or other officer.

Pleading, see post, § 634.

[a] (Sup. 1854)

A stipulation in a policy of insurance required that, in case of loss by fire, the assured should forthwith procure a certificate from a magistrate or notary most contiguous to the place of the fire in reference to the loss. *Held*, that it must be the certificate of the nearest magistrate or notary. Any difference in point of distance in a case of two magistrates near the fire is material.—*Protection Ins. Co. v. Pherson*, 5 Ind. 417.

[b] (Sup. 1874)

By Act Dec. 21, 1865 (Davis' Rev. St. Supp. 1870, p. 315) § 6, a foreign insurance company cannot require a certificate of loss to be certified by the nearest magistrate.—*Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315; *Germania Ins. Co. v. Same*, *Id.* 331.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1350-1351.

See, also, 1 Cyc. p. 277, 19 Cyc. pp. 852-853; note, 23 Am. St. Rep. 258.

#### § 550. Effect of statements and proofs in general.

[a] (App. 1894)

Statements in the proofs of death required by an insurance policy, either of facts or of opinion, are not conclusive.—*Travelers' Ins. Co.*

v. Nitterhouse, 38 N. E. 1110, 11 Ind. App. 155.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1359-1361.

See, also, 19 Cyc. pp. 854-856; note, 44 L. R. A. 846.

**§ 551. Defects and amendments.**

[a] (App. 1899)

Proofs of loss were sent to the insurance company, as required by the policy, except that they were verified by the husband of insured as her agent, instead of by insured herself. The company, after retaining such proofs 43 days, sent a letter to insured, taking exceptions to the proofs furnished, and demanding a statement and invoice of stock covering original purchases by the husband, which was purchased with means furnished by insured; also duplicate bills of purchase after original purchase by husband with insured's means, and afterwards transferred into insured's name; and stating that insured had furnished no proofs of loss according to the conditions of the policy, and demanded and awaited the completion of the papers as per the contract. *Held*, that the letter could not be construed as making objection to the proofs because verified by the agent of insured, and that a subsequent affidavit of insured, to supply the defect growing out of her failure to make the original affidavit, did not affect the original proofs.—*Ft. Wayne Ins. Co. v. Irwin*, 54 N. E. 817, 23 Ind. App. 53.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 1357.

See, also, 19 Cyc. p. 854.

**§ 552. Misstatements or omissions.**

[a] (App. 1904)

Where insured in an accident policy made proof of disability and loss of time to a certain date, under the advice of his physician that he would soon be well, he was not thereby precluded, in an action on the policy, from claiming the amount due for disability continuing after that date.—*Pacific Mut. Life Ins. Co. v. Branham*, 70 N. E. 174, 34 Ind. App. 243.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 1358.

See, also, 1 Cyc. p. 278, 19 Cyc. p. 856.

**§ 553. Fraud or false swearing.**

Pleading, see post, § 640.

Verdict and findings, see post, § 670.

[a] (Sup. 1855)

It is only intentional false swearing that will avoid a policy of fire insurance, under a clause therein that, any fraud appearing, by false swearing or otherwise, the policy shall be avoided.—*Franklin Ins. Co. v. Culver*, 6 Ind. 137.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1362-1366.

See, also, 19 Cyc. pp. 855, 856.

**§ 554. Estoppel or waiver as to notice and proofs or defects and objections.**

Mutual benefit insurance, see post, § 789.

Pleading, see post, § 628.

Verdict and findings, see post, § 670.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1367-1409.

See, also, 1 Cyc. p. 278, 19 Cyc. pp. 857-872, 25 Cyc. pp. 885, 886, 26 Cyc. p. 709.

**§ 555. — In general.**

[a] (App. 1894)

A waiver of proofs of loss is a sufficient excuse for not furnishing them.—*American Fire Ins. Co. of New York v. Sisk*, 9 Ind. App. 305, 36 N. E. 659.

[b] (Sup. 1904)

A condition in an accident policy requiring delivery of proofs of injury within 90 days after the accident, and declaring that a failure to comply therewith should result in a forfeiture of the amount payable under the policy, is for the benefit of the insurer, who can waive a strict compliance therewith.—*National Masonic Acc. Ass'n v. McBride*, 70 N. E. 483, 162 Ind. 379.

[c] (App. 1904)

A waiver of compliance with a condition in a policy requiring service of proof of loss, in order to be effectual, must be made before the policy is forfeited because of insured's failure to perform the conditions thereof.—*Fidelity & Casualty Co. of New York v. Sanders*, 70 N. E. 167, 32 Ind. App. 448.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1307-1373, 1382-1390.

See, also, 19 Cyc. p. 857, 25 Cyc. p. 885, 26 Cyc. p. 709.

**§ 556. — Powers of officers or agents.**

[a] (Sup. 1882)

The fact that the conditions respecting preliminary proofs of loss are written in the contract of insurance does not prevent their waiver by an authorized agent of the company.—*Ætna Ins. Co. v. Shryer*, 85 Ind. 362.

[b] (Sup. 1886)

Although an insurance policy, on its face, prohibits any agent from waiving any of its conditions, where other proofs than those required in the policy are accepted by an agent of the company, duly authorized to act with reference to that subject, the company will be deemed to have waived the proof required by the policy.—*Indiana Ins. Co. v. Capehart*, 108 Ind. 270, 8 N. E. 285.

[c] (Sup. 1903)

An adjuster sent for the express purpose of adjusting a fire loss has authority to waive a provision of the policy concerning proofs of loss.—*Germania Fire Ins. Co. v. Pitcher*, 160 Ind. 392, 64 N. E. 921, 66 N. E. 1003.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1374-1377.

See, also, 19 Cyc. pp. 858-860, 25 Cyc. p. 885.

### § 557. — Express waiver.

[a] (App. 1892)

The company's adjuster of losses visited the scene of a fire the day after the loss occurred, in his official capacity, and informed the insured that he need furnish no notice nor proof of loss. Held a sufficient excuse for not giving notice of the loss within 50 days, though the policy required notice forthwith.—*Phenix Ins. Co. v. Pickel*, 3 Ind. App. 332, 29 N. E. 432.

[b] (App. 1894)

A condition in a policy that no agent shall waive any provision thereof except such as may by its terms be indorsed thereon, and that he shall not be deemed to have waived any provision unless such waiver be indorsed thereon, does not apply to a waiver of proofs of loss.—*American Fire Ins. Co. of New York, v. Sisk*, 9 Ind. App. 305, 36 N. E. 659.

[c] (App. 1902)

Where an insurance company's agent, sent by it to adjust the loss, informed insured on request that proof of loss would not be required, and promised, after an examination of the property, to pay a stipulated sum in settlement, and, on disagreement with insured, proposed arbitration, the company must be held to have waived proof of loss.—*Prussian Nat. Ins. Co. v. Peterson*, 64 N. E. 102, 30 Ind. App. 289.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1378-1381.

See, also, 19 Cyc. p. 861, 25 Cyc. p. 885, 26 Cyc. p. 709.

### § 558. — Implied waiver in general.

[a] (Sup. 1864)

Where a marine policy requires that, in case of disaster, the master and crew shall repair to the nearest convenient notary, and there make a protest setting forth the cause of the disaster, etc., the simple direction by an agent of the insurer to one of the crew, after loss, to go before an officer and make a protest, etc., is not a waiver of the insurer's right to a legal protest in the case.—*Peoria Marine & Fire Ins. Co. v. Walser*, 22 Ind. 73.

[b] (Sup. 1882)

There may be an implied waiver by an insurance company of preliminary proofs of loss

which may be inferred from facts and circumstances.—*Etna Ins. Co. v. Shryer*, 85 Ind. 362.

[c] (Sup. 1886)

Where a policy stipulates that, as soon after a loss as possible, the assured shall render a particular statement under oath, giving such information as the assured may have been able to obtain, concerning the origin and circumstances of the fire, the company having taken and retained in its possession the examination so provided for, the production of the other preliminary proofs was rendered practically useless, and, having notified the assured that nothing further would be required of her, it must be deemed that such facts constituted waiver.—*Indiana Ins. Co. v. Capehart*, 8 N. E. 285, 108 Ind. 270.

[d] (Sup. 1890)

Where an insurance company, after being notified by insured of a loss by fire, obtains possession of and holds the policy of insurance, refusing to adjust or pay the loss, it thereby waives a condition in the policy requiring proofs of loss to be made within a certain time.—*Norwich Union Fire Ins. Soc. v. Girton*, 124 Ind. 217, 24 N. E. 984.

[e] (Sup. 1890)

Where it does not appear that the insurance company denied its liability on the policy, its failure to demand proof of loss and to furnish blanks therefor does not waive the requirement of such proof.—*Continental Ins. Co. v. Dorman*, 125 Ind. 189, 25 N. E. 213.

[f] (App. 1895)

The mere fact that the insurance company "accepted and retained" the proofs of death, or failed to furnish blanks to enable the appellee to make proof, does not constitute a waiver of such proof; the contract not providing that the company would furnish blanks for that purpose.—*Standard Life & Accident Ins. Co. v. Strong*, 41 N. E. 604, 13 Ind. App. 315.

[g] (App. 1895)

Where a fire insurance policy required assured to give immediate notice to the company of any loss, and, two days after a fire, assured notified the company's agent thereof, who notified the company, which sent an adjuster to the scene of the fire, and, after the proofs of loss were filed, the company demanded further proofs, the condition as to notice to the company was waived.—*Milwaukee Mechanics' Ins. Co. v. Stewart*, 13 Ind. App. 640, 42 N. E. 290.

[h] (App. 1899)

After a loss, assured agreed that any action of the insurer in investigating and ascertaining the same should not waive any conditions of the policy. The amount of the loss was afterwards adjusted, when the adjuster stated that the one thing remaining in the way of a settlement was the mortgage on the goods. Held a waiver of further proof of loss.—*Indiana*

Ins. Co. v. Pringle, 52 N. E. 821, 21 Ind. App. 559.

[i] (App. 1904)

Where an accident policy required immediate notice of injury, and the insurer, on receiving notice some time after the injury, sent insured blanks on which to furnish proof of injury and loss of time, giving particular instructions, and stating that, when the proofs had been made and insured was ready to resume his duties, the claim would be adjusted without unnecessary delay, the provision as to immediate notice was waived.—Pacific Mut. Life Ins. Co. v. Branham, 70 N. E. 174, 34 Ind. App. 243.

[j] (App. 1908)

Where a policy provided for notice of injury or death within 10 days, and for final proofs on blanks furnished by insurer within 2 months, insurer's failure to furnish the blanks in time for the final proofs to be made after timely notice of insured's death constituted a waiver of the condition requiring them.—Phoenix Accident & Sick Ben. Ass'n v. Stiver, 42 Ind. App. 636, 84 N. E. 772.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1382-1390, 1406.

See, also, 19 Cyc. p. 861.

§ 559. — Denial of liability.

As waiver of demand for payment as condition precedent to action on policy, see post, § 613.

As waiver of notice of election between rights of insured after default in payment of premium, see ante, § 364.

Pleading, see post, §§ 634, 645.

Weight and sufficiency of evidence, see post, § 665.

[a] Want of and defects in the proofs of loss are waived by the insurer's denying liability on other grounds.—(Sup. 1882) *Ætna Ins. Co. v. Shryer*, 85 Ind. 362; (1888) *Commercial Union Assur. Co. v. State ex rel. Smith*, 113 Ind. 331, 15 N. E. 518; (1888) *American Cent. Ins. Co. v. Sweetser*, 116 Ind. 370, 19 N. E. 159; (1890) *Norwich Union Fire Ins. Soc. v. Girton*, 124 Ind. 217, 24 N. E. 984; (1894) *Continental Ins. Co. v. Chew*, 11 Ind. App. 330, 38 N. E. 417, 54 Am. St. Rep. 506; (1895) *German Mut. Ins. Co. v. Niewedde*, 11 Ind. App. 624, 39 N. E. 534; (1896) *National Life, Maturity Ins. Co. v. Whitacre*, 15 Ind. App. 506, 43 N. E. 905.

[b] (App. 1896)

Where an insurance company denies its liability, it waives proof of loss or defects in proofs already furnished.—*Ætna Ins. Co. v. Strout*, 44 N. E. 934, 16 Ind. App. 160.

[c] (App. 1897)

An insurance company waived proofs of loss where its adjuster, after having a personal interview with insured, who answered questions respecting the origin of the fire, and gave a list

and value of the property, refused to pay the insurance to the assignee of the policy, because the property was mortgaged.—*Western Assur. Co. v. McCarty*, 48 N. E. 265, 18 Ind. App. 449.

[d] (App. 1896)

A company waives notice and proof of loss where its general agent and adjuster, within five days after the fire, of which he had actual knowledge, notifies the insured that the company will not pay the loss.—*Home Ins. Co. of New York v. Boyd*, 49 N. E. 285, 19 Ind. App. 173.

[e] (Sup. 1896)

Proofs of loss are not necessary as a condition precedent to an action for fire insurance when the company, after a fire has occurred, refuses to deliver a policy which it has agreed to deliver, as such refusal is a denial of its liability.—*Western Assur. Co. v. McAlpin*, 55 N. E. 119, 23 Ind. App. 220, 77 Am. St. Rep. 423.

[f] (App. 1900)

The denial of an adjuster of a fire insurance company of any liability under the policy for the loss of wearing apparel amounted to a waiver by the company of proof of loss of such property otherwise required by the terms of the policy.—*German Fire Ins. Co. v. Seibert*, 56 N. E. 686, 24 Ind. App. 279.

[g] (Sup. 1903)

Where, after loss, insurer sent its adjuster, and during the time within which insured was entitled to furnish proofs of loss required by the policy conducted negotiations which authorized the insured to believe proofs of loss would not be required, and thereafter based its refusal to pay on other grounds, such conduct operated as a waiver of the provision of the policy requiring proofs of loss to be filed within a specified time.—*Germania Fire Ins. Co. v. Pitcher*, 160 Ind. 392, 64 N. E. 921, 66 N. E. 1003.

[h] (Sup. 1904)

When the supervisor of death claims of a life insurance company denies the validity of a policy and gives the company's reasons therefor, the company thereby waives its right to a proof of death of the assured.—*Penn Mut. Life Ins. Co. v. Norcross*, 163 Ind. 379, 72 N. E. 132.

[i] (Sup. 1905)

Where notice of injury under an accident policy was not given within a reasonable time, but after it was given a claim was made on the insurance company under the policy for the injury, the fact that the company in response denied all liability solely on the ground that the policy did not cover the injury was not a waiver of the provision requiring immediate notice.—*Ætna Life Ins. Co. v. Fitzgerald*, 75 N. E. 262, 165 Ind. 317, 1 L. R. A. (N. S.) 422, 112 Am. St. Rep. 232.

[j] (App. 1905)

Where the grounds on which insurer denied liability did not appear, and there was no

showing as to when an alleged waiver of proofs of loss thereby was claimed to have become effective, insured was not relieved of the requirement of furnishing such proofs.—*Fire Ass'n of Philadelphia v. Yeagley*, 72 N. E. 1035, 34 Ind. App. 387.

[k] (App. 1906)

A demand for payment of life insurance by persons to whom the company is authorized by the policy to pay the same, and a denial of liability by the company, amounts to a waiver of other proofs of death, and justifies the commencement of action.—*Rutherford v. Prudential Ins. Co.*, 73 N. E. 202, 34 Ind. App. 531.

[l] (Sup. 1906)

Where an adjuster representing an insurance company visited the scene of loss, and on investigation refused payment and denied all liability under a policy, proof of loss was waived.—*Ohio Farmers' Ins. Co. v. Vogel*, 76 N. E. 977, 166 Ind. 239, 3 L. R. A. (N. S.) 966, 117 Am. St. Rep. 382.

[m] (App. 1908)

An insurance company by denying all liability under a policy waives proofs of loss.—*United States Health & Accident Ins. Co. v. Clark*, 83 N. E. 760, 41 Ind. App. 345.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1301, 1302.

See, also, 19 Cyc. pp. 867-871, 25 Cyc. p. 886.

§ 560. — Failure to state ground of objection.

[a] (Sup. 1863)

A policy required, in case of loss, a certificate of certain facts from the nearest magistrate or notary public. On the 22d of March following a loss in January, a certificate of a notary public was sent, and was not objected to by the company until the day of trial, when they set up that another notary public lived about one square nearer to the property lost. One witness positively testified to a promise by the company's agent to pay the loss. *Held*, that the company had waived their right to object to the certificate.—*Byrne v. Rising Sun Ins. Co.*, 20 Ind. 103.

[b] (App. 1895)

If proofs of death were furnished too late, the mere fact that they were retained does not revive the company's liability.—*Standard Life & Accident Ins. Co. v. Strong*, 41 N. E. 604, 13 Ind. App. 315.

[c] (App. 1895)

Receiving and retaining proofs of loss without objecting to their sufficiency is a waiver of the objection.—*Germania Fire Ins. Co. v. Stewart*, 13 Ind. App. 627, 42 N. E. 286.

[d] (App. 1899)

Where an insurance company makes a particular objection to the proofs of loss, it will

not be permitted to urge any other objection which, if made in time, could have been remedied by the insured.—*Ft. Wayne Ins. Co. v. Irwin*, 54 N. E. 817, 23 Ind. App. 53.

If the insured makes proof of loss, within the time limited by the policy, and no objection is made to such proof until after the expiration of the time within which it can be made, and the amount of the loss is not paid by the insurer, a right of action accrues on the policy as far as ascertaining the amount of the loss is concerned.—*Id.*

Where an insurance company is dissatisfied with the proofs of loss furnished, it should make that fact known to the insured without unnecessary delay, and specify its objections, so that they may be corrected in due time, and failure to do so is a waiver of further proofs.—*Id.*

Where, in an action on a policy of fire insurance, it appears that the proofs of loss complied substantially with the requirements of the policy, except the verification, to which no objection was made by the company until 43 days after receiving such proofs, and until the time allowed by the policy for furnishing proof had expired, the objection will be deemed to have been waived.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1333-1404.

See, also, 19 Cyc. p. 862, 25 Cyc. p. 886.

§ 561. — Adjustment of loss and negotiations for settlement.

[a] (Sup. 1888)

Where an adjustment by an authorized agent has been made, and the company has notified plaintiff that it will not pay the loss, further notice and proof are waived.—*American Cent. Ins. Co. v. Sweetser*, 116 Ind. 370, 19 N. E. 159.

[b] (App. 1895)

The sending of an adjuster by an insurance company to adjust a loss is a waiver of a stipulation in the policy requiring written notice of loss.—*Germania Fire Ins. Co. v. Stewart*, 13 Ind. App. 627, 42 N. E. 286.

[c] (Sup. 1907)

Waiver of proofs of loss may be inferred from the facts that, immediately after the fire, the insurer sent its adjuster, who, after an examination of the premises, stock, and conditions, offered insured a certain amount in full payment of the loss, and, on refusal of the offer, agreed with him on the loss on the goods wholly destroyed, and for submission to appraisers, then named by them, of the loss on the other goods.—*Providence Washington Ins. Co. v. Wolf*, 168 Ind. 690, 80 N. E. 26, 120 Am. St. Rep. 395.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1406, 1407, 1409.

See, also, 19 Cyc. p. 865.

**XV. ADJUSTMENT OF LOSS.**

Adjustment, waiver of notice, and proof of loss or of defects therein or objections thereto, see ante, § 561.

Annexing adjuster's agreement as exhibit to pleading, see PLEADING, § 307.

Instructions, see post, § 609.

Participation in adjustment as ground of estoppel or waiver, see ante, § 397.

Pleading nonperformance of conditions, see post, § 640.

Pleading performance of conditions, see post, § 634.

Questions for jury, see post, § 668.

Submission to appraisal and arbitration as condition precedent to action on policy, see post, § 612.

Weight and sufficiency of evidence, see post, § 665.

**§ 566. Effect of adjustment.**

[a] (Sup. 1884)

A settlement of an insurance policy, secured through fraudulent representations to the executor of the insured, whose mental faculties are impaired by age, financial disasters, and affliction, that the company will contest and defeat the collection of the policy, will be set aside, and a recovery allowed of the amount due on the policy.—*McLean v. Equitable Life Assur. Soc. of United States*, 100 Ind. 127, 50 Am. Rep. 779.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1413-1419.

See, also, 10 Cyc. pp. 872, 873, 26 Cyc. p. 710.

**§ 569. Agreement for appraisal or arbitration.**

[a] (Sup. 1852)

The insurance company rejected the claim of assured for the loss of the cargo of a flat boat, and proposed to him to leave the matter to arbitration. The proposition was accepted in writing, whereupon the board of directors entered on the books of the company a request to the assured to join the secretary of the company in selecting the arbitrators, designating the matters to be referred. The secretary and the assured accordingly selected the arbitrators and the secretary executed a bond in the terms prescribed by the Revised Statutes of 1843, and signed the name and annexed the corporate seal of the company thereto. *Held*, that the arbitration intended was the statutory one provided by the Revised Statutes of 1843.—*Madison Ins. Co. v. Griffin*, 3 Ind. 277.

[b] (Sup. 1883)

Misrepresentations as to the obligations imposed by an insurance policy are of law, and do not avoid a submission to arbitration secured thereby.—*Indiana Ins. Co. v. Brehm*, 88 Ind. 578.

[c] (App. 1895)

Submission to arbitrators of the question of the ascertainment of the value of the property destroyed or injured, and not to determine the liability of defendant insurance company for such property, not being a submission of all questions between the parties, is not an award by arbitrators such as is contemplated by the law as an arbitration.—*Germania Fire Ins. Co. of City of New York v. Warner*, 41 N. E. 969, 13 Ind. App. 466.

Where an agreement entered into after the loss, and in fulfillment of the clause stipulating therefor in an insurance policy, states that "it is expressly understood that this agreement and appraisal is for the purpose of ascertaining and fixing the amount of said loss and damage only, \* \* \* and shall not determine, waive, or invalidate any other right or rights of either of the parties," the only question which can be considered as submitted to the appraisers is that of determining the value of the property totally destroyed, and the injury to that not destroyed.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 1425.

See, also, note, 2 Am. St. Rep. 565.

**§ 572. Proceedings on appraisal or arbitration.**

[a] (Sup. 1907)

The provision in a fire policy that the loss is payable 60 days after the notice and proof of loss, and an award of appraisers, when an appraisal has been required, does not give the insurer, after it has agreed to an appraisal, and named its appraiser, an absolute right to 60 days in which to commence the appraisal, but it must proceed without unnecessary delay, and in a reasonable time, depending on the facts of the case.—*Providence Washington Ins. Co. v. Wolf*, 168 Ind. 690, 80 N. E. 26, 120 Am. St. Rep. 395.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1422, 1423, 1427, 1429.

See, also, 19 Cyc. pp. 876-878.

**§ 574. Validity and effect of appraisal or award.**

[a] (Sup. 1852)

The award was that the company should forthwith pay to the assured the sum of \$750.74, and the same should be received by him in full satisfaction and discharge of his claim against said company, and that the company should pay the costs. *Held*, that the award was sufficiently certain.—*Madison Ins. Co. v. Griffin*, 3 Ind. 277.

[b] (Sup. 1903)

If the conduct of a party to an arbitration had a tendency to improperly affect the decision of one or more of the arbitrators in the matter in issue, such conduct will be sufficient cause to entitle the other party to have

the award set aside, irrespective of whether it actually produced any harmful results to the complaining party.—*Insurance Co. of North America v. Hegewald*, 66 N. E. 902, 161 Ind. 631.

Where, in an action on an insurance policy, it was shown, as to an award made by three appraisers, that the one selected by defendant was from a distant city, was unknown to plaintiff, and was an agent of the defendant; that the umpire was likewise from another city, and not a disinterested party; that defendant's appraiser was guilty of misconduct; that this appraiser and the umpire acted together for the company; that the award was grossly inadequate; and that the appraiser selected by the insured was induced to attach his signature to the award under the belief that he was bound to sign the award agreed to by his associates—the insured was entitled to have the award set aside and to recover on the policy.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1430-1432, 1434.

See, also, 19 Cyc. pp. 878-880.

**§ 576. Estoppel or waiver as to adjustment or arbitration.**

Instructions, see post, § 669.

**[a] (App. 1896)**

In an action on a policy providing that, in case of disagreement as to the loss, it should be ascertained by appraisers, and that no action should be maintained until after full compliance with the policy, it appeared that, the appraisers having failed to agree, the company adjusted the loss, and requested plaintiffs to make proof thereof in such amount, which request was complied with. *Held* a waiver by the company of the provisions for appraisal.—*Manchester Fire Assur. Co. v. Koerner*, 13 Ind. App. 372, 40 N. E. 1110, 41 N. E. 848, 55 Am. St. Rep. 231; *North British & Mercantile Ins. Co. v. Same*, 13 Ind. App. 698, 40 N. E. 1112.

**[b] (Sup. 1902)**

Where a fire policy requires, as a condition precedent to action thereon, that the loss be appraised, by an appraiser selected by the company and one selected by the insured and an umpire selected by the appraisers, the fact that the appraisers, acting in good faith, cannot agree on an umpire, is not a waiver of the condition requiring appraisal which will authorize suit without an appraisal, but the parties must select other appraisers.—*Vernon Ins. & Trust Co. v. Maitlen*, 63 N. E. 755, 158 Ind. 393.

**[c] (Sup. 1907)**

The provision in a fire policy for submission of the loss to an appraisal may be waived, after the parties have agreed to have an appraisal, by conduct on the part of either evi-

dencing an intention to defeat the object of the appraisal, or to put the other party to unnecessary expense so as to coerce an unjust settlement.—*Providence Washington Ins. Co. v. Wolf*, 168 Ind. 690, 80 N. E. 26, 120 Am. St. Rep. 395.

Waiver of the provision in a fire policy for arbitration of loss may be inferred, where, after the fire, the parties appointed appraisers and agreed that they should commence at once to appraise the goods, and insured got his appraiser and left him waiting for six days, at great expense, and the insurer stated the appraiser appointed by it could not attend, and promised to procure a substitute, but failed to do so, and when communicated with by telegram failed to reply, though knowing that insured was at great expense, and that the goods, which were not fully insured, were being injured by the delay, and that an early appraisal was necessary for insured to save anything from the stock.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1436-1438.

See, also, 19 Cyc. pp. 881, 882.

**§ 579. Settlement between parties.**

**[a] (Sup. 1889)**

Plaintiff settled a loss under a fire insurance policy for a small consideration, and subsequently brought an action upon the policy, in which he claimed that the compromise had been induced by fraud; but he had not, before action brought, rescinded the settlement by offering to return the consideration for it. *Held*, that he could not recover.—*Home Ins. Co. v. Howard*, 111 Ind. 544, 13 N. E. 103.

**[b] (Sup. 1889)**

Where, in an action on an insurance policy, a compromise and money accepted by the plaintiff in full settlement are set up as a defense, a charge that, if the settlement was made mala fide and obtained by the misrepresentations of the defendant, and the plaintiff was led into it by deceit or fraud, then plaintiff could recover on the policy, is error, since the plaintiff is not entitled to so ignore the settlement after having received benefit under it.—*Home Ins. Co. v. McRichards*, 121 Ind. 121, 22 N. E. 875.

**[c] (Sup. 1890)**

Where, after loss of insured property by fire, the insured gives the insurer a receipt for the original premium in full settlement for loss or damage, and surrenders the policy, he cannot afterwards sue on the policy, without first rescinding or offering to rescind the contract of settlement, and refunding the money received by him under it, even though the insurer was guilty of fraud in procuring the settlement.—*Norwich Union Fire Ins. Soc. v. Girton*, 124 Ind. 217, 24 N. E. 964.

[d] (*Sup.* 1891)

Where a life insurance company, for the purpose of compromising a loss for one-half the amount of the policy, fraudulently represented to the beneficiary that the deceased died by his own hand, while of sound mind, and that the company had proof of it, these were material facts, which the beneficiary had a right to rely on, and the beneficiary may retain the money received, and sue for the damages resulting from the deceit.—*Michigan Mut. Life Ins. Co. v. Naugle*, 130 Ind. 79, 29 N. E. 393.

[e] (*App.* 1893)

An action against an insurance company for fraudulent representations, inducing a settlement of a death claim against it, is not within a by-law of the company which provides that no action shall be sustained, in any court of law or chancery on any death claim unless the same shall be commenced within 12 months after the death of the member.—*Wabash Valley Protective Union of Crawfordsville v. James*, 8 Ind. App. 449, 35 N. E. 919.

[f] (*App.* 1900)

The plaintiff, prior to filing suit to recover for a loss by fire, settled with the insurance company, receipted for the amount received, in full settlement of all loss sustained, and expressed himself as satisfied with the adjustment. *Held* that, in the absence of fraud shown to have been practiced on plaintiff in securing the settlement, a judgment in his favor, could not be sustained.—*German Fire Ins. Co. v. Seibert*, 56 N. E. 686, 24 Ind. App. 279.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1417, 1419.

See, also, 19 Cyc. p. 873.

### XVI. RIGHT TO PROCEEDS.

Exemption of proceeds of life insurance from legal process, see EXEMPTIONS, § 50.

Interest in policy as subject of descent, see DESCENT AND DISTRIBUTION, § 8.

Mutual benefit insurance, see post, § 793.

Rights of policy holders on insolvency of company, see ante, § 63.

#### § 580. Policy payable to owner of property or interest insured.

Insurable interest in property, see ante, § 115.

[a] (*Sup.* 1886)

Though property was conveyed by a husband to his wife in order to defraud his creditors, where insurance is taken on such property in her name, the policy belongs to her, and the proceeds thereof cannot be taken from her by the husband's creditors.—*McLean v. Hess*, 7 N. E. 567, 106 Ind. 555.

[b] (*Sup.* 1887)

The right of a mortgagee to avail himself of the benefit of insurance taken by the mort-

gagor depends wholly upon contract, and his right to invoke the aid of a court of equity to enforce a lien upon money arising from unassigned policies effected by, and in the name of, the mortgagor, depends upon the existence of an unfulfilled executory agreement on the part of the mortgagor to that effect.—*Nordyke & Marmion Co. v. Gery*, 112 Ind. 535, 13 N. E. 683, 2 Am. St. Rep. 219.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1430-1443; 21 CENT. DIG. Execution, § 217.

See, also, 19 Cyc. pp. 883-887; notes, 25 L. R. A. 305, 37 L. R. A. 150.

#### § 581. Policy payable to or for benefit of mortgagee of property insured.

[a] (*Sup.* 1887)

Where a mortgagor has covenanted to keep the mortgaged premises insured for the benefit of the mortgagee, and either has effected or thereafter effects insurance in his own name, though without the mortgagee's knowledge and without any intent to perform the agreement, equity will treat the insurance as effected under the agreement, and will give the mortgagee his equitable lien accordingly.—*Nordyke & Marmion Co. v. Gery*, 13 N. E. 683, 112 Ind. 535, 2 Am. St. Rep. 219.

Where a mortgagor, under a covenant to keep the mortgaged premises insured for the benefit of the mortgagee, effects such insurance to the acceptance of the mortgagee, and one of the companies in which the insurance is effected afterwards becomes insolvent, the mortgagee has no right to other insurance taken out by the mortgagor for his own protection, after the satisfaction of the covenant to insure.—*Id.*

[b] (*App.* 1908)

Where an insurance company forfeits a strict observance of its own rules, as to the change of beneficiaries, or where it is beyond the power of the insured to comply literally with the requirements of the contract as to such change, or where the insured has done all in his power to change the beneficiary, but death, or other intervening causes, have prevented the change, a court of equity will decree that as done which ought to have been done.—*Stewart v. Gwynn*, 41 Ind. App. 320, 82 N. E. 1000, 83 N. E. 753.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1444-1447.

See, also, 19 Cyc. p. 885; note, 25 L. R. A. 679; note, 54 Am. Dec. 693; note, 118 Am. St. Rep. 968.

#### § 583. Life or accident policy payable to insured, his representatives or estate.

[a] (*Sup.* 1882)

A. died, leaving a third wife and 11 children by his different wives. *Held*, that the proceeds of a life insurance policy, payable to

his legal heirs, should be divided into 12 equal parts; the widow taking one and each child one.—*Wilburn v. Wilburn*, 83 Ind. 55.

The rights of the widow of insured as a legal heir within a policy of life insurance payable to insured's legal heirs are measured by terms of the policy, and she is entitled to no preference over other heirs.—*Id.*

[b] (Sup. 1902)

Defendant company insured the life of plaintiff's husband, payable to his executor, "unless settlement should be made under article second of said policy." Article second authorized payment to any one related by blood or marriage, or to any other person appearing to the company to be equitably entitled to the same, by reason of having incurred any expense in any way on behalf of the insured, for his burial or for any other purpose. An agreement was made between plaintiff, her husband, and the company that if plaintiff would pay the premiums her husband would assign the policy to her, and the company would pay the amount to her on death of insured. *Held*, that the agreement was nothing more than the designation of a beneficiary, and did not change the conditions of the policy, so that settlement by the company under article second was a defense to an action therefor by plaintiff.—*Thomas v. Prudential Ins. Co. of America*, 63 N. E. 795, 158 Ind. 461.

[c] (App. 1908)

An insurance company could not escape liability to insured under a life insurance policy because of his innocent failure to list the policy among his assets when filing a petition in bankruptcy; the legal title to the assets having remained in him, since no trustee was ever appointed.—*Equitable Life Assur. Soc. of United States v. Perkins*, 80 N. E. 682, 41 Ind. App. 183.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1450, 1460, 1466, 1485.

See, also, 25 Cyc. pp. 886-889, 901; notes, 30 L. R. A. 609, 3 L. R. A. (N. S.) 904; note, 44 Am. St. Rep. 404.

§ 584. **Life or accident policy designating beneficiary.**

Designation of beneficiary of mutual benefit insurance, see post, §§ 772, 773, 779-783. Policy payable to heirs, see ante, § 583.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1461-1474, 1479, 1482, 1485.

See, also, 25 Cyc. p. 889; note, 50 L. R. A. 552.

§ 585. — **Rights of persons designated in general.**

[a] (Sup. 1904)

The fact that an insurance company issued a policy exacting a fixed rate of premium for a

fixed amount of insurance, and contracted that the policy should participate annually in the surplus earnings of the company in accordance with the regulations adopted by the company's board of trustees, did not place the contract on the footing of a mere benefit certificate, in so far as the rights of the beneficiary were concerned.—*Penn Mut. Life Ins. Co. v. Norcross*, 72 N. E. 132, 163 Ind. 379.

[b] (App. 1910)

The beneficiary in a life policy takes only the rights conferred on her by the policy, subject to the limitations and provisions therein.—*Eagle v. New York Life Ins. Co.*, 91 N. E. 814.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1461-1468.

See, also, 25 Cyc. p. 889; note, 3 L. R. A. (N. S.) 478, 727.

§ 586. — **Vested interest of beneficiary.**

Mutual benefit insurance, see post, §§ 766, 783.

[a] (Sup. 1887)

A beneficiary under an ordinary life policy takes an immediate interest therein, and his rights cannot be impaired by any act of insured performed subsequent to the execution of the policy.—*Kline v. National Ben. Ass'n*, 11 N. E. 620, 111 Ind. 462, 60 Am. Rep. 703.

[b] (App. 1898)

Where an insurance policy is issued on the life of one person for the benefit of another, and the beneficiary is named in the policy, it becomes the property of the beneficiary from the date it goes into force.—*Masons' Union Life Ins. Ass'n v. Brockman*, 50 N. E. 493, 20 Ind. App. 206.

[c] (Sup. 1904)

Where a policy in a mutual life insurance company has been delivered and gone fully into effect, the beneficiary had an interest therein which could not be divested by the insured, who was her husband, without her consent.—*Penn Mut. Life Ins. Co. v. Norcross*, 72 N. E. 132, 163 Ind. 379.

[d] (App. 1909)

Where insured in a life policy has the right under the policy to change the beneficiary, the latter has no vested interest, but the insured's control of the property is complete.—*Equitable Life Assur. Soc. of United States v. Stough*, 89 N. E. 612.

[e] (App. 1910)

The New York statute authorizing a married woman in her own name to cause the life of her husband to be insured, etc., contemplates a contract made by an insurer directly with a wife, either in person or through an agent, and a policy so obtained is the property of the wife and her children, but a policy issued on the life of a husband which designates the husband as the "insured," and which expressly author-

izes him to change the beneficiary, is not within the statute, so that the wife named as beneficiary has no vested right in the policy.—*Eagle v. New York Life Ins. Co.*, 91 N. E. 814.

[r] (App. 1910)

*Burns' Ann. St.* 1908, § 4703, declares that an insured at any time with the consent of the corporation may change the beneficiary without the beneficiary's consent, provided the policy has not been assigned as security for a debt or other legal consideration. *Held* that, while a beneficiary under a contract of insurance has no vested interest therein prior to the death of the insured, yet, on insured's death, the beneficiary's interest became vested and a suit on the policy constituted an election by her to accept the contract, which was enforceable only by her or her representatives.—*American Cent. Life Ins. Co. v. Rosenstein*, 92 N. E. 380.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1470.

§ 587. — **Change of beneficiary.**

Beneficiary of mutual benefit insurance, see post, §§ 779-783.

[a] (Sup. 1882)

Where, on the death of a wife, her interest as beneficiary in an insurance policy on the life of her husband descended to her heirs in the manner provided by *Rev. St.* 1881, § 2488, and the husband thereafter assigned the policy as security for a loan, the fact the assignee had the power, by omitting to pay the premiums on the policy, to render it subject to forfeiture, did not give him the right to change the beneficiary, or to constitute himself the sole beneficiary.—*Harley v. Heist*, 86 Ind. 196, 44 Am. Rep. 285.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1469.

See, also, 1 Cyc. p. 239, 25 Cyc. pp. 892-895; note, 40 C. C. A. 4; note, 4 L. R. A. (N. S.) 939.

§ 590. — **Rights of creditors.**

[a] (Sup. 1877)

A complaint in an action against an heir of a deceased debtor, alleging that the debtor had surrendered a policy of insurance on his life payable to himself, and had procured another payable to the heir, at the instance of the latter, with intent to defraud the plaintiff, is not aided by an allegation that the defendant had no insurable interest in the debtor's life.—*Langford v. Freeman*, 60 Ind. 46.

[b] (Sup. 1879)

On a contest as to the right to insurance money, the proceeds of a policy taken out by a husband for the benefit of his wife, one of the claimants claimed the same merely as assignee of the wife. *Held*, that the question of the solvency of the husband when he procured the policy and paid the premium could not be put in issue by such claimant in order to show

fraud on the husband's part as against creditors.—*Pence v. Makepeace*, 65 Ind. 345.

[c] (Sup. 1884)

A creditor to whom decedent had assigned a life insurance policy as security *held* not to waive his right to the proceeds of the policy by procuring an allowance of his claim against the estate, nor by assigning the policy without recourse to the administrator for collection.—*Hight v. Taylor*, 97 Ind. 392.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1479, 1482, 1485.

See, also, 25 Cyc. p. 899; note, 4 L. R. A. (N. S.) 456.

§ 591. **Life policy for benefit of creditor.**

[a] (Sup. 1887)

Where a debtor insures his life for the benefit of his creditor who is designated in the policy as beneficiary, and the creditor agrees to pay the expenses thereof, and to keep the policy in force, it being further agreed that the debtor may at any time pay the debt, and by reimbursing the creditor obtain an assignment of the policy, the right to the policy and its benefits vests absolutely in the creditor, unless the debt and advances are paid in the lifetime of the debtor, and the debtor's personal representatives can recover no part thereof from the creditor.—*Amick v. Butler*, 111 Ind. 578, 12 N. E. 518, 60 Am. Rep. 722.

Where money has been collected on a policy which had its inception in a scheme of mere speculation on the life of the person who is the subject of insurance, or where insurance is taken out by a debtor as a security for the benefit of his creditor, the expense of procuring and continuing the policy being borne by the former, the amount collected, less the debt secured or the sums advanced in obtaining and keeping the policy in force, may be recovered by the personal representatives of the person insured.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1480.

See, also, 25 Cyc. p. 899.

§ 593. **Assignee of policy before loss.**

Effect of assignment on rights of creditors, see ante, § 590.

Waiver of right to proceeds by holder as collateral by allowance of debt secured as claim against decedent's estate, see EXECUTORS AND ADMINISTRATORS, § 241.

[a] (Sup. 1882)

If one insures his life for the benefit of his wife, upon her death her interest in the policy inures to her administrator, and an assignment to another by the husband only passes the husband's interest as his wife's heir. Such an assignee however, having taken his assignment in good faith, should have premi-

ums paid by him repaid to him.—*Harley v. Heist*, 86 Ind. 196, 44 Am. Rep. 285.

[b] (Sup. 1889)

The fact that the assignee has no insurable interest in the life of the insured does not bar his recovery, where it is shown that the insured himself procured the insurance and paid the premiums.—*Milner v. Bowman*, 119 Ind. 448, 21 N. E. 1094, 5 L. R. A. 95.

[c] (App. 1891)

A policy of insurance on the life of a married woman was assigned by her and her husband to one of the husband's creditors, and was assigned by such creditor to one having no insurable interest in the woman's life. *Held* that, the second assignee having no interest in the policy, an agreement to pay the premiums for his benefit cannot be enforced.—*Kessler v. Kuhns*, 1 Ind. App. 511, 27 N. E. 980.

FOR CASES FROM OTHER STATES.

SEE 28 CENT. DIG. Insurance, §§ 1452, 1476-1478, 1481, 1482, 1485.

See, also, 25 Cyc. p. 899.

§ 594. Assignment of claim for loss.

Assignment to and subrogation of insurer, see post, § 607.

Effect of assignment by creditor on right to proceeds, see ante, § 590.

[a] (Sup. 1884)

Where a policy of insurance was assigned as security for an indebtedness, and the holder after the death of the assignor assigned the policy to the administrator for the purpose of collecting the policy, the fact that the assignment of the policy was executed by the holder without any recourse on her did not show conclusively that she thereby abandoned and surrendered the policy to the administrator, nor preclude her from asserting and proving the actual facts in regard to the execution of such assignment.—*Hight v. Taylor*, 97 Ind. 392.

[b] (App. 1894)

Where insured property was destroyed, the policy after the destruction became a mere chose in action, and might be assigned like any other chose in action.—*Moffitt v. Phenix Ins. Co.*, 38 N. E. 835, 11 Ind. App. 233.

[c] (App. 1896)

The fact that the assignee, after the service of garnishment on him, assigned the policy to a nonresident, and that the policy was taken out of the state by such nonresident, does not entitle insurer to be discharged.—*Rigney v. Jacobs*, 45 N. E. 343, 17 Ind. App. 545.

An assignment of a policy, after loss, for collection merely, does not exempt insurer from garnishment at the instance of a creditor of insured, the assignee being made a party to the proceedings.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1455-1458, 1483, 1485.

See, also, 25 Cyc. p. 899.

**XVII. PAYMENT OR DISCHARGE, CONTRIBUTION, AND SUBROGATION.**

Mandamus to compel payment, see MANDAMUS, § 138.

Mutual benefit insurance, see post, §§ 798, 801.

Payment of part of loss as ground of estoppel or waiver, see ante, § 399.

§ 599. Mode and sufficiency of payment.

[a] (App. 1901)

Where an insurance company, in settlement of a loss, delivers to the insured its draft, and subsequently repudiates the settlement, refuses to pay the draft, and denies all liability, the insured may treat the draft as worthless, and proceed to enforce payment of the policy, as if no attempted settlement had been made.—*Insurance Co. of North America v. Osborn*, 59 N. E. 181, 26 Ind. App. 88.

[b] (Sup. 1902)

Defendant company insured the life of plaintiff's husband, payable to his executor, "unless settlement should be made under article second of said policy." Article 2 authorized payment to any one related by blood or marriage, or to any other person appearing to the company to be equitably entitled to the same by reason of having incurred any expense in any way on behalf of the insured for his burial or for any other purpose. An agreement was made between plaintiff, her husband, and the company that, if plaintiff would pay the premiums, her husband would assign the policy to her, and the company would pay the amount to her on death of insured. *Held*, that payment under said article operated as a complete discharge.—*Thomas v. Prudential Ins. Co. of America*, 63 N. E. 795, 158 Ind. 461.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1490, 1496.

See, also, 19 Cyc. p. 890, 26 Cyc. p. 709.

§ 600. Effect of payment.

[a] (Sup. 1877)

Where insurance money has been paid by the insurer after the death of the insured without the question of the insurable interest of the beneficiary having been raised, no one can question the right of the beneficiary to the money on the ground of lack of insurable interest in the life of the insured.—*Langford v. Freeman*, 60 Ind. 46.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1497.

**§ 602. Damages for refusal of payment.**

[a] (Sup. 1862)

1 Rev. St. p. 334, § 22, providing that, whenever a company shall be notified of any loss sustained on a policy of insurance issued by it, it shall pay the loss within 60 days thereafter under a penalty of 10 per cent. damages for every 30 days it remains unpaid, has reference to domestic corporations or companies only.—Commonwealth's Ins. Co., etc., v. Moninger, 18 Ind. 352.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1498.

**§ 603. Release or discharge from liability.**

Mutual benefit insurance, see post, § 801.

[a] (App. 1893)

An action against an insurance company for damages sustained through its fraudulent representations, inducing a settlement of a loss, is in affirmance of the settlement, and hence does not violate a provision therein that plaintiff will warrant and defend the payment made thereunder against any and all claimants whatsoever.—Wabash Val. Protective Union of Crawfordsville v. James, 8 Ind. App. 449, 35 N. E. 919.

[b] (App. 1907)

A party who was fraudulently induced to execute a release of an insurance policy may affirm the release and sue for damages caused by such fraud or tender back the consideration and sue on the contract.—Supreme Council of Knights & Ladies of Columbia v. Apman, 39 Ind. App. 670, 80 N. E. 640.

The measure of damages in an action to set aside a release of an insurance policy for fraud and to recover on the policy is the difference between the amount received and the amount stated in the policy.—Id.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1499.

See, also, 19 Cyc. p. 891, 25 Cyc. p. 903.

**§ 605. Subrogation of insurer.**

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1504-1516.

See, also, 19 Cyc. pp. 526, 893-897, 25 Cyc. p. 903, 26 Cyc. pp. 710, 711; note, 2 L. R. A. (N. S.) 922; note, 44 Am. St. Rep. 731.

**§ 606. — On payment of loss in general.**

[a] (Sup. 1880)

Where a policy is taken out by a mortgagee, as such, upon his interest in the mortgaged property, for the benefit of the mortgagor, on an agreement with him that in case of loss any sum paid shall be credited on the mortgage

debt, the insurance company, on payment of a loss, is not entitled to an assignment of the mortgage or of any interest therein by way of subrogation.—Ætina Ins. Co. of Hartford, Conn., v. Baker, 71 Ind. 102.

[b] (Sup. 1893)

Where property is injured or destroyed by the negligent act or omission of one under such circumstances that the owner of the property may maintain an action therefor, if the insurer is compelled by reason of the policy to make good the loss to the owner, he may be subrogated to the rights of the owner and recover from the wrongdoer a sufficient sum to reimburse him for such outlay, provided the damages are sufficient to equal the sum paid.—Phoenix Ins. Co. v. Pennsylvania R. Co., 33 N. E. 970, 134 Ind. 215, 20 L. R. A. 405.

[c] (Sup. 1894)

A mortgaged land to B., and, as additional security, insured the mortgaged premises. The policy provided that, whenever the company should pay to the mortgagee any sum for loss under the policy, it should be subrogated to all his rights. A. sold the property to C., who assumed the mortgage. The property was destroyed, and the company, having paid B. the loss, brought this action against C. The description in the complaint and mortgage of the premises differed from that in the policy. *Held*, that such difference in description rendered A. a necessary party.—Insurance Co. of North America v. Martin, 139 Ind. 317, 37 N. E. 394.

[d] (Sup. 1898)

A policy provided that, if insured conveyed his interest in the property insured, the policy should be void, unless assigned to the purchaser with consent of the insurer. A mortgage clause provided that the loss should be payable to the mortgagee, and that the policy would not be invalidated by any act or neglect of the mortgagor, but that if the insurer paid the mortgagee, claiming that as to the mortgagor no liability existed, it should be, to the extent of the payment, subrogated to the rights of the mortgagee. After the issuance of the policy the mortgagor sold the premises, and the purchaser took immediate possession, and assumed the indebtedness thereon. Subsequently, before any assignment of the policy had been made, the buildings were destroyed by fire; and the insurer paid the mortgagee the amount of the loss, taking an assignment of the debt of the mortgagee to the extent of the amount so paid. *Held* that, on the conveyance of the property by the mortgagor, his rights under the policy terminated, and the purchaser acquired none, and the insurer had a valid claim against the property and the purchaser for the amount paid the mortgagee.—Insurance Co. of North America v. Martin, 51 N. E. 361, 151 Ind. 209.

The insurer, by taking an assignment from the mortgagee of the debt and mortgage

lien to the extent of the amount paid, sufficiently showed a denial of liability to the mortgagor or purchaser of the property.—Id.

[e] (App. 1899)

A complaint states a cause of action which alleges that plaintiff had insured certain property, which, without fault of plaintiff or the owner, was destroyed by the negligence of defendant, a natural gas company,—the negligence consisting in failure to provide a watchman to control the supply of gas at night, such service being necessary,—and that plaintiff paid the loss, and became subrogated to the owner's rights.—*Indiana Natural & Illuminating Gas Co. v. New Hampshire Fire Ins. Co.*, 53 N. E. 485, 23 Ind. App. 298.

[f] (App. 1907)

The right of a property owner to recover damages for its destruction is not an incident to property in the thing destroyed, but is a personal right, and the insurer acquires a beneficial interest in that right in proportion to the sum paid by him to the owner.—*Lake Erie & W. R. Co. v. Hobbs*, 40 Ind. App. 511, 81 N. E. 90.

Where insured property is destroyed, the insurer after paying the loss may maintain an action against the person responsible for the loss in the name of the insured, or the insured may maintain an action as trustee for the insurer, wherever the common-law procedure prevails; but, under the Code procedure rule that actions shall be maintained by the real party in interest, the insured may sue in his own name, or both insurer and insured may join in an action where the insurance only partially covers the loss.—Id.

Where insured property is destroyed through the negligence of a third person, and the assured sustains loss in excess of the insurance received, he has a right of action for such excess against the person responsible for the destruction of the property.—Id.

[g] (App. 1909)

By payment of the loss under a fire insurance policy the company was subrogated to the rights of the insured against one negligently causing the fire.—*Pittsburgh, C., C. & St. L. R. Co. v. German Ins. Co.*, 87 N. E. 995.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1504-1511, 1514-1516.

See, also, 19 Cyc. p. 893, 25 Cyc. p. 903, 26 Cyc. p. 710; note, 3 L. R. A. (N. S.) 79.

#### § 607. — Under assignment of rights of insured.

[a] (Sup. 1894)

A mortgaged certain land to B., and, as additional security, insured the mortgaged premises under a policy providing that, whenever the insurer should pay to the mortgagee any sum for loss under the policy, it should be

subrogated to the rights of such mortgagee. A. sold the property to C., who assumed the mortgage, and, the property having been destroyed by fire, the insurer paid the loss to B., and after assignment of B.'s interest brought an action against C., and alleged that the fraction of the mortgage debt retained by B. had been fully paid, which payment was admitted by demurrer. Held, that such allegation of payment after the assignment to the insurance company was essential to its right of recovery and to protect C. from a multiplicity of suits.—*Insurance Co. of North America v. Martin*, 37 N. E. 394, 139 Ind. 317.

[b] (App. 1907)

Where insured property is destroyed by the negligent act of a third person and the insurer pays the insured for the loss, such payment creates an equitable assignment to the insurer of the insured's right of action against the person causing the loss to the amount of the payment by the insurer.—*Lake Erie & W. R. Co. v. Hobbs*, 40 Ind. App. 511, 81 N. E. 90.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1512, 1513.

See, also, 19 Cyc. p. 894, 25 Cyc. p. 903, 26 Cyc. p. 711; note, 65 C. C. A. 615.

#### XVIII. ACTIONS ON POLICIES.

Actions on executory agreements to insure, see ante, § 128.

Alteration, see ALTERATION OF INSTRUMENTS, § 28.

Competency of insurance agent to testify in an action by the heir of the policy holder as to occurrences in decedent's lifetime, see WITNESSES, § 141.

Competency of joint owner as witness in suit by another joint owner, see WITNESSES, § 91.

Estoppel by change of position in action, see ESTOPPEL, § 68.

Limitation of cross-examination of witness to subjects of direct examination, see WITNESSES, § 269.

Mutual benefit insurance, see post, §§ 803-833

On reinsurance contract, see post, § 686.

Remedies and proceedings on insolvency of company, see ante, § 44.

Stipulations at trial, see STIPULATIONS, §§ 11, 16.

Sufficiency of release of joint owner of insurance to render him competent as a witness, see WITNESSES, § 112.

Waiver of prohibition as to testimony of physicians, see WITNESSES, § 219.

#### § 608. Nature and form of remedy.

[a] (Sup. 1864)

A. made application for an insurance upon his life for the benefit of his wife on September 27, 1850, and on that day the application was mailed to the company by its agent. The application was approved, a policy was issued

thereon, and mailed to the agent October 2, 1850, and received by him October 5, 1850. A. was taken sick September 29th, and died October 4th. The policy was returned by the agent to the company. *Held* that, to enforce such contract, a bill in equity might be maintained by A.'s widow.—*Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96.

[b] (App. 1899)

A court of equity, having jurisdiction to compel specific performance, will enforce an oral contract for a policy of fire insurance, and adjudge the damages on a loss as though a policy had been issued, and suit had been brought on it for the loss, since the effect is the same whether the suit is on contract for a loss under the risk or for breach of contract for not insuring, as the loss is the measure of damages.—*Western Assur. Co. v. McAlpin*, 55 N. E. 119, 23 Ind. App. 220, 77 Am. St. Rep. 423.

[c] (App. 1901)

Where the issuance of a policy pursuant to a preliminary agreement for insurance is averred, and recovery is sought on the policy itself, the proceeding is an action at law on the policy, and not in equity to enforce the agreement.—*Prudential Ins. Co. v. Sullivan*, 59 N. E. 873, 27 Ind. App. 30.

[d] (Sup. 1904)

An action on an account stated may be maintained on a claim arising from the loss by fire of insured property.—*Farmers' Ins. Ass'n of Madison County v. Reavis*, 70 N. E. 518, 71 N. E. 905, 163 Ind. 321.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1517, 1519.

See, also, 1 Cyc. p. 282, 19 Cyc. p. 898, 25 Cyc. p. 904, 26 Cyc. p. 714.

§ 611. Grounds of action.

[a] (Sup. 1896)

The principle of a recovery on a quantum valebat has no application to policies of life insurance which are indivisible, and where a policy had been forfeited under its terms for nonpayment of premiums there can be no proportionate recovery thereon on the ground that it provided for the issuance, on its surrender before forfeiture, of a paid-up policy proportionate in amount to the number of premiums paid, no application for such paid-up policy, nor offer to surrender, by the insured, being shown.—*Meyer v. Manhattan Life Ins. Co.*, 144 Ind. 439, 43 N. E. 448.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1518.

See, also, 25 Cyc. p. 904.

§ 612. Conditions precedent in general.

Appraisal of loss, waiver, see ante, § 576.

Instructions, see post, § 669.

Objections in lower court affecting right to review on appeal, see post, § 674.

Pleading, see post, §§ 628, 634, 640, 641.

Questions for jury as to performance, see post, § 668.

Verdict and findings relating to, see post, § 670.

[a] (Sup. 1873)

A provision in an accident insurance policy that "no claim shall be made under this policy by the said insured in respect to any injury, unless the same shall be caused by some outward or visible means, of which proof satisfactory can be furnished," does not require the insured to furnish proofs of the character and extent of the injury before bringing suit.—*Railway Pass. Assur. Co. of Hartford v. Burwell*, 44 Ind. 460.

[b] (Sup. 1886)

Where an insurance policy provides that the insurance shall not be due until 60 days after proof of the loss, with a particular verified statement of the title or interest of the assured, such statement is a condition precedent, and the plaintiff, in a suit to recover the amount of the policy, must show either a performance of the same or a waiver on the part of the company.—*Indiana Ins. Co. v. Capehart*, 108 Ind. 270, 8 N. E. 285.

Where an insurance policy provides that the insurance shall not be due until 60 days after proof of the loss, with a particular verified statement of the origin of the fire, such statement is a condition precedent, and the plaintiff, in a suit to recover the amount of the policy, must show either a performance of the same or a waiver on the part of the company.—*Id.*

[c] (App. 1895)

Where a fire insurance policy provided that, in case of a disagreement as to the amount of a loss, before an action on the policy could be brought the amount of the loss should be submitted to arbitration, and, after the company's adjuster and assured had negotiated as to the amount of the loss without agreeing, the company demanded further proofs of loss and refused to pay anything till they were furnished, but never offered to submit the loss to arbitration, the company cannot claim that a suit brought on the policy four months thereafter was a violation of its terms as to arbitration.—*Milwaukee Mechanics' Ins. Co. v. Stewart*, 13 Ind. App. 640, 42 N. E. 290.

[d] (App. 1900)

Conditions in an insurance policy that, if a fire occur, the insured shall give immediate notice of any loss thereof in writing, to the insurance company, and within 60 days render to the company proof of loss, are conditions precedent

to the right of recovery.—*Hanover Fire Ins. Co. v. Johnson*, 57 N. E. 277, 26 Ind. App. 122.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1520-1528.

See, also, 1 Cyc. pp. 279-281, 19 Cyc. pp. 898-900, 25 Cyc. p. 905, 26 Cyc. p. 716; notes, 2 C. C. A. 473, 9 C. C. A. 628, 35 C. C. A. 404, 39 C. C. A. 389; note, 2 L. R. A. (N. S.) 548.

#### § 613. Demand.

[a] (Sup. 1883)

A demand for the payment of a life policy is not a condition precedent to the right of suing thereon.—*Excelsior Mut. Aid Ass'n of Anderson v. Riddle*, 91 Ind. 84.

[b] (App. 1896)

Demand of payment of a life policy need not be made where the insurer, on notice of death, denies liability.—*Union Cent. Life Ins. Co. v. Hollowell*, 14 Ind. App. 611, 43 N. E. 277.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1529.

See, also, 19 Cyc. p. 899, 25 Cyc. p. 906.

#### § 614. Defenses.

Statute of frauds as defense, to whom available, see FRAUDS, STATUTE OF, § 143.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1530-1534.

See, also, 1 Cyc. pp. 282-284, 15 Cyc. p. 1040, 25 Cyc. p. 907, 26 Cyc. p. 720.

#### § 615. — In general.

[a] (Sup. 1880)

Where a policy of fire insurance is taken out by a mortgagee of the property on an agreement with the mortgagor that the insurance so procured is to be kept up for the benefit of the mortgagee, and that for any loss that might occur to the buildings described therein the sum paid by the insurer should be credited on the mortgage debt, reducing the indebtedness of the mortgagor pro tanto, it is no defense to the action on the policy by the mortgagor that after the fire the real estate on which the insured buildings were located was ample security for the mortgage debt.—*Etna Ins. Co. of Hartford, Conn., v. Baker*, 71 Ind. 102.

Where a policy of fire insurance was taken out by the mortgagee of the property on an agreement with the mortgagor that the insurance was to be kept up for the benefit of the mortgagor, and that for any loss that might occur to the buildings described therein the sum paid by the insurer should be credited on the mortgage debt, reducing the indebtedness of the mortgagor pro tanto, the fact that, after the fire and before the commencement of the suit, plaintiff repaired and rebuilt the building, and that the improvements had since remained as good and valuable as before the fire, was not a de-

fense available to the insurer in an action by the mortgagor on the policy.—*Id.*

[b] (App. 1893)

Where an applicant for insurance executed assignments for future payments of salary to the insurance company to be collected by it and applied on premiums, but the insured afterwards in person drew and receipted for all the money due or owing him as wages for each of the months mentioned in the order so that nothing was ever paid to the insurance company, the insured could not, in attempting to maintain an action on the policy for an accident occurring to him, set up the principle that forfeitures are not favored either in law or in equity.—*Landis v. Standard Life & Acc. Ins. Co.*, 33 N. E. 989, 6 Ind. App. 502.

[c] (App. 1896)

The fact that an insurance company repudiated the risk after the loss would not relieve it from liability.—*German Fire Ins. Co. v. Columbia Encaustic Tile Co.*, 43 N. E. 41, 15 Ind. App. 623.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1530, 1532-1534.

See, also, 25 Cyc. pp. 907, 1528.

#### § 617. Jurisdiction.

Objections to jurisdiction, see COURTS, § 37.

[a] (App. 1903)

Under Burns' Ann. St. 1901, § 4918a, the circuit court has jurisdiction of actions on an insurance policy, although the policy was executed in another state.—*United States Health & Accident Ins. Co. v. Clark*, 83 N. E. 760, 41 Ind. App. 345.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1535.

See, also, 19 Cyc. p. 902, 25 Cyc. p. 908, 26 Cyc. pp. 714, 715.

#### § 618. Venue.

[a] (Sup. 1855)

The charter of an insurance company provided that the assured should, in case of loss, give notice to the directors, and they thereupon should ascertain and determine the loss, and, if the assured was dissatisfied with their decision, he should bring his action at the next court for M. county. An assured lost by fire, gave notice, and the loss was not "ascertained and determined," and he brought his action in the court for V. county. *Held*, that the action was properly brought.—*Indiana Mut. Fire Ins. Co. v. Routledge*, 7 Ind. 25.

[b] (App. 1896)

Even if the action against a foreign insurance company must be instituted in the county in which the insurance was contracted for and the loss occurred, when there is an agent in such county at the time of suit, yet the insurer cannot predicate error upon the overruling of a demurrer to the complaint in an action

brought in another county, where it does not appear that there was any agent in the county where the insurance was effected at the time of the commencement of the action.—*Ohio Farmers' Ins. Co. v. Stowman*, 16 Ind. App. 205, 44 N. E. 558, 940.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1536-1539.

See, also, 1 Cyc. p. 284, 19 Cyc. p. 902, 25 Cyc. pp. 908, 1521.

#### § 620. Limitations by provisions of policy.

In mutual benefit certificate, see post, § 815.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1542-1553.

See, also, 1 Cyc. pp. 281, 282, 15 Cyc. p. 1039, 19 Cyc. pp. 903-910, 25 Cyc. p. 910, 26 Cyc. p. 716; note, 47 L. R. A. 696.

#### § 622. — Time within which action must be brought.

##### [a] (Sup. 1887)

The legislature has the constitutional right to prescribe the terms upon which foreign insurance companies may transact business in Indiana, and under section 3770, Rev. St. 1881, which provides that "no condition or agreement not to sue for a period of less than three years shall be valid," a condition in a policy, executed after that statute went into effect, that, if suit was not commenced within one year from the date of the loss, the lapse of time should be conclusive against the validity of the claim, will not defeat an action brought after the expiration of one year, but within three years from the date of the loss.—*Insurance Co. of North America v. Brim*, 111 Ind. 281, 12 N. E. 315.

##### [b] (App. 1905)

The condition of a policy that no suit on the same shall be maintained, unless brought within six months after the death of insured, is void, under Burns' Ann. St. 1901, § 4923, providing that "no condition or agreement not to sue for a period of less than three years shall be valid."—*Rutherford v. Prudential Ins. Co.*, 73 N. E. 202, 34 Ind. App. 531.

##### [c] (Sup. 1908)

A provision in an insurance policy, limiting the time to bring suit thereon to a period less than that fixed by the statute of limitations, is valid, unless forbidden by statute.—*Caywood v. Supreme Lodge, Knights & Ladies of Honor*, 171 Ind. 410, 86 N. E. 482, 23 L. R. A. (N. S.) 304, 131 Am. St. Rep. 253.

##### [d] (App. 1908)

Under Burns' Ann. St. 1901, § 4923, providing that in an insurance policy "no condition or agreement not to sue for a period of less than three years shall be valid," a provision in a policy, limiting the right to sue to six months,

is void.—*Phoenix Accident & Sick Benefit Ass'n v. Lathrop*, 81 N. E. 227, 41 Ind. App. 141.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1544-1550.

See, also, 19 Cyc. pp. 905-910, 25 Cyc. pp. 910, 911, 1521, 26 Cyc. p. 715.

#### § 623. — Waiver of limitation.

##### [a] (Sup. 1854)

Where a defendant insurance company, by its acts in negotiating for a settlement of a claim, has led insured to believe that he will be paid without suit, the company cannot take advantage of the provision in its policy requiring action to be brought within a stated time after loss.—*Grant v. Lexington Fire, Life & Marine Ins. Co.*, 5 Ind. 23, 61 Am. Dec. 74.

##### [b] (App. 1900)

Where a fire insurance policy provided that the company should pay the loss within 60 days after receiving proof of loss, and a complaint was filed August 30th which alleged that plaintiff notified the company of the loss June 23d, and that its adjuster in two or three days thereafter made inquiry into the facts and notified plaintiff that the loss would not be paid, an objection that the action was premature was not well taken.—*Home Ins. Co. v. Sylvester*, 57 N. E. 991, 25 Ind. App. 207.

##### [c] (Sup. 1908)

A provision limiting the time within which an action may be brought on an insurance certificate, being for the company's benefit, may be waived by it.—*Caywood v. Supreme Lodge, Knights & Ladies of Honor*, 171 Ind. 410, 86 N. E. 482, 23 L. R. A. (N. S.) 304, 131 Am. St. Rep. 253.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1551-1553.

See, also, 1 Cyc. p. 281, 19 Cyc. p. 908, 25 Cyc. p. 912, 26 Cyc. p. 716.

#### § 624. Parties.

Persons entitled to proceeds, see ante, §§ 580-594.

##### [a] (Sup. 1880)

When a policy is taken out by a mortgagee, as such, upon his interest in the mortgaged property, for the benefit of the mortgagor, on an agreement with him that, in case of loss, any sum paid shall be credited on the mortgage debt, the mortgagor is the proper party to sue on the policy.—*Ætna Ins. Co. of Hartford, Conn., v. Baker*, 71 Ind. 102.

##### [b] (Sup. 1887)

Where an insurance policy is issued to the owner of a building, by which the loss is payable to a creditor as his interest may appear, and the amount of loss exceeds the debt due the latter, both such parties may, under Rev. St. 1881, §§ 262, 269, providing for the joinder of

parties "having an interest in the subject of the action, and in obtaining the relief demanded," maintain a joint action on the policy.—*Home Ins. Co. v. Gilman*, 112 Ind. 7, 13 N. E. 118.

[c] (Supp. 1890)

The administrator and the heirs cannot join in an action on a policy of insurance for a loss occurring after the death of the assured.—*Pfister v. Gerwig*, 122 Ind. 567, 23 N. E. 1041.

[d] (App. 1899)

Under *Burns' Rev. St. 1894*, § 251, requiring actions to be prosecuted by the real party in interest, a mortgagee to whom a fire policy is payable "as his interest may appear," where the mortgage debt exceeds the amount of the policy, may sue alone on it, without joining the insured as plaintiff if he is made defendant.—*Franklin Ins. Co. v. Wolff*, 54 N. E. 772, 23 Ind. App. 549.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1557-1571.

See, also, 1 Cyc. p. 282, 19 Cyc. pp. 911-916, 25 Cyc. pp. 913-915, 1521, 1528, 26 Cyc. pp. 716-718; note, 16 Am. Dec. 323; note, 19 Am. Rep. 331.

#### § 625. Process.

##### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1572-1574.

See, also, 1 Cyc. p. 284, 19 Cyc. p. 916, 25 Cyc. p. 915.

#### § 626. — In general.

[a] (App. 1899)

The amended return of the sheriff to the summons issued in an action on an insurance policy read: "Served the within summons, as commanded, on defendant [naming the corporation and giving the date of service], by handing said summons to M., agent of said defendant, residing in C. county, Indiana; and that said M. looked at the same, and advised the undersigned to send said summons to [naming them], the general agents of defendant, residing at Indianapolis. Neither the president nor chief officers of defendant corporation was found in my county." *Burns' Rev. St. 1894*, § 318, provides that process against a domestic or foreign corporation may be served on the president, presiding officer, chairman of the board of trustees, or other chief officer, or, if its chief officer is not found in the county, then on its cashier, treasurer, director, secretary, clerk, general or special agent; and section 319 provides that no summons, or the service thereof, shall be adjudged insufficient, where the party on whom it may be served is informed thereby of the institution of an action against him, of the name of plaintiff and the court, and the time when he is required to appear. *Held*, that the service was sufficient, as the agent received the summons, and from the directions given by him, knew the action had been brought, the parties

thereto, and the court where pending, though the summons may not have been served by reading or leaving a copy at the last and usual place of residence.—*Ft. Wayne Ins. Co. v. Irwin*, 54 N. E. 817, 23 Ind. App. 53.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1572.

See, also, 25 Cyc. p. 915.

#### § 627. — Against foreign insurance companies.

[a] (Supp. 1881)

Code, § 30, provides for the service of process, in an action against a corporation, upon its agent in the county where it has an office, only when the cause of action is connected with the business of such office. *Held*, in an action against an insurance company organized under the laws of Connecticut, upon a policy given by its agent in Illinois on property in the latter state, that service of process on its local agent in Indiana did not give the court jurisdiction over the company.—*Ætna Ins. Co. v. Black*, 80 Ind. 513.

[b] (Supp. 1890)

*Elliott*, Supp. § 903, which provides that no foreign insurance company shall do business in Indiana until it has filed, with the auditor of state, its consent that process against it may be served upon any one of its authorized agents in the state, and, in the absence of such agent, upon the auditor of state, excepts foreign insurance companies from the provisions of *Rev. St. Ind. 1881*, §§ 316, 3022, 3023, regulating the service of process on foreign corporations in general.—*Rehm v. German Ins. & Sav. Inst.*, 125 Ind. 135, 25 N. E. 173.

*Elliott's Supp. § 903*, provides that no foreign insurance company shall transact business in Indiana until it has filed with the state auditor its consent that process be served upon one of its authorized agents. *Held* that, where the plaintiff in a suit against such corporation is its authorized agent, process may be served on the auditor.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1572-1574; 12 CENT. DIG. Corp. §§ 2603-2627.

See, also, 19 Cyc. p. 916, 25 Cyc. p. 915.

#### § 628. Declaration, complaint, or petition.

Aider by verdict or judgment, see PLEADING, § 433.

Pleading common law of other state, see COMMON LAW, § 15.

Pleading foreign statutes, see STATUTES, § 281.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1554, 1575-1608.

See, also, 1 Cyc. pp. 285, 286, 15 Cyc. p. 1040, 19 Cyc. pp. 525, 917-925, 25 Cyc. pp. 916-920, 1521, 26 Cyc. p. 718.

# § 629. — Form and requisites in general.

## [a] (Sup. 1859)

In an action on an open policy providing that the company shall be liable for such sums as shall be specified by application, and mutually agreed upon, and indorsed upon the policy, it is necessary, in the pleadings, to aver that an amount sought to be recovered had been mutually agreed upon and indorsed upon the policy.—*Crane v. Evansville Ins. Co.*, 13 Ind. 446.

## [b] (Sup. 1835)

In a suit upon a contract of insurance made by a foreign company, it is not necessary that the complaint should show a compliance by the agent with the requirements of the "act respecting foreign corporations," etc.—*New England Fire & Marine Ins. Co. v. Robinson*, 25 Ind. 536.

## [c] (Sup. 1874)

A complaint on a life insurance policy which avers the consideration substantially as it was recited in the policy is sufficient against the objection that a part of the consideration was secured to be paid by separate obligations which are not disclosed in the complaint.—*Mutual Ben. Life Ins. Co. v. Cannon*, 48 Ind. 264.

## [d] (Sup. 1880)

A complaint on an insurance policy issued on the life of plaintiff's husband for plaintiff's benefit, which alleged the individual defendants had possession of and claimed some interest in the policy, and prayed that they be compelled to produce the same and assert their claim, was sufficient on demurrer.—*Godfrey v. Wilson*, 70 Ind. 50.

## [e] (Sup. 1889)

In an action on a policy plaintiff need not aver the truth of statements contained in the application, a general allegation that he has performed all the terms of the contract on his part being sufficient.—*Phenix Ins. Co. of Brooklyn v. Pickel*, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393.

## [f] (Sup. 1891)

Where an application for insurance provides that the contract shall be construed according to the charter of the company, a complaint on the policy need not allege that the charter contains nothing to prevent plaintiff from setting up that the company was estopped by the acts of its agent from relying on a false answer in the application as to previous application for insurance.—*Germania Life Ins. Co. of New York v. Lunkenheimer*, 127 Ind. 536, 26 N. E. 1082.

## [g] (Sup. 1891)

A life insurance policy contained a provision that the company should not be liable for a loss occurring while a note given for premium was overdue and unpaid. The complaint alleged that the policy holder gave his note for an annual premium, and before maturity made an agreement with the company

that the time of payment be extended to a certain time after maturity of the note, and prior to the expiration of the period of renewal the maker of the note died. *Held*, in an action by the wife of the deceased policy holder on the policy, that the complaint stated a sufficient cause of action.—*Michigan Mut. Life Ins. Co. v. Custer*, 128 Ind. 25, 27 N. E. 124.

## [h] (App. 1895)

That plaintiff, in an action against an insurance company to recover for a loss, sets forth in his complaint the facts in connection with appraisal proceedings, as provided in the policy, to determine the value of the articles destroyed, and the extent of the injury to those remaining, does not necessarily change the action from one on the policy to one on the award of the appraisers.—*Germania Fire Ins. Co. of City of New York v. Warner*, 13 Ind. App. 466, 41 N. E. 969.

## [i] (App. 1896)

In a complaint on a policy of insurance, an allegation that the policy was executed and delivered to insured in consideration of a certain sum as a premium is a sufficient averment of the consideration for said policy, as it was immaterial whether the premium was paid in cash or whether a credit was given for the same.—*Ohio Farmers' Ins. Co. v. Stowman*, 16 Ind. App. 205, 44 N. E. 558, 940.

## [j] (App. 1900)

Where a complaint to recover for the loss of wearing apparel destroyed by fire alleged that there had been an adjustment as to the loss of household furniture, but none as to family apparel, it was not necessary for plaintiff to aver that he had refunded the benefits under such adjustment.—*German Fire Ins. Co. v. Seibert*, 56 N. E. 686, 24 Ind. App. 279.

## [k] (App. 1904)

In an action on a policy issued by a foreign insurance company, in which the title of the cause and the policy sued on designated the defendant as the "Phenix Insurance Company of Brooklyn, New York," there was a sufficient allegation as to the state under whose laws defendant was organized.—*Phenix Ins. Co. of Brooklyn, N. Y., v. McAtee*, 70 N. E. 947, 33 Ind. App. 106.

## [l] (App. 1906)

A complaint for recovery of insurance, alleging that plaintiff's decedent duly paid four annual premiums on a 20-payment life policy, by which he secured an extension for 10 years by virtue of the table of extended insurance, and that decedent died within such time, shows that such policy was alive at decedent's death.—*Union Mut. Life Ins. Co. v. Adler*, 38 Ind. App. 530, 73 N. E. 835, 75 N. E. 1088.

## [m] (App. 1906)

A complaint, showing that defendant executed a policy of insurance on plaintiff's barn, covering loss thereof by lightning, in consideration of the payment of a certain premium; that

such barn was destroyed by lightning; that plaintiff performed all conditions on his part; and that plaintiff sustained by reason thereof a certain loss, is sufficient on demurrer.—*Home Ins. Co. v. Gagen*, 38 Ind. App. 680, 78 N. E. 927.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1575–1580, 1584–1586, 1592, 1598.

See, also, 19 Cyc. p. 917, 25 Cyc. p. 916, 26 Cyc. p. 718.

#### § 630. — Insurable interest.

Title and insurable interest of insured, see post, § 633.

##### [a] (Sup. 1863)

A complaint on a policy of insurance, alleging that the defendants insured "the plaintiffs to the amount of \$3,000 on 10,000 bushel of oats," etc., sufficiently shows the plaintiffs' interest.—*Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520.

[b] A complaint on an insurance policy must allege an insurable interest at the time of the loss, as well as at the time of the execution and delivery of the policy.—(Sup. 1881) *Home Ins. Co. of New York v. Duke*, 75 Ind. 535; (1881) *Ætna Ins. Co. v. Kittles*, 81 Ind. 96; (App. 1892) *Indiana Live Stock Ins. Co. v. Bogeman*, 4 Ind. App. 237, 30 N. E. 7.

##### [c] (Sup. 1883)

A daughter suing on a policy of insurance on her mother's life must allege and prove a pecuniary interest in the life, as such an interest is not presumed.—*Continental Life Ins. Co. v. Volger*, 89 Ind. 572, 46 Am. Rep. 185.

##### [d] (Sup. 1889)

Where a complaint in an action on a policy avers that the property insured was plaintiff's property at the time the policy was issued, and that it was in his barn on his premises at the time of loss, and that he was damaged to the value thereof, the insurable interest of plaintiff sufficiently appears.—*Phœnix Ins. Co. of Brooklyn v. Pickel*, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393.

##### [e] (Sup. 1889)

In an action on a policy on the life of another, the complaint must allege that plaintiff had an insurable interest in the life of the assured.—*Burton v. Connecticut Mut. Life Ins. Co.*, 119 Ind. 207, 21 N. E. 746, 12 Am. St. Rep. 405.

##### [f] (App. 1897)

In an action on a fire policy, a complaint which does not allege an insurable interest or ownership in plaintiff when the property was destroyed, is fatally defective.—*Western Assur. Co. of Toronto v. Koontz*, 46 N. E. 95, 17 Ind. App. 54.

##### [g] (App. 1902)

Where a complaint on a fire policy failed to allege that plaintiff had an insurable inter-

est in the property insured at the time the policy was issued and at the time of the loss, it was demurrable.—*Vernon Insurance & Trust Co. v. Bank of Toronto*, 65 N. E. 23, 29 Ind. App. 678.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1582, 1583.

See, also, 1 Cyc. p. 285, 19 Cyc. p. 920, 25 Cyc. p. 918, 26 Cyc. p. 718.

#### § 631. — Setting forth or annexing policy and accompanying documents.

Amendment, see post, § 643.

[a] It is not necessary that the application of the party in whose favor a policy issues should be set out in, or made an exhibit to, a complaint on such policy, for it is not the foundation of the action.—(Sup. 1862) *Commonwealth's Ins. Co., etc., v. Monninger*, 18 Ind. 352; (1874) *Mutual Ben. Life Ins. Co. v. Cannon*, 48 Ind. 264; (1882) *Continental Life Ins. Co. v. Kessler*, 84 Ind. 310; (1885) *Penn Mut. Life Ins. Co. v. Wiler*, 100 Ind. 92, 50 Am. Rep. 769; (1889) *Phœnix Ins. Co. of Brooklyn v. Stark*, 120 Ind. 444, 22 N. E. 413; (App. 1893) *Same v. Lorenz*, 7 Ind. App. 266, 33 N. E. 444, 34 N. E. 495; (1894) *Indiana Farmers' Live Stock Ins. Co. v. Byrnett*, 9 Ind. App. 443, 36 N. E. 779.

##### [b] (Sup. 1865)

A parol contract for the insurance of a building against fire was made with an insurance company, and the policy was to be delivered when called for, and the premium paid within five days. The building was destroyed before the expiration of the time, and before the payment of the premium. A tender of the premium was immediately made, but the company refused to deliver the policy. *Held*, in an action to recover the amount insured, that the policy of insurance which the company agreed to issue was not the foundation of the action; and hence it was not necessary to file a copy of it with the complaint.—*New England Fire & Marine Ins. Co. v. Robinson*, 25 Ind. 536.

##### [bb] (Sup. 1884)

Where a policy of insurance was assigned as security for an indebtedness, and the holder after the death of the assignor brought a suit against his administrators to recover the proceeds of the policy, neither the policy nor the written assignments indorsed thereon can be regarded as the foundation of the complaint, and it was not necessary that a copy of the policy or the assignments be filed with the complaint, as it is only when a pleading is founded on a written instrument that the original or a copy thereof under Rev. St. 1881, § 362, must be filed with the pleading.—*Hight v. Taylor*, 97 Ind. 392.

## [c] (Sup. 1884)

A complaint founded on a policy of insurance, and seeking to recover thereon, is insufficient where it fails to make the policy or a copy thereof a part of the pleading, or by proper averments show a sufficient excuse for not doing so.—*McLean v. Equitable Life Assur. Soc. of United States*, 100 Ind. 127, 50 Am. Rep. 779.

## [d] (Sup. 1885)

A complaint on a policy of insurance must contain the policy as an exhibit or a copy thereof.—*Indiana Ins. Co. v. Hartwell*, 100 Ind. 566.

## [e] (Sup. 1886)

In an action on a life policy, it was not necessary that a copy of the application should have been filed with the complaint.—*Northwestern Mut. Life Ins. Co. v. Hazelett*, 4 N. E. 582, 105 Ind. 212, 55 Am. Rep. 192.

## [f] (Sup. 1889)

In an action on an insurance policy on the life of another, which recites payment of the advance premium by plaintiff, and her promise to pay further premiums as the consideration for the execution of the policy, allegations in the complaint that the assured was plaintiff's grandfather, and, desiring to make provision for her, purchased the policy from defendant, and that it was his intention that plaintiff should be the beneficiary thereunder, are demurrable as conflicting with the policy.—*Burton v. Connecticut Mut. Life Ins. Co.*, 119 Ind. 207, 21 N. E. 746, 12 Am. St. Rep. 405.

## [g] (App. 1896)

The fact that the policy is in the hands of insurer, who refuses to deliver the same to insured, is sufficient excuse for failure to set out a copy thereof in the complaint.—*National Fire Ins. Co. of Hartford v. Strebe*, 44 N. E. 768, 16 Ind. App. 110.

## [h] (App. 1896)

Making the policy an exhibit will prevent the complaint from being defective for want of a direct averment therein of the consideration and time of expiration of the policy.—*Ætna Ins. Co. v. Strout*, 44 N. E. 934, 16 Ind. App. 160.

## [i] (App. 1897)

An amended complaint is bad on demurrer where no copy of the policy sued upon is filed with it, though a copy was filed as an exhibit with the original complaint.—*Western Assur. Co. v. McCarty*, 48 N. E. 265, 18 Ind. App. 449.

## [j] (App. 1899)

Where a fire insurance company agrees to make and deliver a policy of insurance within a reasonable time, and nothing as to the terms and conditions of the insurance is left open, a copy of the policy need not be filed with the complaint in an action to recover for a loss ac-

cruing before the delivery of the policy, as the policy is not the foundation of the action.—*Western Assur. Co. v. McAlpin*, 55 N. E. 119, 23 Ind. App. 220, 77 Am. St. Rep. 423.

## [k] (App. 1900)

In an action on an insurance policy, it is not necessary to make the application a part of the complaint.—*Knights Templar & Masons' Life Indemnity Co. v. Dubois*, 57 N. E. 943, 26 Ind. App. 38.

## [l] (App. 1901)

Where an action for a fire loss against a mutual fire insurance company is based on an agreement to issue a policy, and not on the policy, a copy of the blank form of policy used by the company is of no avail as an exhibit.—*Farmers' Co-operative Ins. Co. of Boone County v. Nolan*, 60 N. E. 163, 26 Ind. App. 514.

## [m] (App. 1902)

In an action before a justice on a policy of insurance, the complaint is not bad against a demurrer for failure to make a copy of the application an exhibit, though made a part of the policy by its terms.—*Phoenix Accident & Sick Ben. Ass'n v. Horton*, 64 N. E. 105, 29 Ind. App. 198.

## [n] (Sup. 1904)

A complaint on a policy of insurance was not objectionable for failure to have attached thereto as an exhibit a copy of the application on which the policy purports to have been issued.—*Penn Mut. Life Ins. Co. v. Norcross*, 72 N. E. 132, 163 Ind. 379.

## [o] (Sup. 1905)

An allegation of a complaint on an insurance policy, that the adjuster's agreement is "made a part hereof and attached hereto," is sufficient to make such agreement a part of the complaint under *Burns' Ann. St. 1901*, § 365, providing that when a pleading is founded on a written instrument the original or a copy thereof must be filed with the pleading, and shall be taken as part of the record if not copied in the pleading.—*Fireman's Fund Ins. Co. v. Finklestein*, 73 N. E. 814, 164 Ind. 376.

## [p] (App. 1906)

In a suit on an oral contract of insurance, a copy of the form of insurance in use by the insurer filed as an exhibit to the complaint is not essential to the complaint because it is not the foundation of the action.—*Posey County Fire Ass'n v. Hogan*, 37 Ind. App. 573, 77 N. E. 670.

## [q] (App. 1908)

Where the company in which insured was originally insured transferred its policies and business to another company, and the latter company sent insured a notice of the transfer, and requested him to attach the notice to his policy, but did not state the terms of the contract of transfer between the companies, in an action on the policy it was not necessary to file as an exhibit a copy of the contract of transfer.

even if it was in writing.—*Mutual Reserve Life Ins. Co. v. Ross*, 42 Ind. App. 621, 86 N. E. 506.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1588, 1589.

See, also, 1 Cyc. p. 286, 19 Cyc. p. 918, 25 Cyc. p. 917.

### § 632. — Description, situation, and condition of subject-matter.

[a] (Sup. 1881)

Where the policy provides that it shall cease to be valid if the premises cease to be occupied, the complaint must aver that the house was occupied at the time of the fire.—*Etna Ins. Co. v. Black*, 80 Ind. 513.

[b] (Sup. 1889)

A policy covered a barn, farming implements, hay, grain, stock, etc. In an action thereon, the complaint averred that on a certain day "said barn, farming implements, hay, grain, stock, etc., covered by said policy, and in said barn at the time, were destroyed by fire." Held, that it sufficiently appeared that the warranty of a continued occupancy of the building had been complied with.—*Phenix Ins. Co. of Brooklyn v. Pickel*, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393.

[c] (Sup. 1890)

In an action on a policy containing a condition that it should be null and void if the buildings insured should become vacant or unoccupied without the consent of the company indorsed on the policy, the performance of this condition is sufficiently stated by an averment that the plaintiff "has, upon his part, performed each and every act which, by the terms of said policy, he was required to do."—*Phenix Ins. Co. of Brooklyn v. Golden*, 121 Ind. 524, 23 N. E. 503.

[d] (App. 1903)

A complaint in an action on a fire policy, which describes the property insured as lot 25 in M.'s addition to a certain city, is not bad because the policy shows that defendant insured plaintiff against loss by fire of a dwelling situated on lot 25 in M.'s Fifth addition to the city, though the variance may be ground for an objection to the introduction of the policy in evidence.—*Franklin Ins. Co. v. Feist*, 68 N. E. 188, 31 Ind. App. 390.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1595.

### § 633. — Title or interest of insured.

[a] (Sup. 1874)

A complaint on a policy of insurance should allege that the assured had an interest in the property insured, and to what amount at the commencement of the risk and at the time of the loss, but it is not necessary to state plaintiff's title to, or ownership in, the proper-

ty.—*Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315; *Germania Ins. Co. v. Same*, 46 Ind. 331.

[b] (Sup. 1882)

Where the complaint in an action on a fire insurance policy alleges that, on a certain date, defendant insured plaintiff's property, and that the property was burned and wholly lost to plaintiff, "all of which loss plaintiff, without any fault or negligence on his part has sustained," there was a sufficient showing that plaintiff had an interest in the insured property at the time of its loss.—*Phoenix Ins. Co. v. Benton*, 87 Ind. 132.

[c] (Sup. 1889)

In an action on a policy, providing that it shall be void if the assured is not the sole and unconditional owner of the property, a complaint alleging that plaintiff from the date of the policy until the loss had an insurable interest as the owner of the property, to its full value, sufficiently shows the ownership. A motion to make such allegation more specific is properly overruled.—*Phenix Ins. Co. v. Rowe*, 117 Ind. 202, 20 N. E. 122.

[d] (Sup. 1889)

In an action on an insurance policy, providing that, "if the assured shall not be the sole and unconditional owner in fee of said property, then this policy shall be void," a general allegation that plaintiff is the owner of the property is sufficient, in the absence of a motion to make more specific.—*Phenix Ins. Co. of Brooklyn v. Stark*, 120 Ind. 444, 22 N. E. 413.

[e] (Sup. 1889)

A complaint in an action on an insurance policy issued in the name of the husband, which joins the wife as a party, without averring that she ever acquired an interest in the policy, fails to state a cause of action.—*Traders' Ins. Co. of Chicago v. Newman*, 120 Ind. 554, 22 N. E. 428.

[f] (App. 1897)

A complaint on an insurance policy, which fails to allege that insured was the owner of the insured property, when destroyed by fire, is bad on demurrer.—*Western Assur. Co. v. McCarty*, 48 N. E. 265, 18 Ind. App. 449.

Error in overruling such demurrer is not cured by special findings of fact.—*Id.*

[g] (App. 1898)

In an action on a policy, an averment by plaintiff, claiming to have purchased the property and policy before the fire, that insured owned it when the policy was issued, and was in possession at the time of the fire, does not aver ownership or an insurable interest, and is hence insufficient.—*Phenix Ins. Co. v. Moffitt*, 51 N. E. 948.

[h] (App. 1899)

A complaint, in an action on a policy issued by mistake in the name of plaintiff's husband, alleging that plaintiff was the owner of

the property, that she paid the premium, that the policy was delivered to her, that the name of her husband was inserted by mistake, and that it was the intention of the parties to insure her, does not show an attempt to enter into a contract with the husband.—*Fireman's Fund Ins. Co. v. Dunn*, 53 N. E. 251, 22 Ind. App. 332.

As the insurance company admitted and corrected the error in the policy, by an indorsement in writing that it was issued by error to the person named therein and declaring that it was made payable to another, a lack of definiteness in the complaint in reference to the time of the discovery of the error is immaterial.—*Id.*

[l] (*App.* 1899)

A complaint on a fire insurance policy, alleging that at the date of the policy plaintiff was the owner of the property insured, and that thereafter the property was entirely consumed by fire, and that "plaintiff suffered a total loss, all to his damage in the sum of," etc., does not sufficiently aver that plaintiff owned the property at the time of its destruction.—*Farmers' Ins. Co. of Bedford v. Burris*, 55 N. E. 773, 23 Ind. App. 507.

A complaint on a fire insurance policy must aver that the property destroyed was at the time of the loss owned by the plaintiff.—*Id.*

[j] (*App.* 1902)

A complaint on a contract of fire insurance is insufficient if it fails to show that the insured was the owner of the property, or had an insurable interest therein, at the time of the loss.—*Prussian Nat. Ins. Co. v. Peterson*, 64 N. E. 102, 30 Ind. App. 289.

In an action on a fire insurance policy covering property destroyed in November, 1890, an averment that plaintiff was, on June 7, 1890 (the date of the policy), "and now is," the owner of a dwelling house on a certain street, and another averment that he was on such date, "and now is," the owner of a lot, together with the buildings thereon, and on such lot was a dwelling, which he occupied and used as his home until the loss, is insufficient to show the insured was the owner at the time of the loss.—*Id.*

[k] (*Sup.* 1903)

A complaint in an action on an insurance policy alleged that plaintiff was the owner of the property when it was insured, that while the policy was in force such property was damaged by fire, and that plaintiff immediately notified defendant, and further stated that, "after the loss and injury to his said property," defendant's adjuster visited the premises in company with plaintiff. *Held* to sufficiently allege that plaintiff was the owner of the insured property at the time of the fire.—*Insurance Co. of North America v. Hegewald*, 66 N. E. 902, 161 Ind. 631.

[l] (*App.* 1903)

Where a complaint on a fire policy alleged that plaintiff, "on the 6th day of December, 1899, of one dwelling house No. 1, situate in Jackson county, Indiana, that said defendant on said day in consideration of \$5.50 paid by plaintiff to defendant as a premium, executed and delivered to plaintiff a policy of insurance," etc., an objection that the complaint did not allege that plaintiff "was the owner" of such house at the time the policy was issued was not sustainable, the omission of such words being a clerical error, subject to amendment.—*Ohio Farmers' Ins. Co. v. Vogel*, 65 N. E. 1056, 30 Ind. App. 281.

Where a complaint in an action on a fire policy failed to allege that plaintiff was the owner of the property at the time of the loss, or that he had an insurable interest therein at such time, it was subject to demurrer.—*Id.*

[m] (*Sup.* 1905)

A complaint on an insurance policy alleging that the property covered by the policy belonged to plaintiff when the same was insured, and that while the policy was in force and effect and the property was the property of plaintiff a fire occurred, in which certain articles of the property belonging to plaintiff and covered by the policy were damaged, was sufficient in its allegations of ownership of the property by plaintiff to withstand a demurrer for want of facts.—*Fireman's Fund Ins. Co. v. Finklestein*, 73 N. E. 814, 164 Ind. 376.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1504.

See, also, 19 Cyc. p. 920.

§ 634. — Performance or waiver of conditions.

[a] (*Sup.* 1873)

Where a policy provides that before a loss shall be payable the insured shall produce to the company sworn statements of the loss and other matters, together with a certificate of a disinterested magistrate, respecting the loss, in an action upon the policy, the complaint must show that these conditions precedent have been performed.—*Home Ins. Co. of New York v. Duke*, 43 Ind. 418.

Where a policy provides that proofs of loss must be made before liability accrues, a plea of performance of the condition must clearly state such performance; and a mere allegation that "though proof of such loss has been duly made" defendant has not made good the loss is insufficient.—*Id.*

[b] (*Sup.* 1881)

The allegation of the complaint, in an action on an insurance policy, that the plaintiff "has, in all things, observed, and performed, and fulfilled all and singular the matters and things which were on his part to be observed, performed, and fulfilled, according to the conditions, form, and effect of said policy of insur-

ance," sufficiently avers performance of the conditions precedent named in the policy.—*American Ins. Co. v. Leonard*, 80 Ind. 272.

[c] (*Sup.* 1881)

Where a fire insurance policy provided that it should be void if the premises should cease to be occupied, a complaint in an action for loss thereunder should aver that the house was occupied at the time of the fire.—*Ætna Ins. Co. v. Black*, 80 Ind. 513.

[d] (*Sup.* 1881)

Code, § 84, provides that, in pleading the performance of a condition precedent in a contract, it shall be sufficient to allege generally that the party performed all the conditions on his part, and that, if the allegation be denied, the facts showing the performance must be proved at the trial. *Held* that, in an action on a fire policy, plaintiff having alleged that he had duly fulfilled all conditions of the policy, and that due notice and proof of loss had been given, it was not necessary for him to go on and specifically aver performance of each of the conditions.—*Ætna Ins. Co. v. Kittles*, 81 Ind. 96.

[e] (*Sup.* 1882)

Rev. St. 1881, § 370, providing that in pleading the performance of a condition precedent in a contract it shall be sufficient to allege generally that the party performed all the conditions on his part, and, if the allegation be denied, the fact showing a performance must be proved on the trial, applies to insurance policies, and, in an action on the policy, it is sufficient to allege generally the performance of conditions precedent in the policy.—*Louisville Underwriters v. Durland*, 24 N. E. 221, 123 Ind. 544, 7 L. R. A. 399.

[f] (*Sup.* 1883)

Where plaintiff grounds his action on a breach of an insurance contract, he must show performance on his part and a wrongful refusal or failure to perform on the part of defendant. It is not enough to show nonperformance, for there may be nonperformance without a breach.—*Continental Life Ins. Co. v. Houser*, 89 Ind. 258.

[g] (*Sup.* 1883)

Where a contract of life insurance stipulates that proofs of death shall be furnished to the secretary of the association, a complaint in an action on such contract, alleging that proofs were furnished to the association, is sufficient.—*Excelsior Mut. Aid Ass'n of Anderson v. Riddle*, 91 Ind. 84.

[h] (*Sup.* 1888)

It is enough for a plaintiff to aver generally that he performed all the conditions on his part.—*Commercial Union Assur. Co. v. State ex rel. Smith*, 113 Ind. 331, 15 N. E. 518.

[i] (*Sup.* 1888)

Under Rev. St. 1881, § 370, providing that in pleading the performance of a condition precedent in a contract it is sufficient to allege,

generally, that the party performed all the conditions on his part, an allegation, in an action on a fire policy, that "all matters and things required by said open policy had been in all things complied with," is sufficient.—*American Cent. Ins. Co. v. Sweetser*, 116 Ind. 370, 19 N. E. 159.

[j] (*Sup.* 1889)

In an action on a policy the plaintiff need not aver performance of conditions subsequent, nor negative prohibited acts; the general allegation that he has performed all of the terms of the contract on his part being sufficient.—*Phenix Ins. Co. of Brooklyn v. Pickel*, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393.

[k] (*Sup.* 1890)

In a complaint to recover on a policy of fire insurance, it must affirmatively appear that all conditions precedent to a right of recovery have been complied with by the insured, or an excuse for nonperformance or a waiver of such conditions must appear to make the complaint sufficient as against demurrer.—*Baker v. German Fire Ins. Co.*, 24 N. E. 1041, 124 Ind. 490.

A petition on a fire policy containing a stipulation that the assured shall render a particular account of the loss under oath, as soon as possible after its occurrence, is insufficient when it avers a general compliance with all the conditions of the policy, and also that the loss occurred in August, and that proof of it was furnished in December; for such unexplained delay is unreasonable, and not a compliance with the policy.—*Id.*

[l] (*Sup.* 1892)

Though a complaint on an insurance policy contains no general allegation of performance of its conditions by plaintiff, it is sufficient if it shows a performance of such as rested on him.—*Phenix Ins. Co. of Brooklyn v. Wilson*, 132 Ind. 449, 25 N. E. 592.

[m] (*App.* 1892)

In an action on a policy of fire insurance, the complaint averred that plaintiff did not immediately notify defendant of the loss, because "defendant waived notice and proof thereof in the manner following, to wit: Said defendant had actual knowledge thereof, and notified and told the plaintiff that it would not pay said loss, or any part thereof, and that he need not give said notice in writing or make said proof." *Held* sufficient as an averment that notice was waived within the time in which the insured could perform the conditions of the policy and save his rights thereunder.—*Phenix Ins. Co. v. Pickel*, 3 Ind. App. 332, 29 N. E. 432.

[n] (*App.* 1892)

In an action on an insurance policy, the complaint, after stating the terms of the policy, alleged that plaintiff "performed all of the conditions on his part to be performed, and on the 16th day of May, 1890, said house was totally destroyed by fire; that plaintiff immediately thereafter, on the — day of June, 1890,

notified the defendant of said loss." *Held*, that it was plaintiff's intention that the phrase, "performed all the conditions," should apply not only to antecedent averments, but to plaintiff's conduct up to the commencement of the action; and that, there being no necessary conflict between this general averment and the special averment as to the time of giving notice of loss, the former should control, and the first day of the month be constructively inserted in the blank space.—*Germania Fire Ins. Co. v. Deckard*, 3 Ind. App. 361, 28 N. E. 868.

## [m] (App. 1894)

Where the averments in an action on an insurance policy sufficiently show that the insured had an interest in the property at the time the policy was executed, and that plaintiff had an interest at the time of its destruction, the general averment that plaintiff and the insured had performed all the conditions on their part was a sufficient pleading of the conditions precedent.—*Moffitt v. Phenix Ins. Co.*, 38 N. E. 835, 11 Ind. App. 233.

## [n] (App. 1894)

In an action on a fire insurance policy, where the complaint alleges waiver of proofs, a further allegation that the insured furnished proofs is surplusage, and it was not error to overrule a motion to make such allegation more specific.—*American Fire Ins. Co. of New York v. Sisk*, 9 Ind. App. 305, 36 N. E. 659.

## [nn] (App. 1894)

In an action on a fire insurance policy, an averment that plaintiff, as soon as she knew that the dwelling had burned, at once, in writing, notified defendant, and that plaintiff was notified that defendant would not pay the policy, and that because defendant waived it by denying liability on account of vacancy of premises at the time of loss plaintiff did not make any proof of loss, shows a waiver of the proofs of loss.—*Phoenix Ins. Co. of Brooklyn v. Rogers*, 11 Ind. App. 72, 38 N. E. 865.

In an action on an insurance policy, an averment that plaintiff gave notice of loss "within ——— days," and as soon as he discovered it, when construed in connection with an averment that plaintiff performed all conditions to be performed by him, shows a giving of the notice within a reasonable time.—*Id.*

## [nnn] (App. 1897)

In an action on an insurance policy, an allegation is sufficient which states that plaintiff has fully complied with his contract with said defendant to be performed by said plaintiff, under Rev. St. 1894, § 373 (*Horner's Rev. St. 1897, § 370*), providing that, in pleading performance of conditions of a contract, it is sufficient to allege generally such performance.—*Pacific Mut. Life Ins. Co. v. Turner*, 47 N. E. 231, 17 Ind. App. 644.

## [o] (App. 1896)

A condition that, if the premises become vacant, the policy shall be avoided, is a condition subsequent, breach of which need not be negatived in a complaint thereon, where there is an averment that all the conditions of the policy have been performed.—*Home Ins. Co. of New York v. Boyd*, 49 N. E. 285, 19 Ind. App. 173.

## [p] (App. 1898)

A general averment that all the conditions of the policy have been performed is a sufficient averment of occupation of the premises at the time of the fire, as provided by the policy.—*Insurance Co. of North America v. Coombs*, 49 N. E. 471, 19 Ind. App. 331.

## [q] (App. 1899)

Under *Horner's Rev. St. 1897, § 370* (*Rev. St. 1881, § 370; Burns' Rev. St. 1894, § 373*), providing that it shall be sufficient for plaintiff to allege generally performance of conditions precedent, a general allegation that assured had performed all the terms of the policy is a sufficient allegation of performance of a condition precedent, obligating him to furnish proofs of loss.—*Indiana Ins. Co. v. Pringle*, 52 N. E. 821, 21 Ind. App. 559.

## [r] (App. 1899)

An averment that "from the time of the death of insured the company has denied, and continues to deny, liability," alleges a continued denial of liability from the death of insured, dispensing with any formal proof required by the policy.—*Railway Officials' & Employees' Acc. Ass'n v. Armstrong*, 53 N. E. 1037, 22 Ind. App. 406.

A policy required immediate notice of death, and satisfactory proof within seven months. A complaint thereon alleged immediate notice, but that further proof was not given because waived by the company; that 90 days had elapsed since the waiver, and after the 90 days, and before suit, demand was made, and liability denied. *Held* to aver that the waiver occurred at the time of notice of death, and hence that the denial of liability occurred within the seven months.—*Id.*

A policy required "satisfactory" proofs of death within seven months, but did not indicate what proofs would be "satisfactory." *Held*, that a complaint thereon was sufficient which showed that the company, on being notified, and requested to furnish information as to the insurance, failed to do so, or to indicate what further proofs would be required in time for them to be secured within the time limited.—*Id.*

## [s] (App. 1899)

Where the complaint, in an action on a fire insurance policy, avers that plaintiff has duly and fully performed all the conditions of said policy on his part to be performed, it sufficiently avers a performance of the conditions precedent contained in the policy, under *Burns' Rev.*

St. 1894, § 373, providing that, in pleading the performance of a condition precedent in a contract, it shall be sufficient to allege, generally, that the party performed all the conditions on his part.—*Ft. Wayne Ins. Co. v. Irwin*, 54 N. E. 817, 23 Ind. App. 53.

[t] (App. 1899)

Where a fire insurance company agrees to make and deliver a policy within a reasonable time, and nothing as to the terms of insurance is left open, and it refuses to issue the policy after loss, it is not necessary that the complaint should be special, and show compliance with the conditions precedent of the policy. as said conditions were waived by such refusal.—*Western Assur. Co. v. McAlpin*, 55 N. E. 119, 23 Ind. App. 220, 77 Am. St. Rep. 423.

In an action on an oral contract to insure, where nothing is said as to payment of the premium, and a credit is contemplated between the insurance agent and the insured, an averment that the premium was paid is surplusage, since payment is unnecessary to give a right of action.—*Id.*

[u] (App. 1900)

A complaint in an action on an accident policy alleging that plaintiff gave due notice of his injury at the home office of the association immediately after the injury, and that such notice was accepted as adequate, and without objection, was a sufficient allegation of waiver of a provision that the policy should be void on failure to give written notice to the secretary of the association at its home office within 10 days after the injury.—*Commercial Travelers' Mut. Acc. Ass'n v. Springsteen*, 55 N. E. 973, 23 Ind. App. 657.

[v] (App. 1900)

A complaint which alleged that, in less than 15 days after the fire, plaintiff notified the company of the loss, in writing, and that in 2 or 3 days thereafter it sent an agent to examine the property, who notified plaintiff that the loss would not be paid in full, and within less than 60 days the company notified him that the loss would not be paid, sufficiently averred a waiver by the company of proof of loss.—*Home Ins. Co. v. Sylvester*, 57 N. E. 991, 25 Ind. App. 207.

[vv] (App. 1900)

Where a policy required notice of loss to be given within 60 days after it occurred, a complaint which contained a general allegation that the insured had duly kept and performed all the conditions required to be kept by the policy, and the particular allegation that immediately after the loss, which occurred January 24, 1897, the insured notified the company of the destruction of the house by fire on the — day of January, 1897, was not insufficient on the ground that the specific allegation showed that the general allegation was not true.—*Hanover Fire Ins. Co. v. Johnson*, 57 N. E. 277, 26 Ind. App. 122.

Under Burns' Rev. St. 1894, § 373, providing that, in pleading the performance of a condition precedent in a contract, it shall be sufficient to allege generally that the party performed all the conditions on his part, a general allegation in an action on a policy that the insured had duly kept and performed all the conditions imposed on her to be kept by said policy was a sufficient averment that notice of loss and proof of loss had been given as required by the policy, since they are conditions precedent.—*Id.*

[w] (Sup. 1902)

A general averment, in an action on a fire policy, that insured has performed all the conditions imposed by the policy, does not cure a complaint which shows the nonperformance of a condition requiring appraisal of loss before action, and fails to allege a waiver of such appraisal by the company.—*Vernon Ins. & Trust Co. v. Maitlen*, 63 N. E. 755, 159 Ind. 393.

[ww] (Sup. 1903)

Under Burns' Rev. St. 1901, § 373, providing that in pleading the performance of a condition precedent in a contract it shall be sufficient to allege generally that the party performed all the conditions on his part, an allegation in an action on a policy "that plaintiff fully performed all the obligations required of her" was a substantial compliance with the statute.—*Security Accident & Sick Ben. Ass'n v. Lee*, 66 N. E. 745, 160 Ind. 249.

[x] (Sup. 1903)

A complaint on a fire policy alleged that when the fire occurred plaintiff gave oral notice thereof; that defendant sent an adjuster, who entered into negotiations with plaintiff's agent concerning the loss, and continued them until after the time within which, under the policy, plaintiff was required to furnish proofs of loss had expired, and that plaintiff and defendant were unable to agree as to the loss; that defendant refused to pay the same, but not on the ground of plaintiff's failure to furnish proofs of loss; and that by such conduct defendant waived the notice in writing and formal proofs of loss required by the policy. *Held* that, though such paragraph did not contain allegations sufficient to constitute a technical estoppel, it was sufficient to authorize plaintiff to take a verdict of a jury on the mixed question of law and fact as to whether there was a waiver of proofs of loss.—*Germania Fire Ins. Co. v. Pitcher*, 160 Ind. 392, 64 N. E. 921, 66 N. E. 1003.

Where, in an action on a fire policy, it was alleged that plaintiff and defendant were unable to agree as to the amount of the loss, such averment did not control a subsequent allegation that defendant made no objection to plaintiff's claim on account of her failure to furnish proofs of loss, but based its refusal to pay on other grounds, so as to prevent the latter al-

legation from amounting to an allegation of waiver of proofs of loss.—Id.

[xx] (Sup. 1904)

In an action on a fire policy, an averment that the agent who wrote the policy, and collected the premiums did so with full knowledge of an incumbrance on the property sufficiently alleged the authority of the agent to waive a provision of the policy that it should be void if the property was incumbered.—*German-American Ins. Co. v. Yeagley*, 71 N. E. 897, 163 Ind. 651.

[y] (App. 1904)

In an action on a burglary insurance policy, the complaint alleged that "plaintiff duly notified defendant" of loss. *Held* that, even if this could be said to include both the notice and proof of loss required by the policy, it is no more than the conclusion of the pleader that they were such as the policy required.—*Fidelity & Casualty Co. of New York v. Sanders*, 70 N. E. 167, 32 Ind. App. 448.

Where, in an action on a burglary insurance policy, the complaint alleged that the burglary was committed on May 24, 1901, and "that afterwards" plaintiff notified defendant of the loss, but the suit was not begun until February 27, 1902, and the complaint did not aver plaintiff's compliance with all the conditions of the policy, the complaint did not sufficiently allege compliance with a provision requiring plaintiff to give notice within a reasonable time.—Id.

Where, in an action on a burglary insurance policy, the complaint did not allege a compliance with a provision requiring notice of proof of loss within a reasonable time, an averment that defendant, after notice of loss, sent an adjuster to adjust the same, but refused to pay the loss, without alleging the reason for such refusal, did not sufficiently allege a waiver of plaintiff's performance of such condition.—Id.

[yy] (Sup. 1906)

Under *Burns' Ann. St. 1901*, § 373, providing that in pleading the performance of a condition precedent in a contract it shall be sufficient to allege generally that the party performed all of the conditions on his part, a complaint on an insurance policy, alleging that plaintiff "has fully complied with all the requirements, stipulations, agreements, and conditions on her part to be performed," is a sufficient averment of furnishing proofs of loss, and of the fulfillment by insured of the other requirements of the policy.—*Fireman's Fund Ins. Co. v. Finklestein*, 73 N. E. 814, 164 Ind. 376.

[yyy] (App. 1906)

A complaint in an action against a mutual company on an oral contract for insurance, containing all the other necessary elements and alleging that defendant agreed to insure plaintiff's property for a fixed and definite period in consideration of plaintiff's paying any amount

assessed against her in proportion to the amount of her insurance on the property for the benefit of any member of such association who should sustain a loss by fire, was not fatally defective for failure to allege a payment of the premium, an agreement to pay, a definite understanding in regard to credit, or a waiver of the premium.—*Possey County Fire Ass'n v. Hogan*, 77 N. E. 670, 37 Ind. App. 573.

[z] (App. 1906)

A waiver, by defendant, of a condition in an insurance policy, is inconsistent with the general performance by plaintiff of all of the conditions in the policy; it being necessary to make allegations of waiver and performance in different paragraphs of the complaint.—*Home Ins. Co. v. Gagen*, 38 Ind. App. 680, 76 N. E. 927.

Where a general allegation of performance by plaintiff is made in a complaint on an insurance policy, a particular averment which does not contradict such allegation does not injure the complaint.—Id.

A complaint on an insurance policy, alleging that plaintiff "has duly performed all the conditions on his part to be performed," sufficiently alleges performance by plaintiff; the word "duly" neither adding to, nor detracting from, such allegation.—Id.

A complaint on an insurance policy, alleging that plaintiff "has performed all the conditions on his part to be performed," sufficiently advises defendant and the court that the conditions mentioned refer to the conditions of the policy sued on.—Id.

Under *Burns' Ann. St. 1901*, § 341, subd. 2, providing that the complaint shall contain a statement of the facts constituting a cause of action in such manner as to enable a person of common understanding to know what is intended, and section 373, declaring that in pleading the performance of a condition precedent in a contract it shall be sufficient to allege generally that the party performed all conditions on his part, a complaint in an action on a fire policy, which alleges that plaintiff has duly performed all the conditions on his part to be performed, that on July 5th the building insured was totally destroyed by fire, that plaintiff on July 12th gave the insurer written notice of the loss at a designated office of the insurer, and on September 2d gave it due proof of loss as called for in the policy, sufficiently alleges as against a demurrer performance of the conditions of the policy providing that the insured in case of loss shall, within 15 days, give the insurer notice thereof at the designated office, and within 60 days thereafter shall render to such office proofs of the actual cash value at the time of the loss of any property on which loss is claimed.—Id.

[zz] (App. 1906)

Under *Burns' Ann. St. 1901*, § 373, providing that, in pleading performance of a con-

dition precedent in a contract, it shall be sufficient to allege generally that the party performed all the conditions on his part, an allegation in a complaint on an accident insurance policy that plaintiff had performed all the conditions precedent to her right to sue on the policy was sufficient to show compliance with a provision for the expiration of three months before bringing action.—*Phoenix Accident & Sick Benefit Ass'n v. Lathrop*, 41 Ind. App. 141, 81 N. E. 227.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1593, 1596, 1598, 1603–1606, 1608.

See, also, 1 Cyc. p. 286, 15 Cyc. pp. 1040, 1041, 19 Cyc. pp. 921, 923, 25 Cyc. p. 918, 26 Cyc. p. 719.

**§ 635. — Loss and cause thereof.**

**[a] (Sup. 1874)**

Where a schedule filed with a complaint on a policy of insurance sets out the items destroyed by fire and the value of each, as well as the aggregate value, the complaint sufficiently shows that the plaintiff has been damaged.—*Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315; *Germania Ins. Co. v. Same*, 46 Ind. 331.

**[b] (Sup. 1881)**

A complaint on an insurance policy binding the insurer to pay the loss, not exceeding the sum insured nor the actual cash value of the property, is not bad because it fails to state the value of the property; it stating a loss under the policy and specifying the amount lost upon each of the articles insured.—*American Ins. Co. v. Leonard*, 80 Ind. 272.

**[c] (Sup. 1881)**

In an action on a fire policy for loss of a dwelling house, a complaint was not demurrable for failure to aver the value of the house, since plaintiff would be entitled to recover nominal damages on the presumption that the house was of some value.—*Etna Ins. Co. v. Black*, 80 Ind. 513.

**[d] (Sup. 1882)**

In a suit on a fire insurance policy the value of the property at the time of the loss must be alleged, but not at the taking out of the policy.—*Phoenix Ins. Co. v. Benton*, 87 Ind. 132.

**[e] (Sup. 1890)**

A complaint on a marine insurance policy, by whose terms the company is liable for any loss occasioned by fire, except when caused by explosion of boiler, and except as limited by the warranties therein contained, is sufficient if it alleges that the loss was caused by fire not arising from the explosion of any boiler, and that the insured had performed all the conditions of the contract on their part, without alleging in specific terms that the loss did not occur because of the breach of some one or more of the warranties.—*Louisville Under-*

*writers v. Durland*, 123 Ind. 544, 24 N. E. 221, 7 L. R. A. 399.

**[f] (App. 1896)**

A complaint in an action on a life insurance policy insuring insured against death from "external, violent, and accidental" means must show that the injuries causing insured's death were "accidentally" received.—*Newman v. Railway Officials' & Employes' Acc. Ass'n*, 15 Ind. App. 29, 42 N. E. 650.

**[g] (App. 1899)**

A complaint on an accident policy, stating plaintiff's disability in the language of the policy, is sufficient, since mere evidentiary facts should not be pleaded.—*McElfresh v. Odd Fellows Acc. Co. of Boston*, 52 N. E. 819, 21 Ind. App. 557.

**[h] (App. 1899)**

An averment that insured's death resulted solely from physical bodily injuries proceeding from and inflicted by external, violent, and accidental means, producing immediate death, sufficiently shows an accidental death, within a policy requiring a claim to arise as the direct result of physical bodily injury undoubtedly proceeding from external, violent, and accidental means.—*Railway Officials' & Employes' Acc. Ass'n v. Armstrong*, 53 N. E. 1037, 22 Ind. App. 406.

**[i] (App. 1904)**

Where it was averred that burglars broke into plaintiff's building and broke a safe by working the combination and lock on the outer door of the safe, and did then, by the use of tools and explosives, break into the money drawer on the inside of the safe, breaking the lock therefrom, and extracting the drawer from the safe, taking therefrom money, etc., the complaint stated a loss within the policy insuring against loss by the felonious abstraction of money by burglars from a safe described, after entry into the same, effected by the use of tools or explosives directly thereon.—*Fidelity & Casualty Co. of New York v. Sanders*, 70 N. E. 167, 32 Ind. App. 448.

**[j] (App. 1904)**

A complaint on an accident policy, which stated that plaintiff, after the injury, was immediately and continuously disabled, and incapacitated from business, and so remained wholly incapacitated and prevented from performing any work for 15 months, was not objectionable on the ground that it failed to aver that the disability resulted immediately from the injury.—*Pacific Mut. Life Ins. Co. v. Branham*, 70 N. E. 174, 34 Ind. App. 243.

**[k] (Sup. 1906)**

A complaint on an insurance policy alleged that plaintiff and defendant, through the latter's adjuster, ascertained the amount of the loss, and agreed upon the same; that thereafter defendant examined plaintiff under oath as to the amount of the loss, and entered into a writ-

ten agreement fixing the loss at the sum fixed by the adjuster, and agreed to pay plaintiff the amount fixed. The adjuster's agreement, made a part of the complaint, and signed by plaintiff and defendant, stipulated that the amount of the loss was conclusively agreed to be a certain sum. *Held*, that the complaint and adjuster's agreement taken together rendered any further allegation as to the value of the property at the time of the fire unnecessary.—*Fireman's Fund Ins. Co. v. Finklestein*, 73 N. E. 814, 164 Ind. 376.

[1] (App. 1908)

A complaint, in an action on an accident insurance policy, which alleges that decedent was killed by being run over by a locomotive, sufficiently shows that the injury was caused solely by "external, violent and accidental means," and that there were "visible marks upon the body" by reason of such injury, to comply with the conditions of the policy.—*Phoenix Accident & Sick Benefit Ass'n v. Lathrop*, 41 Ind. App. 141, 81 N. E. 227.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1599-1602.

See, also, 19 Cyc. p. 924, 26 Cyc. p. 719.

§ 636. — Other insurance.

[a] (Sup. 1887)

A complaint upon an insurance policy alleging an express agreement permitting the plaintiff to take additional insurance in any other company, which agreement the company promised to insert in the policy, but failed to do so, and that, relying thereon, the plaintiff did take out additional insurance, is insufficient upon demurrer, where the policy provides that such permission must be indorsed thereon, for not showing, if made before the execution of the policy, that the plaintiff was induced to accept it without knowledge that the stipulation was not inserted, or, if after, for not showing that the assured had presented the policy to the company, and requested the insertion of such stipulation, or that the company had notice of such additional insurance.—*Havens v. Home Ins. Co.*, 111 Ind. 90, 12 N. E. 137, 60 Am. St. Rep. 689.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1597.

§ 639. — Anticipating defenses.

[a] (Sup. 1890)

It is not required of plaintiff in an action on an insurance policy that he in his complaint negative warranties and exceptions stated in the policy. If the loss is within a warranty or exception, it is matter of defense, which must be pleaded affirmatively by defendant.—*Louisville Underwriters v. Durland*, 24 N. E. 221, 123 Ind. 544, 7 L. R. A. 399.

[b] (Sup. 1903)

A complaint in an action on a life policy by the assignee thereof need not negative the defense that the assignment is void as a wagering transaction.—*Davis v. Brown*, 65 N. E. 908, 159 Ind. 644.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1554, 1593, 1598.

See, also, 25 Cyc. p. 917; note, 4 L. R. A. (N. S.) 636.

§ 640. Plea, answer, or affidavit of defense.

Aider by verdict or judgment, see PLEADING, § 434.

Consistency or repugnancy of allegations, see PLEADING, § 21.

Motion to make more definite and certain, see PLEADING, § 367.

Necessity for pleading counterclaim, see PLEADING, § 139.

Pleading matters of fact or conclusions, see PLEADING, § 8.

[a] (Sup. 1868)

A question in the survey was: "Are the outside walls brick or stone?" The answer was: "Brick." To this question there was a note, as follows: "If the building be wood, omit replies to these questions." The breach of the warranty alleged was "that the outside walls were not all brick." *Held*, that the point of the question was whether the walls were of wood, or of the more indestructible material, brick or stone, and that the breach was not well alleged, because it was not averred that any part of the walls was not of stone or brick.—*Cox v. Aetna Ins. Co.*, 20 Ind. 586.

[b] An answer alleging that plaintiff negligently stood by and permitted the property to be consumed, and made no reasonable exertion to prevent the fire or save the property, is bad where it is not averred that it was within his power to have prevented the fire or loss of the property.—(Sup. 1874) *Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315; (1874) *Germania Ins. Co. v. Same*, 46 Ind. 331; (App. 1905) *Home Ins. Co. of New York v. Overturf*, 74 N. E. 47, 35 Ind. App. 361.

[c] (Sup. 1874)

An answer to a suit on an insurance policy, that the plaintiff fraudulently stated the amount of loss to be greater than it was, without showing that the statement was made to the insurance company or its agent, or in any transaction in relation to the loss, is bad.—*Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315; *Germania Ins. Co. v. Same*, Id. 331.

Where the conditions of a policy of insurance require the insured, in case of loss, to produce his books of account and other vouchers in support of his claim, and permit copies and ex-

tracts thereof to be made, whenever required in writing, an answer alleging a refusal to produce them without alleging a request in writing is bad.—Id.

Where a policy of insurance makes it the duty of the insured in case of loss to submit to an examination under oath by the agent or attorney of the insurance company, an answer alleging generally a refusal to submit to an examination, without showing when or by whom the request was made, or that a time or place was named for such examination, is bad.—Id.

[d] (Sup. 1885)

Where a mortgage clause inserted in a policy stated that it was agreed that the mortgagee was to notify the company of any change of ownership or increase of hazard which shall come to his knowledge, an answer, in an action on the policy, averring that a suit was commenced for the foreclosure of the mortgage without any notice to the company, and that such suit was being prosecuted at the time the loss occurred, without the knowledge of the company, whereby the risk of loss by fire to the property was greatly increased, and thereby, by the terms of the policy, such contract of insurance became void, was bad on demurrer because the precedent facts averred in the paragraph were not sufficient to authorize the pleader's conclusion.—*Phenix Ins. Co. of Brooklyn v. Union Mut. Life Ins. Co. of Maine*, 101 Ind. 392.

[e] (Sup. 1890)

In an action on a policy containing a condition that it shall be void if the property becomes vacant, an answer alleging that the house was occupied when the policy was issued, that it became vacant in violation of the condition of the policy, and was burned while vacant, and denying that there was any mistake in putting such condition in the policy states a good defense.—*Rogers v. Phenix Ins. Co. of Brooklyn*, 121 Ind. 570, 23 N. E. 498.

[f] (Sup. 1892)

In an action on an insurance policy containing a condition avoiding it if the assured should obtain other insurance without the consent of the company, where a copy of the policy is filed with the complaint, a special answer in confession and avoidance setting up a violation of such condition is not demurrable because a copy of the policy is not filed with it.—*Replogle v. American Ins. Co.*, 31 N. E. 947, 132 Ind. 360.

[g] (Sup. 1892)

In an action on an insurance policy the assured alleged that defendant's agent undertook to fill in the application for him, and that, although he informed the agent that the property was mortgaged, the latter stated that it was unincumbered. *Held*, that a paragraph of the answer, merely alleging the existence of the mortgage, was demurrable, as it confessed the allegations of the complaint as to the filling up of the application without avoiding them.—

*Bowlus v. Phenix Ins. Co. of Brooklyn*, 133 Ind. 106, 32 N. E. 319, 20 L. R. A. 400.

In an action on an insurance policy, where no fraud is averred, an answer alleging that the insured made an overvaluation of his property, and thus forfeited his policy, is insufficient, though it may be true that an overvaluation so gross as to authorize the inference, taken in connection with other circumstances, of an intention to mislead, would avoid the policy.—Id.

[h] (App. 1892)

Where the policy is made the basis of the action, and set out with the complaint, it need not be set out with the answer.—*Germania Fire Ins. Co. v. Deckard*, 3 Ind. App. 361, 28 N. E. 868.

[i] (App. 1893)

In an action against a tornado insurance company, an answer is insufficient which alleges that defendant and the assured, after investigation, were satisfied that a company which owned a steamboat which was forced against the property by high wind was liable on account of negligence; that the assured elected to and did bring an action against the latter, but was unsuccessful; and that the assured did not assign to defendant all its rights to recover from any other person or corporation for such loss, as provided by the policy, but had sought to recover from the steamboat company in its own right,—since such answer does not show a release of defendant from liability.—*Queen Ins. Co. v. Hudnut Co. of Liverpool*, 8 Ind. App. 22, 35 N. E. 397.

[j] (App. 1895)

In an action on a policy insuring a stock of drugs, averments in the answer that the insured changed his business, in that he conducted the business of selling liquors without a license, "and caused the risk to be changed from hazard to extra hazard," does not aver that the risk was increased by the change in business.—*Aetna Ins. Co. of Hartford, Conn., v. Norman*, 12 Ind. App. 652, 40 N. E. 1116.

In an action on a policy insuring the stock of a drug store, providing that, if the hazard be increased by the insured, the policy should be void, an averment in the answer that the insured changed his business by illegally selling liquors, and that, by reason of said change, the risk became more hazardous, is sufficiently broad to constitute a defense to the action.—Id.

[k] (App. 1895)

Demurrer to a plea in abatement, averring failure to furnish proof of loss, is properly sustained, defendant being entitled, under its general denial, to show that the condition of the policy as to proof of loss had not either been complied with or waived, as alleged by the complaint.—*Manchester Fire Assur. Co. v. Glenn*, 13 Ind. App. 365, 40 N. E. 926, 41 N. E. 847, 55 Am. St. Rep. 225; *North British & American Ins. Co. v. Same*, 13 Ind. App. 699, 40 N. E. 927.

## [i] (App. 1895)

In an action on a fire policy, the answer alleged that when the policy was issued the buildings were used as tenements; that before the loss occurred the insured, intending to use them for other purposes, gave notice to quit to the tenants, and that some of them left; that these facts increased the risk. *Held*, that a demurrer was properly sustained, as the answer did not allege sufficient facts to establish a forfeiture, under a stipulation in the policy making it void "if the hazard be increased by means within the control" of the insured.—*Germania Fire Ins. Co. v. Stewart*, 13 Ind. App. 627, 42 N. E. 286.

## [m] (App. 1896)

In an action on a fire policy by the insured's assignee, creditors of the insured, on their petition, were made defendants, and filed an answer alleging that they had commenced an action in a foreign state against the assignor for the amount due them, and garnished the insurance company; that such suit was still pending; that the money due from such company was due to such assignor, and not to plaintiff; that no legal assignment was made to plaintiff prior to the service of the garnishment; that the pretended assignment was made to defraud the assignor's creditors; and that such assignor was insolvent. The answer prayed that the action be dismissed, etc. *Held*, that such answer was insufficient, either as a plea in bar, or as a cross complaint to recover judgment against the assignor, or to set aside the transfer by him to plaintiff.—*Estey v. Barnes*, 14 Ind. App. 446, 42 N. E. 1118.

## [n] (App. 1897)

An allegation in the answer "that plaintiff procured to be issued to her a policy of insurance" is equivalent to an allegation of delivery to and acceptance of such policy by plaintiff.—*Sisk v. Citizens' Ins. Co.*, 45 N. E. 804, 16 Ind. App. 565.

The policy provided that the best endeavor of the insured should be used in protecting the property from damage at and after the fire, and that the company should not be liable for damage caused by failure to do so. The answer alleged that the property became very wet from the water thrown thereon to extinguish the fire, that plaintiff made no endeavor to dry or clean the same, and that, if it had been properly cared for, the damage would not have exceeded \$100. *Held*, that the answer was good as admitting \$100 damages, and setting out such facts as a defense to the excess only.—*Id.*

In an action on a fire policy, which provides that it shall be void in case of additional insurance, unless consent in writing is indorsed on it by the company, an answer which alleges that additional insurance was procured by plaintiff without defendant's consent being so indorsed in writing is good without alleging that such consent was not given in any other manner.—*Id.*

## [o] (App. 1897)

An answer alleging a forfeiture of the policy sued on must affirmatively show conformance to the prescribed method of making such forfeiture.—*Union Cent. Life Ins. Co. v. Jones*, 47 N. E. 342, 17 Ind. App. 592.

## [p] (App. 1899)

In an action on a policy issued in consideration of representations made in the application, insurer need not allege that it was imposed on or was induced to issue the policy by false statements in the application as to applicant's health.—*Northwestern Life Assur. Co. v. Bodurtha*, 53 N. E. 787, 23 Ind. App. 121, 77 Am. St. Rep. 414.

## [q] (App. 1901)

In an action on a policy, where the complaint averred that plaintiff had performed all the conditions of the contract, the policy being made a part of the complaint, and the general denial was pleaded, it was not error to sustain a demurrer to a paragraph of the answer which alleged the nonperformance by the plaintiff of certain conditions in the policy, since such facts were provable under the general denial.—*North British & Mercantile Ins. Co. v. Rudy*, 60 N. E. 9, 26 Ind. App. 472.

## [r] (App. 1902)

The allegation, in an answer in an action for insurance on a house, that there was a dispute between plaintiff and another as to the ownership of the house, presents no defense.—*Farmers' Mut. Fire Ins. Co. v. Yetter*, 65 N. E. 762, 30 Ind. App. 187.

A paragraph of an answer in an action for insurance on a house, which, in addition to denying plaintiff's ownership, alleged in his complaint and necessary for his recovery, alleged a misrepresentation as to the amount of incumbrances on the insured property, will be regarded as only a traverse of the cause of action stated in the complaint.—*Id.*

## [s] (App. 1904)

In an action on an insurance policy, a paragraph of the answer alleging that plaintiff swore falsely in the specifications furnished by him, but averring no fact showing fraud, stated no defense.—*Phoenix Ins. Co. of Brooklyn, N. Y., v. McAtee*, 70 N. E. 947, 33 Ind. App. 106.

In an action on an insurance policy, a paragraph of the answer alleging that plaintiff committed fraud in making certain false statements contained in the plans and specifications sworn to by plaintiff, but in support of which no copy of the specifications was filed, stated no defense.—*Id.*

## [t] (Sup. 1907)

In an action on an insurance policy, an answer in avoidance because of a condition broken must set out such condition, alleging a breach thereof, and the acts done by the company in pursuance of its election to avoid the policy.—*Glens Falls Ins. Co. v. Michael*,

167 Ind. 659, 74 N. E. 964, 79 N. E. 905, 8 L. R. A. (N. S.) 708.

[u] (App. 1907)

An answer, seeking to avoid a policy for breach of conditions, must allege an election on the part of the insurer to avoid it and also a seasonable return of the premiums received.—*Ætna Life Ins. Co. v. Bockting*, 39 Ind. App. 586, 79 N. E. 524.

[v] (App. 1910)

Allegations of the answer in an action on a fire policy that insured placed stoves in a barn, filled them with gasoline, lighted them, and negligently and carelessly left them burning, in violation of the policy, and that he did such acts "willfully and carelessly," whereby the building was fired from the stoves, merely alleged negligence, and not that the insured did them with the intention to destroy the property, so as to avoid the policy on that ground.—*Farmers' Mut. Fire Ins. Co. v. Hill*, 91 N. E. 361.

[w] (App. 1910)

In an action on a life insurance policy, paragraphs of the answer pleading an alleged rescission of the policy for breaches of warranty, without alleging a return of the premiums paid, or an offer to return the same, on discovery of the alleged breach were demurrable for want of facts.—*American Cent. Life Ins. Co. v. Rosenstein*, 92 N. E. 380.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1554, 1609-1612, 1614-1624.

See, also, 1 Cyc. pp. 287, 288, 15 Cyc. p. 1040, 19 Cyc. pp. 525, 926-928, 25 Cyc. pp. 920, 921, 1521, 26 Cyc. p. 720.

§ 641. Replication or reply and subsequent pleadings.

Departure, see PLEADING, § 180.

[a] (Sup. 1874)

Where an answer to a suit on a policy of insurance covering materials and machinery used in manufacturing tobacco alleges that the risk has been materially increased by using the third story of the building occupied as a storeroom for old boxes, casks, and rubbish, a reply that the boxes, etc., were used and were necessary materials in the business and constituted a part of the risk insured against, is good.—*Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315; *Germania Ins. Co. v. Same*, 46 Ind. 331.

[b] (Sup. 1883)

A reply to an answer setting up an award of arbitrators determining the amount of loss under a policy was insufficient where it did not allege that the interest or prejudice of one of the arbitrators did not come to plaintiff's knowledge until it was too late to revoke the submission.—*McCurdy v. Bowes*, 88 Ind. 583.

[c] (Sup. 1884)

Where, in an action on a life policy, the answer alleged that the insured did not pay either of the annual premiums due from him in money, but paid one-half of the first premium in money, and executed his note for the remainder, and that, when the second annual premium became due, he paid one-half of it in money and executed his note, including therein the amount for which the first note was executed and one half of the second premium, and that neither the principal nor interest of the note had been paid, a reply alleging that the note was received as a payment of the premiums, that it had long been the custom of the company to apply dividends due its members to the payment of notes, and that it had in its hands dividends due the insured sufficient to pay the note, was good.—*Franklin Life Ins. Co. v. Wallace*, 93 Ind. 7.

[d] (Sup. 1888)

In an action on a policy of fire insurance, an answer that the policy was void because of the breach of condition against the taking of other insurance without the consent of the insurer is not met and avoided by a reply that the second policy, provided that it should be void in case the insured had other insurance without the consent of the second insurer, and that the second policy had been taken without the consent of the second insurer to the existence of the first policy.—*American Ins. Co. v. Replogle*, 15 N. E. 810, 114 Ind. 1.

[e] (Sup. 1888)

Where the company answers that the insured, plaintiffs' assignor, agreed to take a less sum than was due, a reply that such agreement was after the assignment to plaintiffs, which was known to defendant, and that plaintiffs' assignor and the adjusters had agreed that, if plaintiffs found that defendant was liable to the extent of the policy, the agreement to take a less sum should be at an end, is good, in substance, on demurrer.—*American Cent. Ins. Co. v. Sweetser*, 116 Ind. 370, 19 N. E. 159.

[f] (Sup. 1890)

Where the policy set out in the complaint provides that a premium note shall be accepted as payment only until maturity, a reply which sets up that the note was accepted as absolute payment is demurrable, since it is an attempt to contravene a written contract by a contemporaneous parol agreement.—*Continental Ins. Co. v. Dorman*, 125 Ind. 189, 25 N. E. 213.

[g, h] (App. 1896)

In an action on a fire policy, defendant alleged that it never executed the policy, and that its agent who issued it had no authority to do so, because it was a prohibited risk, and outside of his territory. The reply set up certain customs obtaining in such agent's office, as to his clerk's accepting risks and issuing policies for defendant with its knowledge and consent; that

the policy in suit was so issued; and that defendant, with full knowledge of all the facts, ratified the issuance by acceptance of the premium, and waived the restrictive provisions of the policy relative to the agency. *Held*, that the reply was not open to the objection that it did not meet the allegations in the answer as to the limitations and restrictions of the agent's authority as to territory and classes of risks, since the ratification set up by the reply estopped the company from denying on demurrer the validity of the policy.—*German Fire Ins. Co. v. Columbia Encaustic Tile Co.*, 15 Ind. App. 623, 43 N. E. 41.

[I] (App. 1899)

The answer setting up breach of warranties in an application that insured had not used and would not thereafter use intoxicants to excess, a reply alleging that the policy was issued and premiums accepted with knowledge of the falsity of the representations was demurrable, as not going to the entire answer, since it failed to allege that the insurer had knowledge of the breach of the promise not to use liquors to excess in the future, and accepted premiums with such knowledge.—*Northwestern Life Assur. Co. v. Bodurtha*, 53 N. E. 787, 23 Ind. App. 121, 77 Am. St. Rep. 414.

[J] (App. 1899)

In an action on a fire insurance policy, a general denial by plaintiff to an answer of defendant setting up a breach of the conditions of the policy tenders no issue of waiver of such conditions.—*Ft. Wayne Ins. Co. v. Irwin*, 54 N. E. 817, 23 Ind. App. 53.

[K] (App. 1899)

A reply to an answer alleging that insured is not the owner of the property, which admits he was not the owner of the legal title, but fails to allege he had any insurable interest, or any interest, is demurrable.—*Franklin Ins. Co. v. Wolff*, 54 N. E. 772, 23 Ind. App. 549.

[L] (App. 1900)

Where the answer alleged that the insurance policy sued on was obtained on the written application of plaintiff, and that it contained warranties and representations which were false and made with intent to deceive the company, a reply which averred that plaintiff did not live near the property and was not acquainted with it, but that defendant's agent had insured it before and was familiar with it, and filled out the blanks, of his own knowledge, to which plaintiff, who was unable to read or write, made his mark, was not objectionable as an unverified plea of non est factum.—*Home Ins. Co. v. Sylvester*, 57 N. E. 991, 25 Ind. App. 207.

Where the answer alleged that the insurance policy sued on was obtained on the written application of plaintiff, and that it contained warranties and representations which were false and made with intent to deceive the company, a reply which averred that plaintiff did

not live near the property and was not acquainted with it, but that defendant's agent had insured it before and was familiar with it, and filled out blanks of his own knowledge, to which defendant, who was unable to read or write, made his mark, was sufficient to avoid the answer, since any misstatements in the application made out by the agent of the company will be imputed to it and not to plaintiff, and it cannot take advantage of a wrong committed by its own agent.—*Id.*

[M] (Sup. 1903)

In an action on a fire policy, the insurer alleged in his answer that the policy sued on stipulated that it should be void if the interest of the insured were otherwise than unconditional and sole ownership; that at the time of the issuance of the policy the insured had made a conveyance thereof to a third person. The answer also averred that the insured represented that she was the owner of the property insured; that the insurer relied on such representations, and that plaintiff had previously conveyed the property to a third person. The insured replied, alleging that the deed to the third person was without consideration, that it was made without his knowledge or consent, that it was never delivered, that the insured retained possession of it except during the time it was being recorded, that insured retained possession of the property and exercised absolute dominion over it. *Held*, that the reply was good as to all the allegations in the answer.—*Franklin Ins. Co. v. Feist*, 68 N. E. 188, 31 Ind. App. 390.

[N] (Sup. 1904)

In an action on a fire policy, in which defendant claimed that the policy was void, under a provision that it should be void if the insured property was incumbered, a reply alleging that the agent who wrote the policy had full knowledge of the incumbrance was sufficient, without other allegations which it contained, to the effect that insured had no knowledge that the incumbrance would avoid the policy, and that the provision for such forfeiture was in fine print, and was not read until after the fire; and hence these averments were merely surplusage, which did not vitiate the reply.—*German-American Ins. Co. v. Yeagley*, 71 N. E. 897, 163 Ind. 651.

[O] (Sup. 1906)

Where death from the disease of which insured died was not insured against, a reply on the theory of waiver of the forfeiture by breach of condition subsequent is bad, where it does not negative knowledge of the conditions on the part of the plaintiffs; an estoppel in pais being impossible where both parties have equal knowledge.—*Knights & Ladies of Columbia Ins. Order v. Shoaf*, 166 Ind. 367, 77 N. E. 738.

In an action on a life policy, where the answer shows death from a disease not insured against by the policy, the reply must show facts sufficient to constitute an estoppel.—*Id.*

[p] (*Sup.* 1907)

Where a fire insurance company pleaded in abatement in an action on the policy that the provision for an appraisal of loss had not been complied with or waived, and plaintiff replied that the company had unreasonably delayed such appraisal, the reply was sufficient.—*Providence Washington Ins. v. Wolf*, 168 Ind. 690, 80 N. E. 26, 120 Am. St. Rep. 395.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1554, 1626-1629.

See, also, 1 Cyc. p. 288, 19 Cyc. pp. 928-930, 25 Cyc. p. 922.

§ 642. **Demurrer.**

Admissions by demurrer, see PLEADING, § 214. Effect as opening record, see PLEADING, § 217.

Waiver of objections to rulings, see PLEADING, § 417.

[a] (*App.* 1904)

Where the complaint in an action against an insurance company set out the issuance of a fire policy, the ownership of the property, its destruction by fire, and that the parties disagreed as to the amount of the loss, and thereafter alleged that, in accordance with the terms of the policy, appraisers were appointed, who made an award fixing the amount of loss, and a recovery of this amount was sought, a demurrer on the ground that the action was on the policy, while the complaint showed that the loss was settled by arbitration and award, was properly overruled.—*Phoenix Ins. Co. of Brooklyn, N. Y., v. McAtee*, 70 N. E. 947, 33 Ind. App. 106.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1554, 1630.

See, also, 19 Cyc. p. 925, 25 Cyc. p. 922.

§ 643. **Amended and supplemental pleadings.**

Additional pleading, see PLEADING, § 285.

Sufficiency of amended complaint, see ante, § 631.

[a] (*Sup.* 1874)

Where, in an action on an insurance policy, the copy thereof made an exhibit in the complaint is neither signed nor countersigned, an amendment thereof on the trial according to the original policy was properly allowed, and cured the defect.—*Mutual Ben. Life Ins. Co. v. Cannon*, 48 Ind. 264.

[b] (*App.* 1901)

Under Burns' Rev. St. 1894, § 399, allowing the court, in its discretion, to correct pleadings if the amendment does not substantially change the claim or defense, it was not an abuse of discretion to allow the plaintiff in an action on a policy to amend his complaint on

the trial, after the jury had been sworn, and the plaintiff partially examined as a witness, by adding certain averments in regard to the notice given by plaintiff to defendant as to the loss; the original complaint having alleged that defendant had performed all the conditions of the contract on his part.—*North British & Mercantile Ins. Co. v. Rudy*, 60 N. E. 9, 26 Ind. App. 472.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1587, 1613.

See, also, 19 Cyc. pp. 930, 931, 25 Cyc. p. 922, 26 Cyc. p. 720.

§ 645. **Issues, proofs, and variance.**

Evidence admissible under general denial, see PLEADING, § 382.

[a] (*Sup.* 1873)

In the absence of proper averments, evidence of matters excusing delay in giving notice of an injury covered by an accident policy is inadmissible.—*Railway Pass. Assur. Co. of Hartford v. Burwell*, 44 Ind. 460.

[b] (*Sup.* 1881)

In an action on an insurance policy, where plaintiff alleged a waiver of the requirement of the policy as to the time of paying premiums by averring a long-continued custom, and also an agreement to receive premiums at any time within 60 days after due, and also alleged that the company had accepted premiums after they were due for a period of 10 years with knowledge that the premiums had not been paid until after they were due, on which course of action plaintiff had relied and acted, it was not necessary for plaintiff at trial to prove every specific averment, but it was sufficient to prove that the terms of the policy had been so far modified by the conduct and agreement of the parties that the annual premium was regarded as not being payable until plaintiff had been given notice and until 60 days had elapsed after such notice.—*Phoenix Mut. Life Ins. Co. v. Hinesley*, 75 Ind. 1.

A variance between a complaint on a life policy and premium notes adduced in evidence as to the dates when by their terms they were made payable is immaterial, where it was evidently contemplated by the parties that, notwithstanding the dates mentioned, the notes should never be paid until the policy should become a claim against the insurer, unless sooner paid out of dividends and profits.—*Id.*

[c] (*Sup.* 1889)

The complaint alleged an executed policy, a copy of which was exhibited, and the answer contained a general denial and pleas in confession and avoidance, but did not put the execution or delivery in issue, under Rev. St. 1881, § 364, providing that a written instrument upon which a pleading is founded may be read without proof of its execution, unless it be denied by a sworn pleading or affidavit. *Held*, that

evidence as to the execution of the policy, and of the agent's authority to deliver it without prepayment of premiums, is immaterial; there being no allegation of collusion between the agent and plaintiff.—*Phoenix Ins. Co. v. Rowe*, 117 Ind. 202, 20 N. E. 122.

[d] (Sup. 1891)

In an action on the policy, where defendant pleads an incumbrance as vitiating the policy, plaintiff cannot raise the issue of waiver under a general denial.—*Continental Ins. Co. v. Vanlue*, 126 Ind. 410, 26 N. E. 119, 10 L. R. A. 843.

[e] (Sup. 1891)

In an action on a policy, the complaint stated that a note given for an annual premium was renewed to June 2d, and it appeared on the trial that the maker should have until he could realize upon sales of tile during the "next tile season," which was from March 1st to the middle of June. The first demand for payment of the note was made on the 27th of May, written and addressed to insured after his death, occurring on May 9th. *Held*, that there was not such a variance between the pleading and proof as to justify the setting aside of the verdict, which included the 27th day of May within the period of extension in the time of payment of said note.—*Michigan Mut. Life Ins. Co. v. Custer*, 128 Ind. 25, 27 N. E. 124.

[f] (App. 1892)

In an action on a fire insurance policy, where defendant set up breach of condition, and plaintiff replied by general denial, the question of defendant's waiver of condition is not within the issues; waiver being a plea of confession and avoidance, and proof thereof not admissible under a general denial.—*Evans v. Queen Ins. Co.*, 5 Ind. App. 198, 31 N. E. 843.

[g] (App. 1893)

An answer in an action on a policy on a stallion which sets up general denial, breach of warranty, and death of the stallion through assured's negligence, tenders no issue as to the falsity or materiality of the representations of the application.—*Indiana Farmers' Live Stock Ins. Co. v. Rundell*, 7 Ind. App. 426, 34 N. E. 589.

[h] (App. 1895)

In an action on an insurance policy defendant was sued as the "V. Insurance Company." The policy filed as an exhibit showed that it was issued by the "V. Life & Trust Trading & Manufacturing Company," although the company was also described in the policy as the "V. Insurance Company." Defendant voluntarily appeared, and described itself in its answer as the "V. Insurance Company." *Held*, that the policy was not inadmissible because of the variance in defendant's name.—*Vernon Ins. Co. of Indianapolis v. Glenn*, 13 Ind. App. 340, 40 N. E. 759, 41 N. E. 820.

[i] (App. 1899)

A complaint on a policy on the life of plaintiff's son, which alleges that it was issued to plaintiff, cannot be claimed to declare on a policy issued to the son, though the policy is made an exhibit, it not being necessarily inconsistent with the averment that it was issued to her.—*Prudential Ins. Co. of America v. Hunn*, 52 N. E. 772, 21 Ind. App. 525, 69 Am. St. Rep. 380.

[j] (App. 1900)

Where plaintiff sues on a policy of insurance as an assignee of the owner of the property insured, he cannot recover on the theory that he has paid a mortgage on the property, and has become subrogated to the rights of the mortgagee.—*Hanover Fire Ins. Co. v. Johnson*, 57 N. E. 277, 26 Ind. App. 122.

[k] (App. 1905)

Though, in an action on a policy, no issue as to waiver of proofs of loss was tendered, it was not reversible error to permit plaintiff's attorney to testify that plaintiff and himself made a demand for the amount of the policy, and that the adjuster replied that insurer was not legally liable, and would not pay.—*Fire Ass'n of Philadelphia v. Yeagley*, 72 N. E. 1035, 34 Ind. App. 387.

[l] (App. 1905)

In a complaint on a fire policy, a general averment that plaintiff, at the inception of the policy and at the time of the loss, was the owner of the property destroyed, is sufficient to admit evidence of any interest he may have had.—*New Hampshire Fire Ins. Co. v. Wall*, 75 N. E. 668, 36 Ind. App. 238.

[m] (App. 1906)

The nonobservance by the assured of the provision in a policy, declaring that it shall be void on the premises becoming vacant, is a matter of defense which, in order to be available, must be specially pleaded.—*Home Ins. Co. v. Gagen*, 76 N. E. 927, 38 Ind. App. 680.

[n] (App. 1908)

In an action on a contract of insurance, defendant alleged that insured had made a false statement in his application that his vision was not impaired, that he had lost an eye prior to the execution of the application, and that this fact was peculiarly within his knowledge. *Held* that evidence as to the condition and facial expression of insured on the day the contract was executed was admissible under the allegations of the answer.—*United States Health & Accident Ins. Co. v. Clark*, 41 Ind. App. 345, 83 N. E. 760.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1554, 1632-1644; 39 CENT. DIG. Plead. § 1330.

See, also, 15 Cyc. p. 1041, 19 Cyc. pp. 932-934, 25 Cyc. pp. 623, 624, 1521, 26 Cyc. p. 720.

### § 646. Presumptions and burden of proof.

[a] (Sup. 1886)

Where, in an action on a life policy, the insurer sets up misrepresentation on the part of the insured, the burden of proof is on the company.—*Northwestern Mut. Life Ins. Co. v. Hazelett*, 105 Ind. 212, 4 N. E. 582, 55 Am. Rep. 192.

[b] (App. 1893)

The burden is on the insurer to show that the answers of the assured in the application were untrue, where it was claimed that the answers constituted warranties and were untrue.—*Indiana Farmers' Live Stock Ins. Co. v. Rundell*, 34 N. E. 588, 7 Ind. App. 426.

[c] (App. 1894)

Where the defense is that the insured committed suicide, in which event the policy was to be void and of no effect, the burden is on the insurance company to establish the issue to the satisfaction of the trial court by a preponderance of the evidence, not by a prima facie case alone, but by such proof as would withstand and overthrow all of the evidence to the contrary.—*Travelers' Ins. Co. v. Nitterhouse*, 38 N. E. 1110, 11 Ind. App. 155.

[d] (App. 1896)

A provision in an insurance policy requiring the written consent of the insurer as to further insurance is for the benefit of the insurer to protect it from the hazard of over-insurance, and it will not be presumed that such provision was waived.—*Sisk v. Citizens' Ins. Co.*, 45 N. E. 804, 16 Ind. App. 565.

[e] (App. 1898)

On an issue as to whether insured in a life policy committed suicide, the presumption is that he did not.—*Union Central Life Ins. Co. v. Hollowell*, 50 N. E. 399, 20 Ind. App. 150.

[f] (App. 1903)

In an action on a fire policy, the insured must not only allege that he was the owner of the property at the time of loss, but must also prove such ownership.—*Milwaukee Fire Ins. Co. v. Todd*, 67 N. E. 697, 32 Ind. App. 214.

[g] (App. 1906)

In an action on a policy of life insurance, providing that it should be void if the insured should take his own life, whether sane or insane, suicide could not be presumed from the mere fact of death in an unknown manner, but the burden of establishing the defense of suicide is on the insurer.—*Equitable Life Ins. Co. of Iowa v. Hebert*, 76 N. E. 1023, 37 Ind. App. 373, 117 Am. St. Rep. 324.

[h] (App. 1908)

Where an insurance contract provided that, if insured wish to withdraw his share of the accumulated reserve in cash, he must give no-

tice, otherwise said sum will be applied to the purchase of an annuity, the burden is upon assured, seeking to avoid the effect, to show an election or a waiver of it.—*Equitable Life Assur. Soc. of United States v. Perkins*, 41 Ind. App. 183, 80 N. E. 682.

[i] (App. 1908)

Where, upon the transfer of insured's policy by the company in which he was originally insured to another company, the latter company notified him of the transfer, stating in the notice that the policy would be continued on the same terms, it will not be presumed, in an action on the policy, that the company did not have the power to insure him on the terms indicated.—*Mutual Reserve Life Ins. Co. v. Ross*, 42 Ind. App. 621, 86 N. E. 506.

[j] (App. 1909)

Defendant in an action on a life policy has the burden of showing alleged false answers to the medical examiner.—*Iowa Life Ins. Co. v. Haughton*, 87 N. E. 702.

[k] (App. 1910)

Where, on an issue of suicide in a suit on a life policy, there is no showing indicating an accident, and facts point strongly to suicide, the presumption against suicide ceases to control; the presumption being a rebuttable one.—*Prudential Ins. Co. of America v. Dolan*, 91 N. E. 970.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1555, 1645-1668.

See, also, 1 Cyc. pp. 289-291, 19 Cyc. pp. 935-939, 25 Cyc. pp. 923, 26 Cyc. pp. 722-727.

### § 647. Admissibility of evidence.

Admissions, as evidence, see EVIDENCE, §§ 215, 217, 236.

As to authority of agent, see ante, § 92.

As to cancellation of policy, see ante, § 235.

Competency of witness to testify as to medical treatment of insured, see WITNESSES, § 37.

Declarations by officers and agents as evidence against insurer, see EVIDENCE, § 244.

Declarations of insured as evidence against beneficiary, see EVIDENCE, § 252.

Evidence at former trial, see EVIDENCE, §§ 575, 579.

Evidence of similar facts to show value, see EVIDENCE, § 142.

Evidence to aid construction of policy, see ante, § 155.

Opinion evidence, see EVIDENCE, §§ 471, 472, 474, 501.

Parol or extrinsic evidence to contradict or vary contract of insurance, see EVIDENCE, §§ 405, 419.

Relevancy of evidence to show character of plaintiff, see EVIDENCE, § 106.

To construe terms of application, see EVIDENCE, § 450.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1555, 1669-1706.

See, also, 1 Cyc. pp. 291-297, 19 Cyc. pp. 525, 939-953, 25 Cyc. pp. 931-943, 1521, 26 Cyc. pp. 727-734; note, 13 Am. Dec. 735.

**§ 648. — In general.**

[a] (App. 1898)

In an action on a life policy, an offer to prove that under the constitution of defendant the policy holder had the right to change a beneficiary was properly refused.—Masons' Union Life Ins. Ass'n v. Brockman, 50 N. E. 493, 20 Ind. App. 206.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1669, 1676.

See, also, 25 Cyc. pp. 931, 1529, 26 Cyc. p. 727

**§ 651. — Policy or other contract.**

[a] (App. 1899)

G. and O., a partnership, held an insurance policy in defendant's company on a stock of goods. G. bought out O. Subsequently, while defendant's agent, who was authorized to deliver policies and collect premiums, was in G.'s store on other than insurance business, G. informed him that the policy had run out, and that he desired to renew the same for the same amount, and upon the same terms, as the former policy, whereupon the agent promised that he would renew it immediately, knowing that G. was then the sole owner of the store. Nothing was said as to payment of the premium, but, the agent being indebted to G. for goods, a credit was contemplated. Subsequent to said promise to renew, and without the policy's having been delivered, the property was destroyed by fire, and the agent was orally notified thereof on the following day. Afterwards the premium was tendered, and demand was made on the agent for the policy, which was refused. In an action on the policy, *held*, that the former policy between plaintiff and the company was admissible in evidence, as it was on the same property, and was referred to in the negotiations for the last insurance.—Western Assur. Co. v. McAlpin, 55 N. E. 119, 23 Ind. App. 220, 77 Am. St. Rep. 423.

[b] (Sup. 1908)

Insured being sued on a fire policy containing a mortgage clause, and claiming that the insurance was not in force for nonacceptance of the policy by insured, insured could not show a card memorandum made by the mortgagee's agents' clerk, on receipt of the policy, which was delivered to him on insured's refusing to receive it; the clerk having no authority to accept the policy as binding the mortgagee.—New v. Germania Fire Ins. Co., 171 Ind. 33, 85 N. E. 703, 131 Am. St. Rep. 245.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1673-1675.

See, also, 19 Cyc. p. 939, 25 Cyc. p. 932, 26 Cyc. p. 727.

**§ 653. — Interest or title of insured.**

[a] (Sup. 1889)

In an action on a policy providing that it shall be void if the assured is not the sole and unconditional owner of the property, plaintiff cannot be required to furnish an abstract of title, under Rev. St. 1881, § 303, permitting the court, in a proper case, to order one to be furnished.—Phoenix Ins. Co. v. Rowe, 117 Ind. 202, 20 N. E. 122.

[b] (App. 1904)

In an action on a fire policy, it is proper to allow plaintiff to testify that he was the owner of the insured building.—Phoenix Ins. Co. of Brooklyn, N. Y., v. McAtee, 70 N. E. 947, 33 Ind. App. 106.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1678, 1679.

See, also, 19 Cyc. p. 941, 26 Cyc. p. 728.

**§ 654. — Performance or breach of warranty or condition.**

[a] (Sup. 1874)

In a suit on a life policy, where the defense was false answers in the application touching the health of assured, the certificate of the physician who examined assured is admissible in evidence, where he acted, in making the examination, by the consent of both parties, although he was not the regular examining physician of the insurance company.—Mutual Ben. Life Ins. Co. v. Cannon, 48 Ind. 264.

[b] (App. 1903)

Where, in an application for insurance, insured agreed not to use intoxicating liquors to excess, and not to practice any pernicious habit that obviously tended to shorten life, and insurer defended on the ground that insured had used intoxicating liquors to excess, and that such dissipation contributed to his death, the refusal to permit a medical expert to state whether he regarded the excessive use of intoxicating liquor a pernicious habit was not error.—Union Life Ins. Co. v. Jameson, 67 N. E. 109, 31 Ind. App. 28.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1677, 1680-1685.

**§ 654½. — Payment of premiums.**

[a] (Sup. 1892)

In an action on a life policy where the issue was whether an agent of the insurer had authority to extend the time for the payment of a premium, conversations between the administrator of insured's estate—the plaintiff in the action—and the president of the insurer, in which the latter stated in effect that it was

the duty of the agent to care for insured's interests in the policy, and statements tending to show that a premium, though paid after the time required, would have been received, were admissible.—*Painter v. Industrial Life Ass'n*, 30 N. E. 876, 131 Ind. 68.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1674, 1686.

### § 655. — Fraud or misrepresentation.

[a] (Sup. 1876)

In an action on a life policy, in which defendant claimed that there had been a breach of warranty as to deceased's habits with respect to the use of intoxicants, questions to a physician as to the condition of deceased from one to two years before the application for the policy related to a time which was too remote.—*John Hancock Mut. Life Ins. Co. v. Daly*, 65 Ind. 3.

[b] (App. 1904)

In an action on a fire policy, in which there was no question of fraud or misrepresentation, evidence that insured had stated that he had learned that he "had a firebug" as a tenant, and would have to increase his insurance, and did so, was immaterial.—*Phoenix Ins. Co. of Brooklyn, N. Y., v. McAtee*, 70 N. E. 947, 33 Ind. App. 106.

[c] (Sup. 1905)

On the issue of fraud in the procurement of a policy of life insurance, statements made by insured, near the time of the issuance of the policy, in explanation of his appearance, walk, the smell of medicines about his person, and as to the impaired condition of his health and his having suffered a surgical operation, were admissible to show insured's knowledge of his physical condition at the time of making out his application for insurance. Judgment (App. 1904) 72 N. E. 652, reversed.—*Haughton v. Aetna Life Ins. Co.*, 73 N. E. 592, 74 N. E. 613, 165 Ind. 32.

[d] (App. 1909)

As tending to show knowledge of the medical examiner of a life insurance company that insured had been operated on, statements of the soliciting agent to another, who had been operated on, that that did not make any difference, that insured had also been operated on, that he wanted them both to take policies, and that he would see the medical examiner, are admissible, in connection with testimony that at the subsequent examination of insured he said to the examiner, in answer to a question as to whether he had been operated on, "You know I have, and I suppose that will bar me from insurance," and the examiner said he would fix that.—*Iowa Life Ins. Co. v. Haughton*, 87 N. E. 702.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1677-1685.

See, also, 19 Cyc. pp. 525, 942, 950, 951, 25 Cyc. pp. 933-937, 26 Cyc. pp. 728, 729.

### § 658. — Loss or damage to property, and cause thereof.

[a] (Sup. 1879)

In an action on a policy insuring a wharf boat lying at a certain wharf against injuries from floating ice, evidence of a custom to remove such boats to an ice harbor some miles away, on approach of danger from floating ice, or that insurer offered to remove the boat at his own risk, is inadmissible.—*Franklin Ins. Co. of Indianapolis v. Humphrey*, 65 Ind. 549, 32 Am. Rep. 78.

Where the policy insures a wharf boat lying at a certain wharf from injuries by floating ice, the motive of insured in refusing to allow the boat to be removed to a harbor some miles off, on approach of danger from floating ice, does not affect the right to recover on the policy for such injuries.—Id.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1689, 1690, 1694.

See, also, 19 Cyc. pp. 945-948, 26 Cyc. pp. 730, 731.

### § 659. — Death of or injury to person insured and cause thereof.

[a] (App. 1896)

In an action on a life policy, a certified copy of the coroner's inquest was inadmissible as affirmative evidence of the defense of death by suicide.—*Union Cent. Life Ins. Co. v. Hollowell*, 14 Ind. App. 611, 43 N. E. 277.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1691-1693; 11 CENT. DIG. Coroners, § 28; 28 CENT. DIG. Ins. Per. § 8.

See, also, 1 Cyc. pp. 291-297, 25 Cyc. pp. 939-943.

### § 660. — Valuation of property.

[a] (App. 1904)

In an action on a fire policy, it was proper to allow insured to testify as to the nature of the fixtures insured, and their value at the time of the fire.—*Phoenix Ins. Co. of Brooklyn, N. Y., v. McAtee*, 70 N. E. 947, 33 Ind. App. 106.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1695.

See, also, 19 Cyc. p. 945, 26 Cyc. p. 729.

### § 661. — Amount of loss.

[a] (App. 1895)

In a suit on an accident policy insuring plaintiff "against the loss of the money value of his time," it was not error to permit plaintiff's counsel to ask him as to his suffering, and how he slept during the disability; the court having instructed the jury that such evidence was not an element of damages, and was only admissible in so far as the discomfort may have interfered with his capacity to perform his work.—*Globe*

Acc. Ins. Co. v. Hielwig, 13 Ind. App. 539, 41 N. E. 976, 55 Am. St. Rep. 247.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 1696.

See, also, 19 Cyc. p. 945, 26 Cyc. p. 730.

**§ 662. — Notice and proof and adjustment of loss.**

Admissibility of copy of notice as dependent on preliminary evidence, see EVIDENCE, § 185.

**[a] (Sup. 1862)**

In an action on a policy of insurance, the plaintiff was properly permitted to testify that he had mailed to the defendant's secretary a notice of his loss.—Commonwealth's Ins. Co., etc., v. Monninger, 18 Ind. 352.

**[b] (App. 1896)**

In an action on a policy, the execution of which was denied by the insurance company, proofs of loss and the correspondence passing between the company's general agent by whom the policy was issued are admissible in evidence.—German Fire Ins. Co. v. Columbia Encaustic Tile Co., 43 N. E. 41, 15 Ind. App. 623.

**[c] (Sup. 1905)**

In an action on a life insurance policy, proofs of death furnished by the beneficiary are admissible in evidence against her. Judgment (App. 1904) 72 N. E. 652, reversed.—Houghton v. Aetna Life Ins. Co., 73 N. E. 592, 74 N. E. 613, 165 Ind. 32.

**[d] (App. 1907)**

Preliminary proofs of death furnished an insurance company are admissible as prima facie evidence of the facts stated therein on behalf of the company in an action on the policy.—Craig v. Modern Woodmen of America, 40 Ind. App. 279, 80 N. E. 429.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1697, 1698, 1700–1706.

See, also, 19 Cyc. p. 949, 25 Cyc. p. 941, 26 Cyc. p. 731.

**§ 664. — Estoppel or waiver.**

**[a] (Sup. 1876)**

In an action on a life insurance policy, where the question was as to forfeiture for non-payment of premiums, letters written by the secretary of the company to the widow of the insured, admitting liability, were inadmissible; it not being shown that the secretary was authorized to adjust losses, or that his act in writing the letters was ratified by the company.—Franklin Life Ins. Co. v. Sefton, 53 Ind. 380.

**[b] (App. 1896)**

Where insured at first claimed a less sum on account of her loss than she subsequently claimed in the action on the policy, she may, to explain the discrepancy, show that her first claim was made through a mistake as to the construction of the policy.—Aetna Ins. Co. v. Strout, 44 N. E. 934, 16 Ind. App. 160.

**[c] (App. 1900)**

Where, in an action on an accident policy requiring written notice of injury to be given to the secretary at the home office of the association, the complaint alleged facts showing a waiver of such notice, the admission of plaintiff's testimony of an alleged conversation between himself and the secretary, in which he claimed to have given parol notice of his injury, was proper.—Commercial Travelers' Mut. Acc. Ass'n v. Springsteen, 55 N. E. 973, 23 Ind. App. 657.

**[d] (Sup. 1904)**

A declaration of the supervisor of death claims of an insurance company relative to the ground on which the company refused to pay the loss sued for was not objectionable as hearsay, but was competent evidence tending to prove a waiver of proof of loss.—Penn Mut. Life Ins. Co. v. Norcross, 72 N. E. 132, 163 Ind. 379.

**[e] (App. 1905)**

Where there was some evidence that the policy sued on was a renewal of a former policy issued by the same agent, in which there was a recognition of the existence of an incumbrance on the property, because of which insured denied liability, evidence as to the former policy was properly admitted.—Fire Ass'n of Philadelphia v. Yeagley, 72 N. E. 1035, 34 Ind. App. 387.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1555, 1687, 1688, 1699.

See, also, 19 Cyc. p. 953, 25 Cyc. p. 939.

**§ 665. Weight and sufficiency of evidence.**

Weight of evidence in rebuttal, see EVIDENCE, § 600.

**[a] (Sup. 1883)**

In an action by the insured in a fire policy against the insurer, evidence held to show that, on a cancellation of the policy according to its terms authorizing a cancellation on a return of the ratable proportion of the premium for the unexpired term, the premium had not been refunded, but that some of it was left unpaid.—Aetna Ins. Co. v. Weissinger, 91 Ind. 207.

**[b, c] (Sup. 1892)**

In an action on a certificate of life insurance, it appeared that deceased died on January 5, 1880. The certificate contained an agreement that deceased would pay all dues and monthly payments agreeably to the by-laws. By a rule of defendant, the monthly payment was due on the first day of each month, with the balance of the month allowed as grace; and, if any such payment was not made at the expiration of such days of grace, the certificate would become void. Deceased's payment for September, 1879, was made October 4th; his payment for October was made November 1st; his payment for November was made December 2d; but his payment for December was not made when he died.

Defendant's by-laws (section 39) provided that lapsed members might be reinstated within 30 days after lapse on payment of back dues, and giving a certificate of good health. Plaintiff contended that such payments were accepted with a waiver of a certificate as to good health, under such section. *Held*, that the jury were warranted in finding that the certificate was continued in force and the dues accepted after the days of grace had elapsed.—*Painter v. Industrial Life Ass'n*, 131 Ind. 68, 30 N. E. 876.

There was evidence that J., who, as agent of defendant, solicited certain insurance, agreed with deceased on an extension of time for the payment of December dues until January 5, 1880. J. was appointed special agent by a written contract, which stated his duties to be soliciting applications for membership, collecting membership fees, and building up the defendant company. A witness testified that defendant's president stated that it was the duty of the agent that solicited a membership to look after and take care of his interest in the policy. *Held*, that the jury were warranted in finding that the time of payment had been waived, and a consent to accept payment on the 5th day of January.—*Id.*

[d] (App. 1892)

Notice of loss was duly mailed in an envelope plainly addressed to the company at its general office, and stamped with sufficient postage, and receipt thereof was not denied by the company. *Held*, that the jury properly found that the notice was received by the company.—*Phenix Ins. Co. v. Pickel*, 3 Ind. App. 332, 20 N. E. 432.

[e] (App. 1894)

In an action on a life insurance policy, where the defense was that the defendant committed suicide, the certificate of the attending physician, the coroner's verdict, and a letter written by plaintiff, the insured's wife, all stating that he committed suicide, were introduced by defendant. Insured had money and friends, and a family with whom he had pleasant relations, and was sober and industrious, and he had no reason to take his life unless it was despondency resulting from an injury which had for some time prevented him from working, but he had not complained on that account. The pistol he held at the time of his death was loaded, and had been placed in a certain drawer without his knowledge, and several days before his death he asked for certain letters in that drawer. On the night before his death he slept well, and next morning ate heartily. He was found lying on his back, with the pistol pointing towards his head, and had a hole in his forehead, but there were no powder marks on him, and his skin at the point of the bullet's entrance was neither livid nor depressed. *Held*, that a finding that the shooting was accidental was justified.—*Travelers' Ins. Co. v. Nitterhouse*, 11 Ind. App. 155, 38 N. E. 1110.

Statements in the physician's certificate and in the coroner's verdict that the insured committed suicide, and in a letter from the beneficiary that the insured, while temporarily insane, shot himself, are merely the expressions of opinion, and are not conclusive.—*Id.*

[f] (Sup. 1895)

In an action on a life policy, plaintiff made a prima facie cause by showing the issuance of the certificate, the performance of its conditions by insured, and a failure of performance on the part of the insurer.—*People's Mut. Ben. Soc. v. McKay*, 39 N. E. 231, 40 N. E. 910, 141 Ind. 415.

[g] (App. 1896)

A life policy was conditioned not to be binding till payment of the first premium, and until the receipt therefor, attached to the policy, had been countersigned by the company's agent, and delivered during the lifetime of the insured, and provided that no conditions could be waived except by officers of the company. The receipt attached provided that it should not be valid unless countersigned by a designated agent. *Held*, that the receipt signed for such agent by another agent, with the fact that, on death of the insured, liability was denied solely on the ground of suicide, was prima facie evidence of payment of the premium.—*Union Cent. Life Ins. Co. v. Hollowell*, 14 Ind. App. 611, 43 N. E. 277.

[h] (App. 1896)

As nonpayment of the premium will not of itself authorize a forfeiture of a policy, a general verdict for plaintiff, where otherwise sustained by the evidence, is not improper, though the evidence shows that the insured had not paid the premium on the policy in suit.—*Ohio Farmers' Ins. Co. v. Stowman*, 16 Ind. App. 205, 44 N. E. 558, 940.

[i] (App. 1899)

A policy required "satisfactory" proofs of death within seven months, but did not state what proofs would be "satisfactory." Insured was killed August 5th, in Ohio. His brother, in Boston, wrote the company August 17th, and again August 30th, giving full particulars, and the address of the beneficiary, his sister, in Mississippi, requesting answer, and giving his address. September 4th the company answered, declining to treat with him, stating that it was advised of the death, and would give the matter attention, and would settle with the beneficiary. The company had received a letter from the beneficiary, dated August 22d, asking for information, and giving her correct address. September 28th it wrote her it had letters from the brother, and asked her if she was the beneficiary, and had the policy, and asked for the brother's address. September 28th attorneys for the beneficiary wrote the company, stating she was the beneficiary, and inquiring about the policy. It answered, October 2d, that it was corresponding with the beneficiary, and was awaiting her reply. As it had misdirected the letter to her, she did not receive it for some

time. November 22d the attorneys wrote they had the policy, and asked for blanks and other instructions. November 28th the company answered that it wrote the beneficiary September 28th, and would like to get at the true facts before placing the proof in the hands of any one to make a claim. January 19th the company was written to for information. January 26th it wrote the attorneys, inclosing proof blank "as a matter of courtesy, not waiving any rights." Deceased had been buried in Louisiana. The blanks sent required statements and certificates of claimant, eyewitnesses, physicians, and undertaker, and it was necessary to send great distances for these, and it was difficult to find the persons. *Held*, that the jury was justified in finding that failure to furnish proofs in time was due to fault of insurer.—*Railway Officials' & Employes' Acc. Ass'n v. Armstrong*, 53 N. E. 1037, 22 Ind. App. 406.

[J] (App. 1900)

Evidence that defendant company by its authorized agent notified plaintiff within less than 60 days after the fire that they would not pay the loss was sufficient proof of waiver of proof of loss to sustain a verdict for plaintiff.—*Home Ins. Co. v. Sylvester*, 57 N. E. 991, 25 Ind. App. 207.

[K] (App. 1901)

Evidence that an injury received in a fight was unintentionally inflicted *held* not sufficient to establish such fact, and thus authorize a recovery on an accident policy.—*Northwestern Benev. Soc. v. Dudley*, 61 N. E. 207, 27 Ind. App. 327.

In an action on an accident insurance policy, the contention that injuries received in a fight were unintentional because the person inflicting the injuries was at the time so intoxicated that he was incapable of the intent to do the injury was not sustained by the evidence, where such person, while testifying that he was so intoxicated that he was not aware of what he did, narrated the offense in detail, showing that he had a recollection of all that was done.—*Id.*

[L] (Sup. 1903)

In an action on a fire policy, evidence *held* sufficient to support a verdict for plaintiff.—*Germania Fire Ins. Co. v. Pitcher*, 160 Ind. 392, 64 N. E. 921, 66 N. E. 1003.

[m] (Sup. 1903)

Where plaintiff in an action on an insurance policy alleged several distinct grounds, each sufficient to entitle him to have an award by arbitrators set aside and to recover on the policy, he was entitled to a recovery if he established any one of the alleged grounds.—*Insurance Co. of North America v. Hegewald*, 66 N. E. 902, 161 Ind. 631.

[n] (Sup. 1904)

In an action on an accident policy, evidence reviewed, and *held* sufficient to sustain a finding that the insurer had received the neces-

sary proofs within the time required, and, if not, it had waived its right to insist on forfeiture for an alleged failure to furnish the same in time.—*National Masonic Acc. Ass'n v. McBride*, 70 N. E. 483, 162 Ind. 379.

[o] (Sup. 1905)

In an action on an accident policy, evidence *held* sufficient to sustain a finding that the proximate cause of death was a fall, and not a tumor of the brain.—*Continental Casualty Co. v. Lloyd*, 73 N. E. 824, 165 Ind. 52.

[p] (App. 1905)

In an action on a policy, evidence *held* to justify a finding that insurer's agent had notice of the existence of a mortgage on the property when he issued the policy, and that insured sufficiently complied with the requirements of the policy respecting the furnishing of proofs of loss.—*Fire Ass'n of Philadelphia v. Yeagley*, 72 N. E. 1035, 34 Ind. App. 387.

[q] (App. 1908)

Evidence in an action on a contract of insurance considered, and *held* sufficient to prove that the insured had no actual knowledge of the application or policy from personal inspection, and that he relied on the agent, who failed to call his attention to all the statements or negligently checked statements without reading them.—*United States Health & Accident Ins. Co. v. Clark*, 41 Ind. App. 345, 83 N. E. 760.

[r] (App. 1910)

To defeat a life policy under a provision against suicide insurer must exclude every other reasonable hypothesis than that of suicide.—*Prudential Ins. Co. of America v. Dolan*, 91 N. E. 970.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1555, 1707-1728.

See, also, 1 Cyc. p. 297, 19 Cyc. pp. 939-953, 25 Cyc. pp. 943-945, 26 Cyc. p. 727; note, 79 C. C. A. 455.

§ 667. Conduct of trial.

Right to open and close, see TRIAL, § 25.

[a] (App. 1896)

Where an insurance company, notified of the death of an insured on the date of death, made no effort to procure an autopsy while the body was with the coroner, and, on the day of burial, notified the administrator that the policy was void because the insured committed suicide, it was proper to deny an application of the company to have the body exhumed for autopsy, made two days before trial of an action on the policy, commenced several months after death.—*Union Cent. Life Ins. Co. v. Hollowell*, 14 Ind. App. 611, 43 N. E. 277.

[b] (App. 1898)

An offer to prove that the witness had talked with insured about his drinking, but not offering to show what he had said about it, is properly refused, where the issue is as to in-

sured's habit of drinking to excess.—*Masons' Union Life Ins. Ass'n v. Brockman*, 50 N. E. 493, 20 Ind. App. 206.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1729–1731.

See, also, 19 Cyc. pp. 955, 956, 25 Cyc. p. 947, 26 Cyc. p. 735.

**§ 668. Questions for jury.**

Instructions invading province of jury, see TRIAL, § 193.

Submission by court to jury of questions of law, see TRIAL, § 199.

**[a, b] (Sup. 1887)**

A condition in a fire policy of a foreign company doing business in Indiana, requiring immediate notice of loss, or notice within less than five days, being void under Rev. St. 1881, § 3770, so that reasonable notice is sufficient, the reasonableness is to be determined by the court, where the facts are undisputed; but, where the facts are disputed, the matter must be left to the jury under proper instructions.—*Insurance Co. of North America v. Brim*, 111 Ind. 281, 12 N. E. 315.

**[c] (Sup. 1890)**

Where a fire destroys about \$46,000 worth of property, of various kinds, insured in 20 different companies, and the particular account of the loss is not forwarded to the insurance company until nearly two months after the fire, the question whether the account was furnished as soon after the fire as possible, as required by the policy, is, in view of the language of the requirement, one of fact for the jury.—*Western Assur. Co. v. Studebaker Bros. Mfg. Co.*, 124 Ind. 176, 23 N. E. 1138.

**[d] (Sup. 1890)**

Where there is no dispute as to the facts whether the requirements of a policy as to the time within which proofs of loss were furnished, the question whether the conditions of the policy were complied with is one of law for the court.—*Baker v. German Fire Ins. Co.*, 24 N. E. 1041, 124 Ind. 490.

**[e] (App. 1892)**

Whether a proper change in the use of insured property will increase the hazard is a question of fact, to be submitted to the jury under proper instructions.—*Germania Fire Ins. Co. v. Deckard*, 28 N. E. 868, 3 Ind. App. 361.

Where notice of loss under a fire insurance policy is given 15 days after the fire, it cannot be said as a matter of law that notice was not given within a reasonable time.—*Id.*

**[f] (Sup. 1894)**

In a suit on an accident policy providing that the benefits should not extend to death caused by bodily infirmity or disease, it appeared that the insured suddenly fell, striking his head. There was no evidence of any external cause for the fall, and the uncontradicted testi-

mony of the experts who conducted the post mortem showed that the heart and brain were generally diseased, and that this caused the fall and death. *Held*, that an affirmative instruction for defendant was properly given.—*Sharpe v. Commercial Travelers' Mut. Acc. Ass'n of America*, 139 Ind. 92, 37 N. E. 353.

The fact that persons meeting the insured observed nothing in his appearance to indicate ill health raises no conflict as to the existence of the diseases testified to by the experts.—*Id.*

**[g] (App. 1894)**

Where the proofs of death on the entire evidence leave it in doubt how the death of the insured was caused, the question must be determined by a jury.—*Travelers' Ins. Co. v. Nitterhouse*, 38 N. E. 1110, 11 Ind. App. 155.

**[h] (App. 1895)**

Ordinarily the question whether certain acts of the assured, as a change of use or occupation, will increase the risk or not, is one for the jury exclusively.—*Germania Fire Ins. Co. v. Stewart*, 42 N. E. 286, 13 Ind. App. 627.

**[i] (App. 1898)**

The question whether a premium has been paid is an ultimate fact for the jury.—*Union Cent. Life Ins. Co. v. Hollowell*, 50 N. E. 399, 20 Ind. App. 150.

**[j] (App. 1902)**

If the facts are undisputed, whether notice of a loss or an accident insured against was given within a reasonable time becomes a question of law for the court.—*Employers' Liability Assur. Corp. v. Light, Heat & Power Co.*, 63 N. E. 54, 28 Ind. App. 437.

**[k] (App. 1903)**

What is a reasonable notice of a claim under an indemnity insurance policy is a question of law for the court when the facts are not disputed.—*London Guarantee & Accident Co. v. Siwy*, 66 N. E. 481, 35 Ind. App. 340.

**[l] (Sup. 1906)**

Where, in an action on a life policy, defendant relied on the defense of breaches of warranties, and the evidence was conflicting, and left inferences and deductions to be drawn in arriving at the ultimate fact, it was error to direct a verdict for defendant, though the weight of the evidence was with it.—*Haughton v. Aetna Life Ins. Co.*, 73 N. E. 592, 74 N. E. 613, 165 Ind. 32.

In an action on a life insurance policy, where defendant filed no general denial, but relied on the affirmative defense of fraud, and thus assumed the burden of proof, and the evidence as to fraud, while largely uncontradicted, was conflicting in certain particulars, and left inferences and deductions to be drawn in arriving at the ultimate fact, it was error for the court to give a peremptory instruction for defendant, although the weight of the evidence was with it.—*Id.*

## [m] (Sup. 1906)

Where, in an action on an accident policy, it appears that two or more causes contributed to the injury, and equally prudent persons would differ as to which was the efficient cause, the question is for the jury.—*Continental Casualty Co. v. Lloyd*, 73 N. E. 824, 165 Ind. 52.

## [n] (Sup. 1906)

Evidence considered, and held to present a question for the jury whether insured in an accident policy gave notice within a reasonable time of an injury resulting from the act of insured in sleeping on his arm, by which the circulation therein was so affected that periostitis developed, causing protracted illness.—*Ætna Life Ins. Co. v. Fitzgerald*, 165 Ind. 317, 75 N. E. 262, 1 L. R. A. (N. S.) 422, 112 Am. St. Rep. 232.

## [o] (App. 1906)

In an action on a policy of life insurance, evidence held to present a question of fact for the jury whether the insured had taken his own life by poisoning.—*Equitable Life Ins. Co. of Iowa v. Hebert*, 76 N. E. 1023, 37 Ind. App. 373, 117 Am. St. Rep. 324.

## [p] (Sup. 1907)

Whether an arbitration between the insured and the insurer failed because of fraud, delay, or other fault is a question for the jury.—*Providence Washington Ins. Co. v. Wolf*, 168 Ind. 690, 80 N. E. 26, 120 Am. St. Rep. 395.

## [q] (App. 1908)

Where an insurance company denies liability upon the stated specific grounds that the policy had been forfeited, as lapsed, whether such act was a waiver of objection raised by the insurance company that a written notice of the election to take a share of the accumulated reserve had not been given, and that thereby such sum was to be applied on an annuity, was for the jury.—*Equitable Life Assur. Soc. of United States v. Perkins*, 41 Ind. App. 183, 80 N. E. 682.

## [r] (App. 1908)

Whether applicant or an insurance agent made false answers to questions in the application held, under the evidence, for the jury.—*United States Health & Accident Ins. Co. v. Clark*, 41 Ind. App. 345, 83 N. E. 760.

Answers to interrogatories in an action on a policy of insurance showed that the insured died August 15, 1903, and the insurer paid the premiums into court November 23, 1905. An exhibit, made a part of the answer, showed that proof of loss advising the insured of every breach of warranty alleged by it was received September 23, 1903. Held, that what is a reasonable time for the return of premiums in order to avoid the policy is ordinarily a question of fact, and the court would not be justified in holding that they were returned in a reasonable time contrary to the general verdict for plaintiff.—Id.

## FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1536, 1732-1770.

See, also, 1 Cyc. pp. 298, 300-302, 19 Cyc. pp. 956-962, 25 Cyc. pp. 947-949, 26 Cyc. pp. 736-739.

## § 669. Instructions.

Applicability of instructions to pleadings and evidence, see TRIAL, § 251.

Instructions excluding or ignoring issues, defenses or evidence, see TRIAL, § 253.

Instructions invading province of jury, see TRIAL, § 193.

Submission by court to jury of questions of law, see TRIAL, § 199.

## [a] (Sup. 1873)

It is error to charge that the jury may consider circumstances excusing delay in giving notice of an injury covered by an accident policy where no such matters of excuse are proved.—*Railway Pass. Assur. Co. of Hartford v. Burwell*, 44 Ind. 460.

## [aa] (Sup. 1888)

In an action on a life policy, where the defense is a breach of assured's warranty that he had no disease of a certain kind, the inference from the certificate of the attending physician, as to the cause of death, is a proper subject for argument to the jury, but not a question of law requiring an instruction as to what the certificate tends to prove outside of the facts recited therein.—*Continental Life Ins. Co. v. Yung*, 113 Ind. 159, 15 N. E. 220, 3 Am. St. Rep. 630.

## [b] (Sup. 1890)

In an action on a life policy, where the defense is a forfeiture by reason of assured's having become so far intemperate as to induce delirium tremens, an instruction defining the term "delirium tremens" to signify "that diseased condition of the brain said to be produced by the excessive and prolonged use of spirituous liquors" is as favorable to the insurance company as it has a right to expect.—*Ætna Life Ins. Co. v. Deming*, 123 Ind. 384, 24 N. E. 86, 375.

## [c] (App. 1894)

In an action on a policy insuring a horse, the court instructed that if the insurance was issued to plaintiff by defendant, both acting in good faith and the horse was not diseased at the time that he was insured, the verdict should be for plaintiff for the full amount of the insurance. Held, that such instruction was erroneous, the policy having provided that no animal should be insured for more than one-half its cash value, and there being a conflict in the evidence as to the value of the horse.—*Indiana Farmers' Live Stock Ins. Co. v. Byrnett*, 36 N. E. 779, 9 Ind. App. 443.

In an action on a policy the court refused to instruct that if plaintiff made a written application for insurance, and any material fact or circumstance stated in writing was not

fairly represented by plaintiff, and defendant was misled thereby and induced to deliver to plaintiff a policy, or if any of the answers contained in such application were untrue, then, if such facts existed, the verdict should be for defendant. *Held*, that the instruction asked was too broad in its terms, it not being limited to such facts or circumstances pleaded in the answer, but being such that it would permit the jury to take into consideration any facts stated in writing.—*Id.*

[d] (App. 1896)

In an action on a life policy making "self-destruction by the insured, whether sane or insane," an avoidance of the policy, it was error to instruct that death from poison self-administered would not avoid the policy, unless it was shown that it was "willfully and deliberately" taken by the insured, with intent to commit suicide; and such error was not cured by a subsequent instruction directing a verdict for defendant if "deceased came to his death by poison taken with intent to commit suicide."—*Union Cent. Life Ins. Co. v. Hollowell*, 14 Ind. App. 611, 43 N. E. 277.

[e] (App. 1898)

In an action on a life policy, the court charged that, if answers in the application were warranties and untrue, the policy was void, and again charged in effect that the jury had the right to construe the contract. *Held*, that the instructions were erroneous as contradictory.—*Masons' Union Life Ins. Ass'n v. Brockman*, 50 N. E. 493, 20 Ind. App. 206.

Correct instructions as to all the answers in the application for a policy being warranties, the effect of false statements therein, and that the materiality of the statements was not to be considered by the jury, do not cure an instruction that "nothing can be construed as a warranty except that which was and is plainly and unequivocally declared to be such by the parties," since the latter is erroneous, because practically leaving the policy to be construed by the jury, or, at least in connection with the other instructions, confusing and misleading the jury as to what the law on the subject really is.—*Id.*

The giving of an instruction, in action on policy, that "the word 'warranty' means more than an agreement,—it means a guaranty,"—is reversible error, since the words have distinct meanings.—*Id.*

[f] (App. 1899)

In an action on a policy, an instruction purporting to state the averments of the complaint necessary to be proved to entitle plaintiff to recover, which omits the averment of plaintiff's insurable interest in the property, is erroneous.—*Indiana Ins. Co. v. Pringle*, 52 N. E. 821, 21 Ind. App. 559.

[g] (App. 1899)

Where the pleadings, in an action on a policy of fire insurance, do not present an issue

of waiver of the conditions of the policy, it is error to instruct the jury that insured must either show a performance of the conditions of the contract on her part to be performed, or show that the insurer had waived the performance of such conditions.—*Ft. Wayne Ins. Co. v. Irwin*, 54 N. E. 817, 23 Ind. App. 53.

[h] (App. 1900)

In an action on an accident policy providing that no claims should accrue except for accidental injury arising independent of all other causes immediately and wholly disabling assured from performing any and all kinds of business pertaining to his occupation, it was proper for the court to instruct that plaintiff could recover if he was disabled to the extent that he could not do any and all kinds of business pertaining to his occupation, and to refuse to instruct that plaintiff's injury must have been such as to wholly disable him from performing any and every kind of business pertaining thereto, since the clause in the policy being capable of two constructions, the more liberal to assured must prevail.—*Commercial Travelers' Mut. Acc. Ass'n v. Springsteen*, 55 N. E. 973, 23 Ind. App. 657.

[i] (App. 1903)

Where insured warranted that he would not use intoxicating liquors to excess, nor practice any pernicious habit that obviously tended to shorten his life, and an action on the policy was contested on the ground that insured used intoxicating liquors to excess, an instruction that if, from the nature of deceased's employment, and his physical condition occasioned thereby, he became weak and exhausted, and was compelled to, and did, resort to stimulants, as he believed, for his own protection, and to enable him to continue his labors, and, in so doing, occasionally drank intoxicants to the extent of being under the influence thereof, such indulgence would not be excessive, and would not constitute a defense to the action, unless the jury found that such indulgences were excessive, or tended to, and did, shorten life, was erroneous, in that it left to determine for himself what would be an excessive use of liquors.—*Union Life Ins. Co. v. Jameson*, 67 N. E. 199, 31 Ind. App. 28.

In an action on a policy contested on the ground that insured used intoxicating liquors to excess, the court instructed that if from the nature of deceased's employment and his physical condition occasioned thereby he became weak and exhausted, and was compelled to and did resort to stimulants, as he believed for his own protection, and to enable him to continue his labors, and in so doing occasionally drank intoxicants to the extent of being under the influence thereof, such indulgence would not be excessive, and would not constitute a defense to the action, unless the jury found that such indulgence was excessive or tended to and did shorten life. *Held*, that the instruction was contradictory, in that while attempting to describe what indulgences would not be excessive

it submitted to the jury whether such indulgences were excessive.—*Id.*

Where, in an action on a policy, there was no claim that the contract was ambiguous, nor any attempt made to explain any supposed ambiguity, it was error to leave its construction to the jury, by an instruction that a contract of insurance should be liberally construed to effect its purpose, and, inasmuch as the interrogatories in the application were prearranged by the insurance company, whatever there may be in language so prepared which has any tendency to defeat the main purpose of the contract should be strictly construed against the company, and, if there was any ambiguity in an interrogatory propounded, it should be construed most strongly against the company, and most favorably to the assured, in whose favor all doubts should be resolved.—*Id.*

[J] (App. 1904)

In an action on an accident policy, the court charged that, while there must be an immediate, continuing, and total loss of business time, there need not be a total loss of time beginning at the time the bodily injuries were first sustained, and continuing total for the period for which the indemnity is sought; and thereafter charged that the loss of time must be immediately consequent upon the injuries, and thereafter continuous during any period for which the plaintiff might recover, so that if the plaintiff suffered loss of time and afterwards his injuries improved, so that he suffered no loss of time, he could not recover for any period thereafter, although he might subsequently suffer total loss of time, but that the loss of time must be continuous. *Held*, that the two instructions were not contradictory or misleading.—*Pacific Mut. Life Ins. Co. v. Branham*, 70 N. E. 174, 34 Ind. App. 243.

[k] (App. 1906)

Where, in an action on a policy insuring against loss by fire or lightning and not against loss by winds, the court charged that there could be no recovery occasioned by wind, but that the damages, if any, must be exclusively for loss by lightning, because the evidence showed no loss by fire and the policy did not cover loss by wind, it was proper to refuse to charge that if the building was first struck by lightning and thereby weakened, but would not have fallen had it not been for the wind following the stroke of lightning, there could be no recovery on account of the fall of the building by wind.—*Home Ins. Co. v. Gagen*, 76 N. E. 927, 38 Ind. App. 680.

Where the only loss recoverable under a policy was for damages by lightning, it is not error to refuse an instruction framed as if the policy covered loss by wind, cyclone, or tornado as well as by lightning; such instruction being calculated to confuse the jury.—*Id.*

[l] (Sup. 1907)

In an action on a fire policy, a plea alleging that plaintiff had not secured a required appraisal of the loss and damaged goods, an instruction that such requirement might be waived and that defendant's conduct should be considered in determining whether it had unreasonably delayed such appraisal is proper.—*Providence Washington Ins. Co. v. Wolf*, 168 Ind. 690, 80 N. E. 26, 120 Am. St. Rep. 395.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1536, 1771-1784.

See, also, 1 Cyc. p. 299, 19 Cyc. p. 964, 25 Cyc. pp. 951-954, 26 Cyc. p. 739.

§ 670. Verdict and findings.

Failure to answer interrogatories or make findings, see TRIAL, § 356.

Questions proper to be submitted by special interrogatories, see TRIAL, § 350.

Requests for special interrogatories, see TRIAL, § 351.

Sufficiency of special findings in general, see TRIAL, § 355.

[a] (Sup. 1855)

Where a policy was conditioned to be void in the event of any fraud or false swearing by the insured, and insured estimated his loss, in the proofs thereof, at something between \$1,400 and \$1,500, but recovered \$200 less in a suit on the policy, the mere circumstance that the amount claimed in the plaintiff's preliminary affidavit exceeded the amount of the verdict did not show that the plaintiff had been guilty of false swearing.—*Franklin Ins. Co. v. Culver*, 6 Ind. 137.

[b] (Sup. 1864)

In a suit on a marine policy, providing that, in case of loss, the assured should not sell the wreck without the underwriter's consent, and that the boat should be kept in a seaworthy condition and sufficiently manned, the court found specially that the master of the vessel was the husband of assured, and her agent, who effected the insurance; that after the loss he made his protest and forwarded it; that he sold the wreck without the underwriter's consent and without waiting for an answer, having no reason therefor, except that he could not wait for such answer during the necessary time because of the great expense of living there; that there was no evidence whether the boat was in a seaworthy condition or not; and that the damage resulted from the boat's not being provided with a competent pilot. *Held*, that the special facts found sustained a general finding for the defendant.—*Lewis v. Central Ins. Co. of Cincinnati*, 23 Ind. 445.

[c] (Sup. 1874)

Where, in an action on a policy, the jury was required to answer whether the party in-

sured had not within a designated period had a certain disease, for which he received medical treatment, and the answer returned was: "He may have received medical treatment for that disease, but we believe, if he did, he received treatment for a disease he did not have"—the answer was equivalent to a finding that the jury did not believe that the insured received such treatment for that disease.—*Mutual Ben. Life Ins. Co. v. Cannon*, 48 Ind. 264.

[d] (Sup. 1875)

In an action on a fire policy, defended on the ground of an overvaluation by the insured in his application for insurance, a verdict for plaintiff for less than the face of the policy is equivalent to a finding that there was an overvaluation, but that it was made by an honest mistake.—*Citizens' Fire & Marine Ins. Co. v. Short*, 62 Ind. 316.

[e] (Sup. 1873)

In answer to this question in an application for a policy of insurance: "What are your habits in respect to the use of intoxicating liquors? Have you ever used intoxicating liquors to excess?" the applicant replied, "Temperate." The answer to the second branch of the question was found by the court to have been in effect waived by the company. *Held*, that the real issue was as to the applicant's habits at the date of the application, and that whatever the jury might have found as to his previous habits was irrelevant and immaterial.—*John Hancock Mut. Life Ins. Co. v. Daly*, 65 Ind. 6.

[f] (Sup. 1834)

In an action on an insurance policy by the beneficiary, who was a creditor of the insured, the jury were asked to what amount plaintiff was the creditor of the insured at the time of the application, to which they answered \$581. They also answered that he had no other interest in the life of insured, and, thirdly, they answered that, if he had any interest other than as a creditor, it was a verbal obligation for the payment of \$300 for goods obtained by insured and another from plaintiff. *Held*, that the answers were not inconsistent.—*Northwestern Mut. Life Ins. Co. v. Heimann*, 93 Ind. 24.

[g] (Sup. 1869)

A special finding that proofs of loss were never furnished is not inconsistent with a general verdict for plaintiff, as the stipulation of the policy requiring them may be waived.—*Phoenix Ins. Co. v. Rowe*, 117 Ind. 202, 20 N. E. 122.

[h] (Sup. 1891)

Where a complaint on a life insurance policy alleged that the insured told the agent of a rejected application at the time that the policy in suit was written, the averment is sustained by a special finding that he told the agent about the prior application a few days before, and the agent wrote a false answer without reading the questions to the insured,

and without his knowledge or consent.—*Germania Life Ins. Co. of New York v. Lurkenheimer*, 127 Ind. 536, 26 N. E. 1082.

[i] (Sup. 1892)

In an action on a fire policy which provided that in case of loss notice should be given in writing, the verdict found that the local agent of insured immediately notified the insurer of loss, that the notice was sent, and that it gave the number of the policy, date of loss, and probable amount of loss. *Held* that, while the finding did not state that the notice was in writing, such was a fair inference.—*Phoenix Ins. Co. of Brooklyn v. Perry*, 30 N. E. 637, 131 Ind. 572.

[j] (Sup. 1892)

In an action on a marine insurance policy it appeared that the vessel insured was, in a storm, cut adrift from a propeller, and lost. A special verdict was found that the vessel was cut adrift "to relieve the propeller and tow from a danger of navigation, and for the best interest of the property at risk." *Held*, that the insurer's liability was not limited by such verdict to a general average loss, as it did not show the sacrifice was made as the sole means of averting an immediate, common danger to the property and crew.—*British American Assur. Co. of Toronto v. Wilson*, 31 N. E. 938, 132 Ind. 278.

[k] (Sup. 1892)

Where a policy of fire insurance required notice of loss to be given, a special verdict in an action thereon showing but imperfectly that notice was given is nevertheless sufficient to prevent a declaration of forfeiture for failure to find that notice was given.—*Bowlus v. Phenix Ins. Co.*, 32 N. E. 319, 133 Ind. 106, 20 L. R. A. 400.

[l] (App. 1892)

Where a policy of insurance was made a part of the complaint, it constituted a part of the issues formed by the pleadings and was therefore not a proper subject of special verdict, as it is not the office of a special verdict to set out the pleadings.—*Evans v. Queen Ins. Co.*, 31 N. E. 843, 5 Ind. App. 198.

[m] (App. 1894)

The failure of the jury to find, in their special verdict, that notice of loss under the policy of insurance declared upon was given within a reasonable time, is not supplied by a finding that defendant received from plaintiff "Proof of loss."—*Germania Fire Ins. Co. of Peoria v. Columbia Encaustic Tile Co.*, 11 Ind. App. 385, 39 N. E. 304.

[n] (App. 1895)

In an action on an insurance policy issued on the life of S., the jury found that S. was injured, and died within 90 days afterwards; that "plaintiff procured a blank form, and executed proofs of the death of said S., and forwarded the same to the defendant, and that said proofs were accepted and retained by said defendant"; and, also, "that immediate writ-

ten notice of the death of said S. was given by plaintiff, or by some one in her behalf, to the defendant." *Held*, that the findings failed to show compliance with a condition in the policy that written notice should be given the company "of any accident or injury for which a claim is to be made, with full particulars thereof, and the full name and address of the insured."—*Standard Life & Accident Ins. Co. v. Strong*, 41 N. E. 604, 13 Ind. App. 315.

[c] (App. 1896)

As nonpayment of the premium will not of itself authorize a forfeiture of a policy, special findings by the jury that the insured paid the premium, or a part thereof, on the policy in suit, and did not, after the loss, offer to pay the balance of the premium still due on such policy and another, and that the premium on the policy in suit was paid over to the insurer by its agent, were not inconsistent with the general verdict for the insured, though contrary to the evidence.—*Ohio Farmers' Ins. Co. v. Stowman*, 16 Ind. App. 205, 44 N. E. 558, 940.

[d] (App. 1898)

In an action on a fire insurance policy, the judgment in favor of plaintiff, rendered on the special verdict, which does not find that plaintiff was the owner at the time of the fire, will be reversed.—*Insurance Co. of North America v. Coombs*, 49 N. E. 471, 19 Ind. App. 331.

A special verdict which finds that defendant insured plaintiff against loss on her one and two story dwelling house, in section 5, is a sufficient finding that she owned the property at the time it was insured.—*Id.*

[q] (App. 1900)

Where, in an action on an accident policy containing a condition that it should not cover injuries received from a voluntary exposure to unnecessary danger, the jury found, in answer to interrogatories, that assured was injured by running into a wagon while riding a bicycle against a heavy wind, which he might have avoided if he had been looking ahead; that he was not conscious of danger, and did not knowingly and intentionally assume a risk, nor intentionally take chances of colliding with the wagon; and that he did not voluntarily expose himself to danger,—such findings, taken together, showed no irreconcilable conflict with the general verdict in plaintiff's favor.—*Commercial Travelers' Mut. Acc. Ass'n v. Springsteen*, 55 N. E. 973, 23 Ind. App. 657.

[r] (App. 1903)

A fire policy contained this clause: "The entire policy, unless provided by agreement indorsed thereon or added thereto, shall be void if the interest of the insured be other than unconditional and sole ownership." In an action on the policy, the court found that when it was issued plaintiff was the owner of the buildings insured, which were situated on leased land. *Held* not equivalent to a finding that plaintiff was the owner at the time of loss.—

*Milwaukee Fire Ins. Co. v. Todd*, 67 N. E. 697, 32 Ind. App. 214.

In an action on a fire policy by the insured, the court should state in its special finding that insured owned the property at the time of loss, and the absence of such a statement in the special finding is to be treated as indicating that the court did not find such to be the fact.—*Id.*

[s] (Sup. 1904)

In an action on a fire policy, in which the complaint contained a cause of action on an account stated, the jury found, in answer to a special interrogatory, that a director and the secretary of defendant visited plaintiff on a certain date, and that plaintiff asked when he would get his money, and the secretary said that it would take 30 days to investigate, and, if they found everything right, he would get his money in 30 days, and that that was all that was said concerning the question. There was also a general verdict for plaintiff on the cause of action on an account stated. *Held*, that the answer to the special interrogatory did not necessarily show that there was no account stated, inasmuch as it had no tendency to prove that there might not have been a statement of account at some other time.—*Farmers' Ins. Ass'n of Madison County v. Reavis*, 70 N. E. 518, 71 N. E. 905, 163 Ind. 321.

[t] (App. 1905)

The complaint in an action against a mutual insurance company alleged that after plaintiff conveyed the property, retaining a life estate, defendant's secretary was notified of the change in title; that he stated that no change in the policy was necessary; that afterwards the insurance was readjusted, and a new policy issued containing a condition that the policy would be void unless insured owned the property in fee simple; and that before the policy was issued defendant's officers were notified as to the condition of plaintiff's title. *Held*, that a special finding of the jury that plaintiff did not state the condition of the title to the person who readjusted the insurance does not constitute such a variance between the allegations and verdict as authorized the court to disturb the judgment for plaintiff.—*Farmers' Mut. Fire Ins. Co. of De Kalb County v. Jackman*, 73 N. E. 730, 35 Ind. App. 1.

[u] (App. 1907)

Where, in an action on a life insurance policy, the jury specially found that insured made representations that he did not use spirituous liquors, and that such representations were false, etc., but did not find that insurer had ever rescinded the contract or offered to return the premium, it was not entitled to judgment notwithstanding a verdict for plaintiff.—*Ætna Life Ins. Co. v. Bockting*, 39 Ind. App. 586, 79 N. E. 524.

[v] (App. 1908)

Answers to special interrogatories, which show that a decedent was struck by an engine

while walking upon a highway over a railroad crossing, do not show that he was killed in consequence of walking or being upon a roadbed of a railroad.—*Phoenix Accident & Sick Benefit Ass'n v. Lathrop*, 41 Ind. App. 141, 81 N. E. 227.

[w] (App. 1908)

The jury, in an action on an insurance policy, returned a general verdict for plaintiff, and found specially that statements in the application concerning the insured's vision and surgical treatment were not true, but that he answered all questions truthfully and had no knowledge of false answers, and the loss of one of his eyes was plainly noticeable. *Held*, that there is no necessary conflict between the special findings and the verdict, as the untruthfulness of the answers might have been due to the way in which the insurance agent recorded them.—*United States Health & Accident Ins. Co. v. Clark*, 41 Ind. App. 345, 83 N. E. 700.

[x] (App. 1908)

Interrogatories showing that assured in his application was asked whether he had applied for insurance to any other company and had been refused, to which he answered, "No," and showing that he had made an application for a policy, and another showing that assured was asked in his application whether he then had any insurance on his life, to which he answered, "None," are not in irreconcilable conflict with a verdict for the beneficiary.—*Haughton v. Aetna Life Ins. Co.*, 42 Ind. App. 527, 85 N. E. 125, 1050.

[y] (App. 1908)

Where answers to interrogatories in an action on an accident policy show that decedent put an insane person off of certain premises, that the insane person went in the highway, told decedent that he was ready for him, that decedent went into the highway, that a bystander called out, "Don't strike him," but did not indicate whom she was addressing, and that decedent received his death wound in the highway, they are not in irreconcilable conflict with a verdict for plaintiff.—*Phoenix Accident & Sick Ben. Ass'n v. Stiver*, 42 Ind. App. 636, 84 N. E. 772.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1785-1787.

See, also, 1 Cyc. p. 303, 19 Cyc. p. 968, 25 Cyc. p. 954.

#### § 672. Judgment.

Conformity to verdict and findings, see JUDGMENT, § 256.

Res judicata, see JUDGMENT. §§ 540-749.

[a] (Sup. 1862)

Section 22, p. 334, 1 Rev. St., authorizing judgment for a sum larger than the verdict in actions on policies, where plaintiffs are entitled to a certain per cent. damages, refers to domes-

tic corporations only.—*Commonwealth's Ins. Co., etc., v. Monninger*, 18 Ind. 352.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1789, 1790, 1792-1794.

See, also, 1 Cyc. p. 303, 19 Cyc. pp. 969, 970, 25 Cyc. pp. 955-956, 1529, 26 Cyc. pp. 739, 740.

#### § 674. Appeal and error.

[a] (Sup. 1886)

The failure of plaintiff, suing on a policy of insurance, to introduce the proofs of loss in evidence, cannot be complained of where other evidence was admitted, without objection, showing that they were duly made out and tendered to the insurance agent, who made no objection to their form and substance.—*North British & Mercantile Ins. Co. v. Crutchfield*, 108 Ind. 518, 9 N. E. 458.

[b] (Sup. 1890)

The certificate of membership in a mutual insurance association issued to deceased not indicating that he was received as a member of a "senior department" created for persons over 75 years old, and no special mortuary fund being named, a finding that he was not received as a member of such special department will not be disturbed, though defendant association had issued by-laws creating such senior department, and its members were divided into divisions, one of which included those over 75; such division being made, not for the purpose of grading benefits, but for regulating assessments.—*Old Wayne Mut. Life Ass'n v. Nordby*, 122 Ind. 446, 24 N. E. 159.

[c] (Sup. 1890)

An objection that the "preliminary proofs of death" were not shown to have been furnished as a condition precedent to the bringing of the action is not well taken, when a physician testifies to making out the proper certificate and forwarding the same to the company, and the bill of exceptions recites that the certificate was read in evidence at the instance of the company.—*Aetna Life Ins. Co. v. Deming*, 123 Ind. 384, 24 N. E. 86, 375.

[d] (Sup. 1892)

An insurance policy was conditioned to be void if the insured should obtain other insurance without the consent of the company, but the company, after full knowledge of all the facts, required him to make full proofs of loss, and to incur the expense of making additional proof, and of furnishing plans and specifications of the building destroyed. *Held*, that the sustaining of a demurrer to a paragraph of the reply setting up such facts as a waiver of forfeiture by the company is rendered harmless neither by a general denial in another paragraph of the reply nor by an allegation in the complaint that the insured had furnished the proofs of loss, since neither of these would render admissible evidence as to the making of the additional proofs of loss, and of the furnishing of the plans and specifica-

tions.—*Replogle v. American Ins. Co.*, 132 Ind. 360, 31 N. E. 947.

[e] (App. 1896)

As nonpayment of the premium will not of itself authorize a forfeiture of a policy, special findings by the jury that the insured paid the premium, or a part thereof, on the policy in suit, and that the insured did not, after the loss, offer to pay the balance of the premium still due on said policy and another, and that the premium on the policy in suit was paid to the insurer by its agent, were not prejudicial, though contrary to the evidence, nor inconsistent with the general verdict for the insured.—*Ohio Farmers' Ins. Co. v. Stowman*, 16 Ind. App. 205, 44 N. E. 558, 940.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1796–1804.

See, also, 1 Cyc. p. 304, 15 Cyc. p. 1041, 19 Cyc. pp. 973–976, 25 Cyc. p. 956, 26 Cyc. p. 740.

### XIX. REINSURANCE.

#### § 676. Power and right to reinsure risk.

[a] (Sup. 1873)

During the temporary absence of A., one of two equal partners in the business of an insurance agency, B., the other partner, procured a policy of reinsurance in a certain company of which A. alone was agent at that place; the policy being countersigned by B. in the firm name as agents. The policy contained a provision that it should not be valid unless countersigned by the company's duly authorized agent. The premium was paid to B., and was accounted for by A. in his next monthly report to the company after his return; he having been informed of the manner in which the policy was issued and countersigned. The general agent of the company, on being informed of the issuing of the policy and receiving a copy thereof, made some objections as to the character of the risk, but was informed by A. that the property was being removed from the state and that the policy would be canceled; A. having been duly informed to that effect. The reinsured company was in no way connected with or responsible for the statement that the property was being removed, and had no information concerning the objections raised by the general agent. The premium was not returned or tendered to the reinsured company, nor did it have notice of the dissatisfaction of the company that issued the policy, nor of its desire to cancel it. *Held*, in an action to recover for loss of the property, that as neither A. nor the general agent had taken any steps to undo the acts of B., by returning the premium, seeking to have the policy canceled, or giving notice of dissatisfaction of the reinsured, but having allowed the reinsured to rest under the belief that the risk was complete and satisfactory, their conduct operated as a ratification by the

general agent of the act of B. in issuing the policy.—*United Life, Fire & Marine Ins. Co. v. President, etc., of Ins. Co. of North America*, 42 Ind. 588.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1807–1809.

See, also, 19 Cyc. pp. 639, 640, 25 Cyc. p. 781, 26 Cyc. p. 711.

#### § 677. The contract in general.

##### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1810–1812, 1818, 1819.

See, also, 19 Cyc. p. 638, 25 Cyc. p. 781, 26 Cyc. p. 71.

#### § 678. — Requisites and validity.

[a] (Sup. 1857)

A contract of reinsurance is a contract of indemnity.—*Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443.

##### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1810.

See, also, 19 Cyc. p. 638, 26 Cyc. p. 711.

#### § 679. — Construction and operation.

[a] (Sup. 1857)

Where insurers have not paid nor adjusted the losses, and the case stands between them and the original insured upon the terms of the policy and the facts connected with the loss at the time the reinsurers are sued, the reinsurers may make every defense the original insurers could then make.—*Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443.

[b] (Sup. 1909)

Not only a reinsurance policy, but the contract of reinsurance between the insurance companies, is to be construed liberally in favor of the holder of a reinsurance policy.—*Federal Life Ins. Co. v. Kerr*, 89 N. E. 398.

[c] (App. 1910)

A life policy provided that after the payment of five annual premiums insured should be entitled to extended insurance for a specified term. Thereafter the risks of insurer were transferred to another company, and the contract between the companies provided that any policy of the first company reinsured on which premiums were not paid when due should become ipso facto void. *Held*, that such contract between the companies had no effect on the policy holder's right to extended insurance as against the reinsuring company.—*Federal Life Ins. Co. v. Arnold*, 90 N. E. 493.

A life policy provided that after the payment of five annual premiums insured should be entitled to extended insurance for a certain period. Thereafter the risks of the company were transferred to another company, and, in an action against the latter predicated on extended insurance, defendant claimed that under a term of the contract between itself and the

first company it had charged a sum against insured as a lien for a reserve, and that an indebtedness existed chargeable against the policy. *Held*, that such provision of the reinsurance contract, being in antagonism with the rights of the insured as they existed against the first company, was void as against the policy holder.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1811, 1812, 1818, 1819.

See, also, 19 Cyc. p. 639, 26 Cyc. p. 711.

**§ 684. Extent of liability of reinsurer.**

[a] (Sup. 1857)

The liability of a reinsurer is to pay the whole amount of a loss, to the extent of the reinsurance, to the re-insured, and it is not affected by the insolvency of the latter or his inability to fulfill his own contract with the original policy holder.—*Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443.

It is not necessary for the reinsured to pay the loss to the first insured before proceeding against the reinsurer.—*Id.*

[b] (App. 1910)

Where one insurance company under Burns' Ann. St. 1908, § 4753, took over the assets of another and reinsured its risks, the statute entered into their contract and imposed the same obligations upon the new company, and vested the insured with the same rights against it as existed under the original contract of insurance in favor of the insured and his beneficiary against the original company.—*Federal Life Ins. Co. v. Risinger*, 91 N. E. 533.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1817.

See, also, 19 Cyc. p. 641, 25 Cyc. pp. 781, 782, 26 Cyc. p. 713.

**§ 686. Actions on contracts of reinsurance.**

[a] (Sup. 1909)

While plaintiff's insured held a life policy in the M. company, it and defendant made a contract, under Burns' Ann. St. 1908, § 4753, whereby its risks were transferred to defendant. Defendant issued a policy of reinsurance, to be attached to the policy of the M. company, which, while referring to the contract between the companies for the conditions of its issuance, provided that it constituted the policy of defendant, and that it and the policy to which it was to be attached constituted the holder a policy holder of defendant, and that no change of policy further than the attachment was necessary. *Held*, that the contract between the companies was not the basis of the action for the insurance money, within the statute requiring that, where a pleading is founded on a written instrument, it or a copy thereof shall be filed with the pleading, but that any force it might have was a matter of defense.—*Federal Life Ins. Co. v. Kerr*, 89 N. E. 398.

[b] (App. 1910)

An insurance policy stipulated that after the payment of five annual premiums insured should be entitled to certain extended insurance, provided that on the payment of the fifth annual premium no indebtedness existed against the policy. The risks of the company were transferred to another company, and in an action against the latter by the policy holder the liability of defendant was predicated on extended insurance, and the complaint failed to allege that there was no indebtedness against the policy at the commencement of the period of extended insurance. *Held*, that the complaint was not demurrable because of the failure to show the absence of indebtedness.—*Federal Life Ins. Co. v. Arnold*, 90 N. E. 493.

Where the risks of an insurance company were transferred to another company, and in an action against the latter by a policy holder in the first company the complaint showed that the contract of reinsurance upon which it was sought to hold defendant liable was in writing, the complaint was not demurrable because neither the contract nor a copy of the same was made a part of the complaint.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1823.

See, also, 25 Cyc. pp. 781, 782, 26 Cyc. p. 713.

**XX. MUTUAL BENEFIT INSURANCE.**

Beneficial associations in general, see BENEFICIAL ASSOCIATIONS.

Laws relating to as impairing obligation of contracts, see CONSTITUTIONAL LAW, § 156.

(A) CORPORATIONS AND ASSOCIATIONS.

Mutual insurance companies, see ante, §§ 52-72.

**§ 690. Authority or license to do business.**

Mandamus to compel issuance of license, see MANDAMUS, § 15.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1828.

See, also, 29 Cyc. p. 13.

**§ 692. Incorporation and organization.**

[a] (App. 1898)

The Independent Order of Foresters is a mutual benefit society, and its high court of Illinois is incorporated. Its constitution provides that it shall have original jurisdiction of all courts organized under its authority, and provides certain rules for their government. By article 11, § 1, the high chief ranger was given complete authority over all subordinate courts and their effects, and may demand and receive them. By article 15, § 5, he may, for

cause, withdraw the authority, and dissolve any local court. By article 12, § 1, the moneys of the court are merely a trust fund for the purposes of the order, and not to be divided up among the members under any pretense. By article 12, § 2, whenever a member severs his connection by withdrawal or otherwise, his interest in any of the funds or property of the court becomes extinguished. *Held*, that where the majority of the members of a subordinate court seceded in order to join in the organization of a high court for the state of Indiana, and the charter was given to the remainder, who refused to secede, the seceders are not entitled to the effects of the lodge, such as the regalia, furniture, etc., as against the high chief ranger.—*Ahlendorf v. Barkous*, 50 N. E. 887, 20 Ind. App. 656.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1832.

See, also, 29 Cyc. pp. 14–22.

### § 693. Constitutions and by-laws.

Constitution and by-laws as part of contract, see post, §§ 717–719.

#### [a] (Sup. 1889)

The authorized representatives of the members of a voluntary association alone are vested with the power to determine when a change in its by-laws is demanded, and with their discretion the courts cannot interfere.—*Supreme Lodge, Knights of Pythias, v. Knight*, 20 N. E. 479, 117 Ind. 489, 3 L. R. A. 409.

A constitution of a voluntary association is nothing more than a by-law under an inappropriate name, and the association can alter or abrogate it, unless some higher rule restrains or prohibits the appeal.—*Id.*

#### [b] (App. 1898)

An old by-law of a company paying losses by assessments on its members, prohibiting a withdrawal of a member without the consent of the board of directors, and a new by-law prohibiting such withdrawal without a return of the policy for cancellation, are not inconsistent, and both could be enforced.—*Patrons' Mutual Aid Soc. of Vermillion County v. Hall*, 49 N. E. 279, 19 Ind. App. 118.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1833.

See, also, 29 Cyc. pp. 16–20.

### § 694. Membership.

Pleading, see post, § 815.

Presumptions and burden of proof, see post, § 817.

Questions for jury, see post, § 825.

Reinstatement after suspension, see post, §§ 758–763.

Suspension, see post, § 757.

Weight and sufficiency of evidence, see post, § 819.

#### [a] (Sup. 1887)

A person who enters a mutual benefit association is bound to take notice of the by-laws in force at the time he becomes a member.—*Holland v. Taylor*, 111 Ind. 121, 12 N. E. 116.

#### [b] (App. 1898)

An insured, who was a member of a company that paid all losses by assessments, and whose by-laws prohibited a member from withdrawing without returning his policy, continued to be a member, and was entitled to his insurance in case of loss, after the secretary had agreed with him by parol that his assessments should cease, that his policy was at an end, and had erased his name from the books, where he still retained his policy.—*Patrons' Mutual Aid Soc. of Vermillion County v. Hall*, 49 N. E. 279, 19 Ind. App. 118.

#### [c] (App. 1898)

A member of a voluntary association formed for mutual benefit has an interest in the general assets of the association only so long as he remains a member, unless there is a dissolution of the association.—*Ahlendorf v. Barkous*, 50 N. E. 887, 20 Ind. App. 656.

#### [d] (App. 1910)

Where the charter of a beneficial association gives it the power to expel members for certain causes when the member becomes vested with privileges or property rights in the association, it cannot expel him without notice and an opportunity to be heard.—*Federal Life Ins. Co. v. Risinger*, 91 N. E. 533.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1834, 1835.

See, also, 29 Cyc. pp. 28–40.

### § 696. Powers of association in general.

#### [a] (Sup. 1907)

Whether foreign fraternal beneficial associations are regarded as foreign, or whether they are regarded as domestic under *Burns' Ann. St. 1901, § 5050b*, providing that such companies then doing business in the state might continue to do so by complying with the provisions of the act, they are not authorized to do acts which similar local associations are prohibited from doing.—*State ex rel. Mutual Protective League v. Bigler*, 169 Ind. 223, 82 N. E. 464.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1837.

See, also, 29 Cyc. pp. 47–50.

### § 697. Superior, subordinate, and affiliated bodies.

#### [a] (Sup. 1907)

A foreign fraternal beneficial association maintaining no lodges and giving its secret work privately, employing deputies at a salary and requiring them to do a certain amount of business on penalty of discharge, is not within *Burns' Ann. St. 1905, § 5050a*, requiring such

associations to have a lodge system with a ritualistic form of work, or section 5050k, prohibiting such associations, with certain exceptions, from employing paid agents.—*State ex rel. Mutual Protective League v. Bigler*, 169 Ind. 223, 82 N. E. 464.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1838.

See, also, 29 Cyc. pp. 40–45.

### § 700. Insolvency and dissolution.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1840–1847.

See, also, 29 Cyc. pp. 52–58.

### § 708. — Assets and receivers.

[a] (Sup. 1893)

In a proceeding by policy holders to have a receiver appointed for a mutual benefit association, a complaint alleging that it is insolvent; that its assets amount to \$1,000,000; that its officers have converted \$750,000 to their own use, placing them in a bank under their control, without security, save the money so deposited; that the money due the corporation from branches in the various states is only secured by indemnity bonds issued by such irresponsible bank; that the chief officer, who has misappropriated the funds, and whose duty it is to call meetings of the board of managers, fails to do so, and refuses to allow the proceedings to be published as required; and that a large sum will fall due on certificates within about six months from the filing of the complaint—states ample cause for the appointment of a receiver.—*Supreme Sitting of the Order of Iron Hall v. Baker*, 33 N. E. 1128, 134 Ind. 293, 20 L. R. A. 210.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1845.

See, also, 29 Cyc. pp. 53, 54.

### § 710. — Distribution of assets and funds.

[a] (Sup. 1898)

On the insolvency of a mutual benefit association, and the appointment of a receiver in an Indiana court, an order was issued by such court requiring all branches and all local receivers in the different states to forward to the Indiana receiver all funds in their hands. An Ohio court refused to order the transfer of such funds to the Indiana receiver, but directed its receiver to distribute the same among the members of the local branches, which was done. Meanwhile the Indiana court, in which the principal receivership was pending, directed that all receivers account to the principal receiver, and pay over to him the funds in their hands, by a certain date, or be thereafter barred from receiving any distribution on the claims represented by them until all others who should have so accounted had been first fully paid. *Held*, in an action against the principal receiver

in Indiana by certain Ohio creditors, who were unable, on account of the action of the Ohio court, to comply with said order, that they were entitled to be paid their claims, less what they had received on account thereof in Ohio or elsewhere, and any assessments not paid by them which had been paid by other certificate holders, and any unnecessary expenses incurred in the administration of the funds in Ohio.—*Cowen v. Failey*, 49 N. E. 270, 149 Ind. 382.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1847.

See, also, 29 Cyc. pp. 58–62.

### (B) THE CONTRACT IN GENERAL.

Parol or extrinsic evidence to contradict or vary contract, see EVIDENCE, § 405.

### § 711. Nature of the contract.

[a] For most purposes, mutual benefit associations are insurance companies, and the certificates issued by them are policies of insurance, and governed by the rules applicable to such contracts.—(Sup. 1885) *Elkhart Mutual Aid Benevolent & Relief Ass'n v. Houghton*, 103 Ind. 286, 2 N. E. 763, 53 Am. Rep. 514; (1886) *Presbyterian Mut. Assur. Fund v. Allen*, 106 Ind. 593, 7 N. E. 317; (1887) *Holland v. Taylor*, 111 Ind. 121, 12 N. E. 116; (1889) *Supreme Lodge Knights of Pythias v. Knight*, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409.

[b] (App. 1893)

Certificates issued by mutual benefit associations must be regarded when considering their insurance features in legal contemplation, policies of insurance, and are in most respects governed by the rules of law which apply to ordinary insurance contracts.—*Supreme Lodge, A. O. U. W. v. Hutchinson*, 33 N. E. 816, 6 Ind. App. 399.

[c] (App. 1904)

The obligations of an association and its members are reciprocal and both must comply with its constitution and laws.—*Supreme Lodge Knights of Honor v. Jones*, 69 N. E. 718, 35 Ind. App. 121.

[d] (App. 1905)

A mutual benefit certificate which contains a promise to pay a specified sum to the party named in the certificate as beneficiary is a written promise to pay money.—*Grand Lodge A. O. U. W. v. Barwe*, 75 N. E. 971, 38 Ind. App. 308.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1848.

See, also, 29 Cyc. pp. 62, 63.

### § 713. Application and acceptance.

[a] (App. 1896)

The constitution of an endowment society having three classes of memberships, in which the

assessments were fixed, was amended by creating a fourth class, in which assessments were graduated according to age, the amendment providing that those already members should be admitted to the fourth class on a physician's certificate approved by the medical examiner in chief, and the payment of fees, and that "in these cases the limit as to age shall not apply." Plaintiffs' intestate, a member previous to the amendment, after the amendment forwarded the certificate of a competent physician, with the fees, for admission to the fourth class; but the medical examiner arbitrarily refused to approve it, on account of intestate's age. The intestate never sought to compel admission by writ of mandamus. *Held*, that plaintiffs were entitled to recover on his certificate as a member of the fourth class, although during his life he made no formal tender of assessment dues. — *Sourwine v. Supreme Lodge Knights of Pythias of the World*, 12 Ind. App. 447, 40 N. E. 646, 54 Am. St. Rep. 532.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1851.

See, also, 29 Cyc. pp. 67, 68.

#### § 714. Form and requisites of certificates of membership.

[a] (Sup. 1908)

Where a mutual benefit certificate was not countersigned by the secretary of the subordinate lodge, as required by the certificate, it was not completely executed.—*Caywood v. Supreme Lodge, Knights & Ladies of Honor*, 171 Fed. 410, 86 N. E. 482, 23 L. R. A. (N. S.) 304, 131 Am. St. Rep. 253.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1852.

See, also, 29 Cyc. pp. 64, 65.

#### § 715. Application as part of contract.

[a] (App. 1893)

While all members of mutual beneficial orders must take notice of the by-laws and constitution of their order, this rule does not enable the order to construe the written application, executed before the party becomes a member, as a warranty of all the statements made therein.—*Supreme Lodge A. O. U. W. v. Hutchinson*, 33 N. E. 816, 6 Ind. App. 399.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1853.

See, also, 29 Cyc. pp. 67, 68.

#### § 717. Constitution, by-laws, or rules as part of contract.

Compliance with, on change of beneficiary, see post, § 784.

Provisions as to actions for benefits, see post, §§ 803-805.

Provisions as to beneficiary, see post, § 771.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1854, 1855.

See, also, 29 Cyc. pp. 68-72.

#### § 718. — Existing provisions.

[a] (Sup. 1889)

The assured and the beneficiary in a voluntary association have a right that is subject to the limitations and restrictions of the charter and the by-laws which are factors of the contract.—*Supreme Lodge, Knights of Pythias v. Knight*, 20 N. E. 479, 117 Ind. 489, 3 L. R. A. 409.

The established by-laws of a voluntary association are elements of the contract of insurance, and cannot be disregarded.—*Id.*

[b] (Sup. 1889)

Defendant's by-laws provided that to entitle the beneficiary of a member of decedent's age to \$2,000 he must pay \$4 on each assessment, and to entitle his beneficiary to \$1,000 he must pay \$2 on each assessment, and plaintiff's certificate stipulated that each member should comply with the laws of the order. *Held*, that the by-laws were part of the contract.—*Gray v. Supreme Lodge Knights of Honor*, 118 Ind. 293, 20 N. E. 833.

[c] (Sup. 1890)

A person who becomes a member of a mutual benefit association is bound to take notice that the by-laws become a part of the contract, the same as if written in the certificate, and the beneficiary named has an interest which can only be defeated by a change effected in the manner provided by the by-laws. But there are exceptions to this doctrine. Equity will aid imperfect changes of beneficiaries, and it considers that done which ought to have been done, and never requires impossibilities.—*Isgrigg v. Schooley*, 25 N. E. 151, 125 Ind. 94.

[d] (App. 1904)

The member of a mutual benefit association takes a benefit certificate therein subject to the reasonable rules, by-laws, and regulations of the association; such regulations forming a part of the contract.—*Bunyan v. Reed*, 34 Ind. App. 295, 70 N. E. 1002.

[e] (Sup. 1909)

The application for membership in a mutual benefit association does not constitute the entire contract; but the by-laws, rules, and regulations form a part of the same.—*Farra v. Braman*, 171 Ind. 529, 86 N. E. 843.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1854.

See, also, 29 Cyc. pp. 68-72.

#### § 719. — Subsequent provisions or amendments.

[a] (Sup. 1889)

Deceased held a certificate in the insurance department of an order to which he belonged. The plan of the second rank, of which he was one, provided that members should be assessed \$1 at each death of a member, the fund thus raised being applicable only to losses in that rank. The certificate stipulated that

it should be governed by the laws of the order then in force or thereafter enacted, and the constitution provided that it and the by-laws should be amendable by the supreme lodge. Deceased's certificate stipulated for the payment on his death to plaintiff of \$2,000, or, if there should be less than 2,000 members of that rank, then only \$1 for each member. The number of members increased to 16,000, when, by an amendment of the constitution and by-laws, a new rank was established with an assessment based on life expectancy, which was preferable to the second rank for young, but more expensive for old, men, and the younger members of the second rank were transferred, so that at deceased's death, three years later, only 173 members of the second rank remained; he having in the nine years of his membership paid in \$240. The new scheme was adopted in good faith, to benefit the order in general. Both deceased and plaintiff, upon learning of the new scheme, notified the supreme lodge that they protested against it. *Held*, that the change was not a violation of the contract, but within the scope of defendant's powers, and that plaintiff could recover only \$173 on the certificate.—Supreme Lodge, Knights of Pythias v. Knight, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409.

If the acts of defendant in depleting the rank to which deceased belonged were a breach of the contract of insurance, only nominal damages would be recoverable, as the loss occasioned thereby would be so remote and conjectural as not to form the basis of a recovery.—*Id.*

A member of a voluntary association must take notice of all its by-laws which affect his rights or interests, and, where there is an express reservation of the right to amend, he is bound to take notice of the existence and effect of that reserved power.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1855.

See, also, 29 Cyc. pp. 72-85; note, 63 C. C. A. 285; note, 1 L. R. A. (N. S.) 1065.

### § 723. Misrepresentation, fraud, or breach of warranty.

Estoppel or waiver as to defects or objections, see post, § 724.

Instructions, see post, § 826.

Pleading, see post, § 815.

Presumptions and burden of proof, see post, § 817.

Questions for jury, see post, § 825.

[a] (Sup. 1886)

Written statements in an application for membership in a mutual benefit association, not referred to in the certificate, are not warranties.—Presbyterian Mut. Assur. Fund v. Allen, 106 Ind. 593, 7 N. E. 317.

[b] (App. 1893)

The fact that an applicant for membership in a benevolent society was guilty of

bigamy, and that the beneficiary named in the application as his wife was not in fact such because of the existence of the applicant's prior marriage, does not render the certificate issued to him void as having been procured by fraud and misrepresentation; since the relationship of the beneficiary to the applicant had nothing to do with his admission into the order, and the order did not rely on his statement as to his moral qualifications, but sought information elsewhere as to them.—Supreme Lodge A. O. U. W. v. Hutchinson, 6 Ind. App. 399, 33 N. E. 816.

An application for membership in a benevolent society, which directs payment of the certificate, on the member's death, to "M. H. wife," cannot be treated by the society as a warranty that the beneficiary named is the applicant's wife, in the absence of any intimation in the application itself that the facts therein stated are warranties, though the constitution of the society declares the application to be a warranty, since the constitution is not binding on one who is not yet a member, but who simply proposes to become one.—*Id.*

[c] (App. 1894)

Provisions in the by-laws that a person obtaining membership by false statements as to his age shall be expelled, and forfeit all benefits, relate to proceedings which may be taken during his lifetime, and do not prevent the beneficiary from recovering after his death.—Supreme Council of Catholic Benevolent Legion v. Boyle, 10 Ind. App. 301, 37 N. E. 1105.

[d] (App. 1895)

Where an application for insurance referred to certain statements therein made as "warranties," and the certificate recited that it was issued "in consideration of the representations and declarations" made in the application, such statements should be considered as representations only.—Supreme Lodge Knights of Pythias of the World v. Edwards, 15 Ind. App. 524, 41 N. E. 850.

[e] (App. 1901)

A warranty in an application for life insurance, that the applicant does not use intoxicating liquors "at all" is not rendered false by an occasional use of intoxicants, if such use falls short of a habit.—Supreme Lodge, Knights of Pythias v. Foster, 59 N. E. 877, 26 Ind. App. 333.

[f] (App. 1909)

Statements by the insured in his application for life insurance concerning matters of fact which are presumably within his knowledge are warranties; but statements as to matters of fact concerning which the insurer should know that the applicant could not have certain knowledge of, and such as are necessarily opinions, are to be regarded as warranting only his honest belief in their truth and his honest opinion where an opinion is given.—Collins v. Catholic Order of Foresters, 43 Ind. App. 549, 88 N. E. 87.

Answers to interrogatories in an application for life insurance as to previous illness, specific diseases, and ailments tending to shorten life, warrant only the applicant's honest belief and opinion upon those subjects; but answers to interrogatories with reference to the spitting of blood and habitual coughing are to be regarded as warranties.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1859-1865.

See, also, 29 Cyc. pp. 86-91.

**§ 724. Estoppel or waiver as to defects or objections.**

Pleading, see post, § 815.

Presumptions and burden of proof, see post, § 817.

Questions for jury, see post, § 823.

**[a] (Sup. 1837)**

By the act governing the incorporation of insurance companies (Rev. St. 1881, § 3727), the general power is given them to "make insurances on the life of any person"; and to an answer to a complaint upon a benefit certificate setting up the defense that the rules and by-laws of the company, which were known to the applicant, forbade the issuance of a certificate to one under 18 years old, and that he had falsely and fraudulently misrepresented his age, a reply that he had informed the agent of the company of his true age (17 years and 10 months) before the application was made; that such agent informed him that 2 months, being so short a time, would make no difference; and that he paid the admission fee and two advance assessments, which the company still retains,—is good upon demurrer.—*Gray v. National Ben. Ass'n*, 111 Ind. 531, 11 N. E. 477.

Although an applicant for a benefit certificate may have misrepresented his true age, which was unknown to the association, yet where 18 months are allowed to elapse between the proof of death showing the true age and the determination of a suit thereon by the beneficiary, without an offer on the part of the association to rescind the contract, or to refund the money received thereon, it will be estopped from setting up such defense.—*Id.*

**[b] (App. 1907)**

Insured warranted that he was born on a specified date and agreed that any untrue answer should forfeit the rights of himself and his beneficiaries to all benefits derived from his membership in the society. Insured was, in fact, a year older than his statement indicated, but the breach was immaterial to the risk as he would have paid the same rate at either age. *Held*, that the breach of warranty rendered the policy voidable only, and that the insurer, having taken no steps to enforce a forfeiture, must be held to have elected to consider it valid and was not entitled to object, in an action to recover thereon, that the policy was void from the beginning.—*Modern Woodmen of America v.*

*Vincent*, 40 Ind. App. 711, 30 N. E. 427, 82 N. E. 475.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1837, 1866-1868.

See, also, 29 Cyc. pp. 77, 78.

**§ 725. Modification and reformation.**

**[a] (Sup. 1889)**

In an action on a benefit certificate issued by defendant for plaintiff's benefit, defendant's answer alleged that it issued two classes of certificates, and that a member was entitled on payment of \$4 to a certificate for \$2,000, and on payment of \$2 to a certificate for \$1,000; that decedent paid \$2, and contracted for a certificate for \$1,000, but, by mistake of defendant's agent, a certificate for \$2,000 was issued, which decedent accepted. *Held*, that whether decedent accepted the certificate by mistake, thinking it to be for \$1,000, or accepted it with knowledge of the mistake of defendant's agent, defendant was entitled to a reformation, and a demurrer to the answer was properly overruled.—*Gray v. Supreme Lodge Knights of Honor*, 20 N. E. 833, 118 Ind. 293.

A benefit society is entitled to reformation of a certificate for a mistake though the beneficiary did not know of the mistake, and though she was a party to and had an interest in the contract from the time the certificate was issued, as her husband the insured, was her agent in procuring the certificate.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 1869.

See, also, 29 Cyc. pp. 79-85.

**§ 726. Construction and operation in general.**

**[a] (Sup. 1882)**

Forfeitures are not favored in law, and instruments will be so construed as to avoid them, if it can be done without doing violence to the language employed.—*Supreme Lodge of Knights of Honor v. Abbott*, 82 Ind. 1.

**[b] (Sup. 1884)**

In an action on a life policy issued by a mutual benefit society, its rules and regulations should be liberally construed to effect the benevolent object of the organization, and such doctrine of construction is also applicable generally to rulings on questions of evidence.—*Supreme Lodge Knights of Pythias of the World v. Schmidt*, 98 Ind. 374.

[c] A certificate issued by a mutual benefit association, being in legal effect a contract of insurance, is in most respects governed by the rules which apply to policies of insurance.—(Sup. 1886) *Presbyterian Mut. Assur. Fund v. Allen*, 106 Ind. 593, 7 N. E. 317; (1887) *Holland v. Taylor*, 111 Ind. 121, 12 N. E. 116.

**[d] (App. 1903)**

While forfeitures are not looked on with favor, it is the duty of the court to declare a

forfeiture of a certificate on facts which will admit of no other conclusion.—Grand Lodge A. O. U. W. v. Marshall, 68 N. E. 605, 31 Ind. App. 534, 99 Am. St. Rep. 273.

[e] (App. 1907)

Insurance contracts are to be construed exactly as other contracts are.—Modern Woodmen of America v. Vincent, 40 Ind. App. 711, 80 N. E. 427, 82 N. E. 475.

[f] (App. 1908)

Conditions in an insurance policy tending to work a forfeiture of the policy will be construed most strongly against the insurer, and most favorably toward those against whom they are meant to operate.—United States Benev. Soc. v. Watson, 41 Ind. App. 452, 84 N. E. 29.

[g] (App. 1909)

A condition in a life policy, operative only after the death of insured, must receive a liberal and reasonable construction in favor of the beneficiary; forfeitures not being favored.—Supreme Tent, Knights of the Macca-bees of the World, v. Ethridge, 43 Ind. App. 475, 87 N. E. 1049.

[h] (App. 1909)

In construing statements in an application for life insurance, the interrogatories and answers must be construed together.—Collins v. Catholic Order of Foresters, 43 Ind. App. 549, 88 N. E. 87.

[i] (App. 1910)

Provisions for the forfeiture of a benefit certificate are strictly construed as against insurer.—Brotherhood of Painters, Decorators and Paperhangers of America v. Barton, 92 N. E. 64; Same v. Peters, Id. 183.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1870–1872.

See, also, 29 Cyc. pp. 66, 67.

### § 726½. Classification of risk.

Jurisdiction of equity to compel transfer of insured to other class, see EQUITY, § 57. Questions for jury as to transfer between classes, see post, § 825.

Right of beneficiary after attempted transfer of insured from one class to another, see post, § 791.

Weight and sufficiency of evidence as to transfer between classes, see post, § 819.

[a] Where a member of a fraternal insurance society was entitled to transfer from one class of risks to another, if in good health, and while in good health applied for such transfer, but was rejected arbitrarily, he was not bound to institute mandamus proceedings to compel such transfer in order to preserve his rights, which he effectually did by paying sufficient funds to the society's financial officer, to whom assessments were payable, to meet assessments against him on the basis of the class to which he was entitled to transfer, and directing that

the moneys be applied to the payment of such assessments.—(App. 1903) Supreme Lodge Knights of Pythias v. Andrews, 67 N. E. 1009, 31 Ind. App. 422; (1906) Id., 77 N. E. 361, 78 N. E. 433, 39 Ind. App. 1.

[b] (App. 1906)

Where assured was entitled to transfer from one class of risks to another, if in good health at the time of his application, the motives of the medical examiner which induced him to reject such application were immaterial.—Supreme Lodge Knights of Pythias v. Andrews, 77 N. E. 361, 78 N. E. 433, 39 Ind. App. 1.

### § 727. Assignment or other transfer.

Admissibility of evidence, see post, § 818. Pleading, see post, § 815.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1873–1876, 1977–1980.

See, also, 29 Cyc. pp. 93–97.

### § 728. — In general.

[a] (Sup. 1889)

Under Rev. St. 1881, § 3850, which provides that certificates of membership in benevolent or charitable associations shall be regarded as contracts between the person insured and the association, and that the beneficiary may be changed by the association as the parties to the contract may agree, a certificate of membership payable to the heirs or legal representatives of the insured, and assigned by him to a third person, is, in the absence of any objection on the part of the association, payable to such assignee.—Milner v. Bowman, 119 Ind. 448, 21 N. E. 1004, 5 L. R. A. 95.

The assignment is not rendered void by the fact that the insured died insolvent, when it is not shown that he was insolvent at the date of the assignment.—Id.

[b] (App. 1884)

Where the assignee of a mutual benefit life insurance policy of \$2,000 pays the insured \$300, and agrees to pay the dues and the assessments thereon, in consideration of the assignment, the assignment is not invalid as a gambling transaction, in the absence of proof of the age or expectancy of life of the insured.—Nye v. Grand Lodge A. O. U. W., 9 Ind. App. 131, 36 N. E. 429.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1873, 1875, 1876, 1977–1980.

See, also, 29 Cyc. pp. 93, 94.

### (C) DUES AND ASSESSMENTS.

### § 731. Nature and grounds of obligation.

[a] (App. 1908)

The Supreme Lodge of a fraternal beneficial association consisting of a Supreme Lodge and local lodges, and furnishing insurance to

its members dependent on the maintenance of a benefit fund, stands as the representative of all the members, and it owes the duty to them to require that assessments be paid by each member as the law of the order requires.—*Supreme Lodge Knights of Honor v. Hahn*, 43 Ind. App. 75, 84 N. E. 837.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 1878.

See, also, 29 Cyc. p. 98.

**§ 732. Grounds of assessment.**

[a] (App. 1893)

A provision looking to the adjustment of death claims, made on the basis of regular assessments, the proceeds of which are to be used to form pools periodically out of which such claims are to be paid pro rata, is a valid one, and if incorporated in the by-laws or certificate, and if seasonably and properly asserted, may be enforced by either of the parties.—*People's Mut. Ben. Soc. v. Werner*, 34 N. E. 105, 6 Ind. App. 614.

**FOR CASES FROM OTHER STATES,**

See, also, 29 Cyc. pp. 98, 99.

**§ 734. Liability to assessment.**

[a] (Sup. 1900)

Where the by-laws of a beneficial association provided that on the death of a member each member should be assessed, for the benefit of such deceased member's family, and on failure to pay such assessments members should forfeit their membership, but neither the member's benefit certificate nor the by-laws contained any promise to pay such assessments, the only remedy for nonpayment was by forfeiture of the member's interest, and hence the beneficiary of a deceased member was not entitled to an order requiring assignees of the association to collect assessments from all persons who had been members thereof within six years prior to the deceased member's death.—*Gibson v. Megrew*, 56 N. E. 674, 154 Ind. 273, 48 L. R. A. 362.

[b] (App. 1903)

The constitution of a beneficial association, fixing the rate of assessments, and requiring that they be paid monthly, provided that 12 assessments are required to meet death losses, and directing that payments be made on a certain day in the month in which assessments are made, is sufficient to require members to pay monthly assessments.—*Grand Lodge A. O. U. W. v. Marshall*, 68 N. E. 605, 31 Ind. App. 534, 99 Am. St. Rep. 273.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1881, 1882.

See, also, 29 Cyc. pp. 77, 90-101.

**§ 736. Levy of assessment.**

[a] (App. 1903)

Where the constitution of a beneficial association requires the call on the subordinate lodges for the beneficiary fund and notice of the assessment to be made by the grand recorder, with the approval of the finance committee, and directs that the issuance of the call shall constitute the making of the assessment, which shall be published, and a copy sent to each lodge and member, the notice of assessment and call on the beneficiary fund are sufficiently approved when signed and approved as one instrument.—*Grand Lodge A. O. U. W. v. Marshall*, 68 N. E. 605, 31 Ind. App. 534, 99 Am. St. Rep. 273.

Under the constitution of a beneficial association, requiring the grand recorder to call on subordinate lodges for the beneficiary funds in their respective treasuries when needed, and directing that the issuing of such call shall constitute an assessment, and shall contain a list of all deaths occurring since the last call was made, the recorder, in making such call, is required only to give a list of such deaths occurring since the last call as have been officially reported to him by the subordinate lodges.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 1833.

See, also, 29 Cyc. pp. 98, 99.

**§ 737. Notice of assessment.**

[a] (App. 1910)

Where a beneficial association is given the right to levy assessments with no definite time fixed for their payment, the levy does not become binding upon the assured, or affect any right which he possesses under the policy until notice has been given of an assessment which it is claimed creates the liability or destroys the right.—*Federal Life Ins. Co. v. Risinger*, 91 N. E. 533.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 1884.

See, also, 29 Cyc. p. 102.

**§ 739. Time for payment.**

Notice of time for payment as affecting forfeiture for nonpayment, see post, § 751.

[a] (App. 1904)

Mutual benefit or fraternal insurance ordinarily lasts only from maturity of one assessment to maturity of another, and stipulations to insure prompt payment are of the substance and essence of such contracts.—*Supreme Lodge Knights of Honor v. Jones*, 69 N. E. 718, 35 Ind. App. 121.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 1886.

See, also, 29 Cyc. pp. 99, 100.

**§ 740. Mode and sufficiency of payment.**

Sufficiency of payment or tender to prevent forfeiture, see post, § 753.

## [a] (App. 1908)

The stipulation in a mutual benefit insurance policy that the local secretary should be the agent of insured in the remittance of past due premiums is invalid, as creating inconsistent duties.—*United States Benev. Soc. v. Watson*, 41 Ind. App. 452, 84 N. E. 29.

## FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1887.

See, also, 29 Cyc. pp. 99–102.

## § 742. Actions for dues or assessments.

## [a] (App. 1908)

A fraternal beneficial association issuing a benefit certificate can only compel payment of assessments by virtue of the constitution of the association providing for the suspension of any member failing to pay any assessment, and it cannot go into court and sue a member for an assessment.—*Supreme Lodge Knights of Honor v. Hahn*, 43 Ind. App. 75, 84 N. E. 837.

## FOR CASES FROM OTHER STATES,

See, also, 29 Cyc. p. 99; note, 23 L. R. A. 435.

## (D) FORFEITURE OR SUSPENSION.

Admissibility of evidence, see post, § 818.

Instructions, see post, § 826.

Pleading, see post, § 815.

Questions for jury, see post, § 825.

Strict construction for provision for forfeiture, see ante, § 726.

Weight and sufficiency of evidence, see post, § 819.

## § 748. Violations of terms or conditions of contract.

Admissibility of evidence, see post, § 818.

Estoppel or waiver affecting right of forfeiture, see post, § 755.

Pleading, see post, § 815.

## [a] (App. 1900)

Where the provision of a certificate in a mutual insurance order was that the board of trustees might suspend a member for engaging in certain occupations, while the provision of the by-laws was that a member engaging in such occupation should stand suspended, the court in determining the rights of the parties will adopt the provision that will give the greater right to the insured and his beneficiary.—*Supreme Tent Knights of Maccabees of the World v. Volkert*, 57 N. E. 203, 25 Ind. App. 627.

## [b] (App. 1901)

Notice to a recorder of a fraternal insurance association that a certificate holder is engaged in a prohibited occupation is notice to the society.—*Supreme Court of Honor v. Sullivan*, 59 N. E. 37, 26 Ind. App. 60.

## FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1893, 1894.

See, also, 29 Cyc. pp. 32, 169.

## § 749. Nonpayment of dues or assessments.

Admissibility of evidence, see post, § 818.

Estoppel or waiver affecting right of forfeiture, see post, § 755.

Pleading, see post, § 815.

Presumptions and burden of proof, see post, § 817.

Questions for jury, see post, § 825.

Reinstatement, see post, § 760.

Weight and sufficiency of evidence, see post, § 819.

## FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1895–1900.

See, also, 29 Cyc. pp. 33, 169–178.

## § 750. — Default as a ground of forfeiture in general.

## [a] (App. 1900)

Under a certificate in a mutual fraternal association giving insured until a given day in the month to pay an assessment levied, there can be no forfeiture for nonpayment of such dues where insured dies on such given day.—*Supreme Tribe of Ben Hur v. Hall*, 56 N. E. 780, 24 Ind. App. 316, 79 Am. St. Rep. 262.

## [b] (App. 1903)

Where the constitution of a beneficiary association provides that any member neglecting to pay any assessment regularly made shall forfeit all rights as a member, the beneficiary of a member who failed to pay an assessment after notice and compliance by the association with all the requirements of the laws of the order cannot recover the benefit.—*Grand Lodge A. O. U. W. v. Marshall*, 68 N. E. 605, 31 Ind. App. 534, 99 Am. St. Rep. 273.

## [c] (App. 1904)

Where by-laws provide that "a member failing to pay any assessment required by law shall stand suspended, and shall not thereafter be entitled to the benefit of the widow and orphans' benefit fund," unless reinstated, a member failing to pay an assessment due and payable on March 1st is not in "good standing" on March 10th.—*Supreme Lodge Knights of Honor v. Jones*, 69 N. E. 718, 35 Ind. App. 121.

## FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1895, 1896, 1903.

See, also, 29 Cyc. pp. 170, 171.

## § 751. — Notice of time for payment.

Notice to give effect to forfeiture, see post, § 756.

## [a] (Sup. 1881)

Where the rules of a mutual benefit society provide that members shall stand suspended on failure to pay assessments for a period of 30 days after notice thereof has been read at a lodge meeting, notice given to a member by the secretary of the lodge of the reading of a notice of an assessment is insufficient where it does not state the date of such reading, so that the member may know within what time he is required to pay.—*Supreme Lodge, Knights of Honor of the World v. Johnson*, 78 Ind. 110.

## FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1897–1902.

See, also, 29 Cyc. pp. 33, 171, 172; note, 59 C. C. A. 317.

## § 753. — Sufficiency of payment or tender to prevent forfeiture.

## [a] (App. 1900)

That payment of dues on a policy on the day following the death of insured will not revive the policy has no application where the policy was in force at the date of insured's death, and the payment only covered current dues.—*Supreme Tribe of Ben Hur v. Hall*, 56 N. E. 780, 24 Ind. App. 316, 79 Am. St. Rep. 262.

That an officer of a local branch of a fraternal association, whose duty it is to collect dues from members, and transmit same to the parent society, fails to do so, will not forfeit a certificate; and this though the by-laws provide that local officers are agents for the members of the local society, and not for the parent society.—*Id.*

## [b] (App. 1900)

Where the only mode provided for the payment of dues and assessments by members of a mutual insurance order was to pay them to the local lodge or a designated officer thereof whose duty it was to transmit the same to the supreme lodge, to this extent such subordinate lodge or officer was the agent of the supreme lodge.—*Supreme Tent Knights of Maccabees of the World v. Volkert*, 57 N. E. 203, 25 Ind. App. 627.

## [c] (App. 1904)

When the evidence shows that a member failed to pay an assessment at the time fixed by the by-laws, and that after his death it was paid to the local treasurer, who returned it on learning of his death, a verdict and judgment for his beneficiaries cannot be sustained.—*Supreme Lodge Knights of Honor v. Jones*, 69 N. E. 718, 35 Ind. App. 121.

## FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1903, 1905.

See, also, 29 Cyc. pp. 33, 176–178.

## § 754. — Excuses for nonpayment.

## [a] (App. 1899)

A certificate of membership in a beneficial insurance association provided for payment of a certain sum as sick benefits. In his application, made a part of the certificate, insured, in answer to questions, stated his weekly wages, and agreed that indemnity for sickness should not exceed the amount thereof, and that if his monthly dues were not paid at stated times he should be suspended from receiving benefits until reinstated. *Held*, that where insured became sick while in good standing, and the association became indebted to him for sick benefits in excess of subsequent dues during sickness, the failure to pay such dues did not forfeit the membership.—*Columbian Relief Fund Ass'n v. Hopper*, 53 N. E. 1051, 24 Ind. App. 169.

## [b] (Sup. 1908)

That a mutual benefit company owed insured money for services when an assessment was due would not authorize its application to the payment of an assessment on insured's certificate, or constitute a payment of such assessment, unless the company was directed or requested so to do.—*Caywood v. Supreme Lodge, Knights & Ladies of Honor*, 171 Ind. 410, 86 N. E. 482, 23 L. R. A. (N. S.) 304, 131 Am. St. Rep. 253.

## FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1906.

See, also, 29 Cyc. pp. 178–180.

## § 755. Estoppel or waiver affecting right of forfeiture.

Estoppel or waiver as to notice and proof of loss, see post, § 789.

Pleading, see post, § 815.

Questions for jury, see post, § 825.

## [a] (Sup. 1881)

The demand and receipt of assessments by a life insurance company, after the death of the insured, with knowledge of his death, and that the contract was voidable on account of misrepresentations by the insured, waives the forfeiture.—*Masonic Mut. Ben. Ass'n v. Beck*, 77 Ind. 203, 40 Am. Rep. 295.

## [b] (Sup. 1887)

A policy issued in favor of the mother of the insured, which contained this provision: "This certificate shall be incontestable for any cause except fraud or misrepresentation in the application or proofs of loss, or failure to report to the association any change of occupation, that would make the risk a more hazardous one." It also recited that the admission fee and several assessments had been paid, and contained the number of what is denominated the "binding receipt." Certain assessments and fees were payable in advance upon the policy, for which a "binding receipt" was usually given. An indorsement was made on the policy in these terms: "I have received for the above, binding receipt No. 6,337. N. B. If the num-

ber of a binding receipt is inserted, it becomes conclusive evidence that the above amount has been paid." Part of the assessments were paid in cash, and for the remainder the assured gave a written order wherein it was specified: "If this order is not paid, then all my rights in said association are thereby forfeited. I hereby authorize said association to deduct from moneys due on account of injuries any indebtedness there may be against my certificate." *Held*, that the fact that the orders were not paid did not work a forfeiture of the policy as against the beneficiary therein, and that, as against her, the insurer was estopped from averring that the assessments acknowledged in the policy and in the "binding receipt" to have been received were not paid.—*Kline v. National Ben. Ass'n*, 111 Ind. 462, 11 N. E. 620, 60 Am. Rep. 703.

[c] (Sup. 1889)

Mere occasional indulgences by an insurance company in the absence of an express or implied agreement to waive payment of assessments according to the conditions of the contract cannot justly be construed as a permanent waiver, or as depriving the company of the right to insist on a forfeiture, or to cancel its policy on account of the failure to pay according to the stipulations therein.—*Sweetser v. Odd Fellows Mut. Aid Ass'n*, 19 N. E. 722, 117 Ind. 97.

Where a certificate issued by a mutual benefit association provides that it shall be void unless assessments are paid within 10 days after receiving notice, but it appears that it was the habit of the association to receive payments from the assured if made within 60 days from the time of notice, and the certificate remained uncanceled at the death of the insured, the association is estopped to claim a forfeiture because the assessments were not paid within the 10 days.—*Id.*

[cc] (App. 1894)

Agents employed by benevolent insurance societies to solicit insurance have power to waive stipulations in the benefit certificate which do not relate to the by-laws.—*Supreme Council of Catholic Benevolent Legion v. Boyle*, 10 Ind. App. 301, 37 N. E. 1105.

[d] (App. 1896)

If an agent of a fraternal insurance association may change by parol agreement the time fixed by the by-laws for monthly payments, and waive a forfeiture which would otherwise result from the failure to make such payments at the time so fixed, a forfeiture was not waived by the mere promise of the branch president of such association that he would send notice when payments became due, where it did not appear that the president, in making such promise, assumed to act on behalf of the association, nor that the parties in interest were misled thereby.—*Eichel v. Supreme Lodge Knights of Pythias of the World*, 15 Ind. App. 268, 43 N. E. 1014.

[e] (App. 1900)

Forfeiture of a policy in a mutual fraternal order may be waived by its officers after the death of insured.—*Supreme Tribe of Ben Hur v. Hall*, 56 N. E. 780, 24 Ind. App. 316, 79 Am. St. Rep. 262.

Where the by-laws of a mutual fraternal order provide that a certificate shall be void unless dues are promptly paid, but it was the custom to permit members to pay dues when it suited their ability or convenience, and a policy was uncanceled at the death of one insured, and thereafter, with knowledge of the facts, the officers of the local lodge, charged with the duty of collecting and transmitting assessments to the parent lodge, demanded and received overdue assessments, the parent association is estopped to claim a forfeiture because assessments were not paid when due.—*Id.*

[f] (App. 1900)

Where the by-laws of a beneficial association, which were a part of the contract of insurance between the society and the member, provided that any member who should engage in the sale of liquor should, from the date of engaging in such occupation, stand suspended, and the society, on the death of a member, had knowledge that he was engaged in the sale of liquor at the time of his death, but sent blanks to the beneficiary for proofs of death, it was thereby estopped from asserting that the certificate was forfeited.—*Supreme Tent Knights of Maccabees of the World v. Volkert*, 57 N. E. 203, 25 Ind. App. 627.

The by-laws of a beneficial society, which were part of the contract of insurance between it and its members, provided that, if a member should engage in any occupation prohibited by the by-laws, among which was the sale of liquor, his certificate should become void from the date of his engaging in such occupation, without any action on the part of the officers of the society, and that the receipt of an assessment from such member after his engaging in a prohibited occupation should not be a waiver of the condition. *Held*, that where a member engaged in the sale of liquor, which fact was known to the local authority to whom he paid his dues, and the society retained and received the last assessment with notice of the fact that the member died while engaged in the sale of liquor, the society, in an action on the certificate, was estopped from asserting that the certificate was forfeited.—*Id.*

[g] (App. 1901)

A beneficial insurance society may waive a forfeiture which has accrued against the holder of a benefit certificate.—*Supreme Court of Honor v. Sullivan*, 59 N. E. 37, 26 Ind. App. 60.

When it was the duty of the recorder of a subordinate body of a beneficial association to collect dues from its members, and forward them to the chief body, and the constitution of the subordinate body declared its recorder was not the agent of the chief body to do anything

save as specially authorized, and the constitution declared any member becoming a railroad switchman should forfeit his certificate, receipt by the recorder of assessments from a member with knowledge that he had become a railroad switchman was a waiver of the forfeiture.—*Id.*

[h] (App. 1904)

Under the laws of a fraternal benefit order, each member was liable to an assessment for death benefits, payable on or before the last day of each month. The laws also provided that a member failing to pay an assessment when due should stand suspended, and not thereafter be entitled to benefits until he had been duly reinstated. A certificate had been in force over 12 years when the insured died, March 10, 1901, though some assessments had been paid from one to three days after they were due. The assessment for February, 1901, was not paid when due; and a creditor of the insured, who had paid some previous assessments, wrote on March 15, 1901, to the local lodge, asking if insured's dues had been paid. The financial reporter of the lodge wrote the creditor that the dues had not been paid, but that insured could be reinstated, if done by the 31st of March. On March 18th the creditor sent a draft to the proper officer of the lodge for the amount of the February assessment, who received it, and sent a receipt therefor to the creditor. On March 25th the order was notified of insured's death, whereupon the draft received from the creditor was returned to him, with the information that insured was under suspension at the time of his death, and, not having been reinstated prior to his death, was not entitled to benefits. It appeared that the financial reporter of the local lodge of which insured was a member had accepted and remitted past-due assessments made against him. *Held*, that defendant was not estopped from declaring a forfeiture for nonpayment of the assessment of February, 1901, on the day that it was due.—*Supreme Lodge Knights of Honor v. Jones*, 69 N. E. 718, 35 Ind. App. 121.

The local officer who collects dues from the members of the local lodge and transmits them to the grand lodge is the latter's agent.—*Id.*

[i] (App. 1908)

Where a mutual benefit insurance policy provided that it would be forfeited immediately upon failure to pay premiums on the first of each month when due, and the payment for November 1st and December 1st were not made until December 22d, the one for January 1st being paid when due, and all three being remitted January 14th to defendant by its local agent to whom the payments were made, and there was no showing as to any communication between the agent and the company as to reinstatement of plaintiff, the policy will not be held to have been forfeited, since, the act of the agent being the act of defendant, strict payment of premiums was waived.—*United States*

*Benev. Soc. v. Watson*, 41 Ind. App. 452, 84 N. E. 29.

[j] (App. 1910)

Where the local officer of a fraternal association collected assessments for three months, after they had been in arrears for more than three months, so that under the constitution of the association the member stood suspended, and collected unconditionally and in compliance with the contract, and did not report the member as suspended, and the officers of the association did not know of the facts until the receipt of proofs of death of the member and they did not repudiate the acts of the local officer and did not offer to return the money collected, the officers ratified the acts of the local officer, and the association was estopped from setting up as a defense the nonpayment of dues within the time fixed by the constitution.—*Brotherhood of Painters, Decorators and Paperhangers of America v. Barton*, 92 N. E. 64; *Same v. Peters*, *Id.* 183.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1907-1916.

See, also, 29 Cyc. pp. 39, 40, 185-198; note, 4 L. R. A. (N. S.) 421.

§ 756. Notice and proceedings to give effect to forfeiture.

[a] (App. 1903)

Where, by the laws of a society, nonpayment of an assessment operates as a forfeiture of the certificate, the member must elect every time he is called on to pay an assessment either to pay within the stipulated time or suffer the penalty of loss of membership, and no affirmative action of the lodge is required to suspend the insured for nonpayment of the assessment.—*Grand Lodge A. O. U. W. v. Marshall*, 68 N. E. 605, 31 Ind. App. 534, 99 Am. St. Rep. 273.

FOR CASES FROM OTHER STATES.

SEE 28 CENT. DIG. Insurance, §§ 1917, 1918.

See, also, 29 Cyc. pp. 35-37, 182.

§ 757. Effect of forfeiture or suspension.

[a] (Sup. 1882)

A by-law of a benevolent society provided that any subordinate lodge in arrears should stand suspended, and no death benefit should be paid if a death occurred during the suspension. *Held*, that the by-law was not to be construed as cutting off the right to receive the benefit, except during the continuance of the suspension.—*Supreme Lodge of Knights of Honor v. Abbott*, 82 Ind. 1.

[b] (App. 1908)

The constitution of a fraternal beneficial association consisting of a Supreme Lodge and local lodges required every member to pay a monthly assessment, and provided that any

member failing to pay an assessment should stand suspended and be entitled to no rights under his benefit certificate until reinstatement in the manner provided. A member made default in the payment of assessments, but the local lodge paid them to the Supreme Lodge. It was not shown whether the Supreme Lodge had knowledge of the facts. The member subsequently defaulted, and he then received notice of his suspension for nonpayment of dues. He was familiar with the laws of the association. He made no effort to be reinstated. After his suspension a third person acting for him offered to pay the local lodge the assessments then due, which payment was declined on the ground that it would be necessary for the member to be reinstated. *Held*, that the member, by failing to make application for reinstatement, must be taken to have acquiesced in his suspension, thereby terminating the contract, and could not rely on a former course of conduct by which the local lodge had frequently paid his dues and permitted him to reimburse the lodge.—*Supreme Lodge Knights of Honor v. Hahn*, 43 Ind. App. 75, 84 N. E. 837.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 1919.

See, also, 29 Cyc. p. 31.

**§ 758. Reinstatement.**

Pleading, see post, § 815.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1920–1926.

See, also, 29 Cyc. pp. 38, 39, 183.

**§ 759. — Right in general.**

[a] (App. 1908)

Any right of a member of a beneficial association, under its by-laws providing that no member can become delinquent from failure to pay any assessment while sick, provided he is not in arrears when taken sick, to have assessments paid for the months he was sick and drawing sick benefits credited to him, on the theory that he was not bound to pay assessments for such months, so as to prevent his suspension and consequent forfeiture of his insurance certificate, when two years thereafter he failed to pay his assessment for a month when he was not sick, or at least gave no notice of sickness, was waived, not only by lapse of time, but by his conduct; he having known of his suspension, and the reason therefor, and never claimed he was entitled to such credit, or made any effort for reinstatement, though he lived six years thereafter, but having merely said, when asked soon after his suspension if he did not want to come back, that he would as soon as he had enough money.—*Pfingston v. Grand Lodge, A. O. U. W. of Indiana*, 41 Ind. App. 9, 83 N. E. 254.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1920, 1921.

See, also, 29 Cyc. pp. 38, 183.

**§ 760. — Payment of arrears.**

[a] (App. 1904)

Payment of an assessment after the death of assured by the beneficiary will not revive a forfeited contract.—*Supreme Lodge Knights of Honor v. Jones*, 69 N. E. 718, 35 Ind. App. 121.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 1923.

See, also, 29 Cyc. pp. 39, 184.

**§ 763. — Waiver of objections.**

[a] (App. 1894)

Where a policy of life insurance issued by the grand lodge of a benevolent society provides that if the assured fails to pay his assessment he shall be suspended, and can be reinstated only by a majority vote of the subordinate lodge to which he belongs, after paying all assessments due from him, the refusal of the officer of the subordinate lodge, whose duty it is to collect assessments, to accept those due from the assured after his suspension, does not waive the provision of the policy requiring a vote of his lodge, where there is no evidence that if the question had been submitted to the lodge it would have voted for reinstatement, and the constitution of the society provides that the officers of the subordinate lodge, in collecting assessments, are not agents of the grand lodge.—*Grand Lodge of A. O. U. W. of Indiana v. King*, 38 N. E. 352, 10 Ind. App. 639.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 1925.

See, also, 29 Cyc. pp. 39, 183.

**(E) BENEFICIARIES AND BENEFITS.**

**§ 766. Status of beneficiaries in general.**

[a] (App. 1904)

Where the rules of a beneficial insurance order did not limit a member's right to contract, he may do so with other parties as his interest dictates, and it may be compelled to recognize such contract.—*Carter v. Carter*, 72 N. E. 187, 35 Ind. App. 73.

[b] (App. 1906)

Where the constitution and by-laws of a fraternal insurance company make it incumbent upon the insured to keep up his membership, the beneficiary has only a contingent interest prior to the death of the member.—*Grand Lodge A. O. U. W. of Indiana v. Hall*, 37 Ind. App. 371, 76 N. E. 1029.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 1923.

See, also, 29 Cyc. p. 105.

**§ 767. Insurable interest of beneficiary.**

Pleading matters of fact or conclusions relating to, see PLEADING, § 8.

## [a] (Sup. 1884)

Certificates of membership in mutual aid associations are, in effect, life insurance policies, and governed by the rules thereof as to the necessity of an insurable interest.—*Elkhart Mut. Aid Benevolent & Relief Ass'n v. Houghton*, 98 Ind. 149.

## [b] (Sup. 1885)

Every one has an insurable interest in his own life, and, with the consent of the company, may make the policy payable to any one named therein; and where, in the absence of fraud, a grandfather takes out a policy of insurance in favor of his grandson, such policy is valid and binding on the company issuing it.—*Elkhart Mutual Aid Benevolent & Relief Ass'n v. Houghton*, 103 Ind. 286, 2 N. E. 763, 53 Am. Rep. 514.

## [c] (App. 1894)

Where a life policy was valid in its inception, and not procured or the assignment thereof made as a contrivance to circumvent the law against gambling, the assignee may hold and enforce the policy, though he has no interest in the life of the insured.—*Nye v. Grand Lodge A. O. U. W.*, 36 N. E. 429, 9 Ind. App. 131.

## FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1929-1931.

See, also, 29 Cyc. pp. 105, 115-117.

**§ 768. Persons who may be beneficiaries.** Presumptions and burden of proof, see post, § 817.

## FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1932, 1933, 1935-1938.

See, also, 29 Cyc. pp. 105-107; note, 2 L. R. A. (N. S.) 653.

**§ 769. — In general.**

## [a] (App. 1894)

Where an insured might lawfully bequeath the beneficiary fund to one not a member of his family dependent on him or related to him by blood, there is no reason why he may not accomplish the same purpose by appointment as beneficiary.—*Nye v. Grand Lodge A. O. U. W.*, 36 N. E. 429, 9 Ind. App. 131.

## FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1932, 1937, 1938.

See, also, 29 Cyc. p. 105; note, 3 L. R. A. (N. S.) 334.

**§ 771. — Provisions of charter or by-laws.**

## [a] (App. 1893)

Where the constitution and by-laws of a benevolent society establish three classes of beneficiaries,—the family of the member, relations by blood, and those dependent on him for support,—a named beneficiary, designated

as the member's wife, who is dependent on him for support, and who is innocent of any wrong, is entitled to payment on the member's death, though she was not in fact his lawful wife, because he had been guilty of bigamy in marrying her.—*Supreme Lodge A. O. U. W. v. Hutchinson*, 6 Ind. App. 399, 33 N. E. 816.

## FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1935, 1937.

See, also, 29 Cyc. pp. 107-111.

**§ 772. Designation of beneficiary.**

## FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1939-1941.

See, also, 29 Cyc. pp. 117-121.

**§ 773. — In general.**

## [a] (App. 1896)

The endowment fund law of a beneficial society, providing that no one except the wife or children of a member shall take as beneficiary, unless the member shall have designated such person as beneficiary in a book to be kept in the lodge room, does not allow brothers of a member dying without wife or children to claim as beneficiaries merely because, when he became a member, there was no book in the lodge in which to designate beneficiaries, and the secretary told him he would bring it to make such designation, but failed to do so, though the member then told the secretary that he wished to designate said brothers.—*Loewenthal v. District Grand Lodge, No. 2, I. O. B. B.*, 49 N. E. 610, 19 Ind. App. 377.

## FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1939.

See, also, 29 Cyc. pp. 117-119.

**§ 779. Change of beneficiary.**

Pleading matters of fact or conclusions relating to, see PLEADING, § 8.

## FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1946-1949.

See, also, 29 Cyc. pp. 125-136; note, 40 C. C. A. 4; notes, 15 L. R. A. 350, 49 L. R. A. 749.

**§ 780. — Right to change in general.**

## [a] (Sup. 1886)

The general rule is that, where not forbidden by the charter or by-laws, a member of a mutual benefit association may change the beneficiaries named in the certificate; but, where the charter provides who shall be the beneficiaries in the event that those named in the policy cannot receive the insurance, the parties cannot make any other persons beneficiaries except those designated in the charter.—*Presbyterian Mut. Assur. Fund v. Allen*, 106 Ind. 593, 7 N. E. 317.

## [b] (Sup. 1887)

The general rule is that the right to change a beneficiary in a mutual benefit society, by mutual agreement of the association and the member, exists independently of its constitution and by-laws, and may be exercised whenever it is not limited directly or impliedly by such constitution or by-laws; and the act of March 2, 1887 (Rev. St. 1881, § 3850), which declares certificates to be contracts between the association and the beneficiary, did not change the rule, except to prevent any future restrictions in the constitution or by-laws of such society upon the contract or the rights of the parties to change the beneficiary.—*Masonic Mut. Ben. Soc. of Indiana v. Burkhardt*, 110 Ind. 189, 10 N. E. 79, 11 N. E. 449.

## [c] (Sup. 1902)

*Burns' Ann. St. 1901, § 5050*, relating to the right to change beneficiaries, has no application to mutual associations which are unincorporated.—*Mason v. Mason*, 65 N. E. 585, 160 Ind. 191.

## FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1946.

See, also, 29 Cyc. p. 125.

**§ 782. — Rights of beneficiary previously designated.**

## [a] (App. 1904)

Where the rules permitted a member to receive a new certificate if the original were "lost or beyond his control," and a member executed an antenuptial contract making his intended his beneficiary, and, after marriage, procured a certificate payable to her, and afterwards, by a false affidavit, procured a new one payable to his brother, she is the rightful owner of the insurance; such certificate being in his "control" and not "lost."—*Carter v. Carter*, 72 N. E. 187, 35 Ind. App. 73.

## FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1948.

See, also, 29 Cyc. pp. 125-130.

**§ 783. — Vested interest of beneficiary.**

## [a] (Sup. 1887)

A beneficiary acquires no vested right to the benefits which are to accrue upon the death of a member of a mutual benefit and charitable association until such death occurs, and the member may exercise the power of appointment without the consent of such beneficiary, and without restriction other than such as may be imposed by organic law, or the rules and regulations of the society.—*Masonic Mut. Ben. Soc. of Indiana v. Burkhardt*, 110 Ind. 189, 10 N. E. 79, 11 N. E. 449.

## [b] (Sup. 1887)

Where a mutual benefit certificate provides for a change of beneficiary, the beneficiary named has no indefeasible interest in the amount to be paid on the death of the insured, but has an interest subject to defeat by a change of beneficiary as provided for in the by-

laws made a part of the contract.—*Holland v. Taylor*, 12 N. E. 116, 111 Ind. 121.

## [c] (Sup. 1889)

Where a certificate issued by a mutual benefit association was payable to the heirs or legal representative of the insured member, the beneficiary took no vested interest therein during the lifetime of the member, and the member had the right to change the beneficiary.—*Milner v. Bowman*, 21 N. E. 1094, 119 Ind. 448, 5 L. R. A. 95.

## [d] (App. 1904)

A beneficiary acquires no vested right to the benefits that are to accrue to him on the death of a member of a mutual benefit association until such death occurs, and the member may exercise his power of appointment without any restriction other than such as may be imposed by the organic law or the rules and regulations of the association.—*Bunyan v. Reed*, 70 N. E. 1002, 34 Ind. App. 295.

## [e] (App. 1904)

The beneficiary of a mutual policy does not acquire, by reason of that fact alone, a vested interest therein, since assured may ordinarily change the beneficiary at will, in accordance with the rules of the order.—*Carter v. Carter*, 72 N. E. 187, 35 Ind. App. 73.

## [f] (Sup. 1909)

Though the beneficiary in a certificate has no vested right till death of assured, she has an interest, subject only to the right of substitution of another in the mode prescribed by the contract.—*Farra v. Braman*, 171 Ind. 529, 86 N. E. 843.

## FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1949.

**§ 784. — Mode of changing designation.**

## [a] (Sup. 1887)

C. T. obtained a certificate, payable to "S. T. and M. M. [executors], for the benefit of A. T. [daughter]." By the rules of the society, benefits were only payable to beneficiaries dependent upon the assured, and the only way in which a change of beneficiary could be effected was by surrender of the certificate. By will the insured directed his executors to pay his debts out of the benefit, if his personal property were insufficient; to invest the proceeds of the certificate for his daughter's benefit; and, in the event of her death before majority, to pay a certain portion to his wife and father, and the remainder to two legatees, who were in no way related to him. *Held* that, the society being in the nature of a mutual benefit society, in the absence of any provision in the certificate or by-laws authorizing the assured to change the beneficiary otherwise than by surrender of the certificate, the executors could only collect the amount due upon the certificate, and, upon collection, the beneficiary's guardian was entitled to receive and manage it on her behalf, free from any of the provisions in the

will.—*Holland v. Taylor*, 111 Ind. 121, 12 N. E. 116.

[b] (*Sup.* 1890)

Whenever circumstances exist which deprive a member of a mutual benefit society of the power of formally complying with the by-laws prescribing a mode of making a change in the beneficiary, he is relieved from the literal compliance with the rules, but is not divested of the right to make a change, and the member having done all that he could toward making a change in beneficiaries, and having been prevented from a formal compliance by the original beneficiary, the latter cannot set up his own wrongful act to prevent a recovery for the benefit of the new beneficiary.—*Isgrigg v. Schooley*, 25 N. E. 151, 125 Ind. 94.

[c] (*Sup.* 1902)

The plan of organization of a mutual association of employes provided that application for membership should specify the beneficiary of death benefits, and that an application of a member for insurance in a class wherein higher benefits are paid should state that it was subject to the conditions recited in the principal application, unless modified in such supplementary application, and recited its purpose to pay death benefits "to the relatives or other persons specified in the applications of such employes." The regulations provided that an applicant might, in his application, or subsequently, designate a beneficiary other than a relative, and that death benefits should be payable only to the beneficiary designated in the member's application, if living. *Held*, there was no change of beneficiary, where a supplementary application provided for none, and the new certificate issued on surrender of the old one did not specify the beneficiary, though the member at the time declared another his beneficiary, and delivered the new certificate to her.—*Mason v. Mason*, 65 N. E. 585, 160 Ind. 191.

[d] (*Sup.* 1909)

The application for membership provided that the death benefit should be payable to the member's wife, E., if living at his death, and not withdrawn as his beneficiary, or to such other person as he should later "designate in writing," in substitution, with the approval of "the superintendent." *Held* that, in the absence of fraud by E., preventing the substitution of beneficiary, no substitution was effected by the member by his requesting the local agent to substitute a certain person as beneficiary, and the agent failing to make a substitution; or by the member delivering to another person than the one originally named as beneficiary the certificate and the book of rules, and as a part of the transaction informing her that the insurance money was her property.—*Farra v. Braman*, 171 Ind. 529, 86 N. E. 843.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1950–1954.

See, also, 29 Cyc. pp. 130–136.

## § 786. Loss or contingency on which benefits become payable.

Admissibility of evidence, see post, § 818.

Amendment of constitution or by-laws relating to risks, see ante, § 719.

Instructions, see post, § 826.

Pleading, see post, § 815.

Verdict and findings, see post, § 827.

Weight and sufficiency of evidence, see post, § 819.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1955–1959.

See, also, 29 Cyc. pp. 108, 109, 137–144.

## § 787. — In general.

[a] (*Sup.* 1885)

Where the arm of a member of a beneficial association was shattered by a pistol shot received in a fight not caused by his fault, he is suffering from an accidental disability, within the meaning of the laws of the order providing for the payment of benefits to members "disabled by accident," and he is therefore entitled to the benefits provided.—*Supreme Council Order of Chosen Friends v. Garrigus*, 104 Ind. 133, 3 N. E. 818, 54 Am. Rep. 298.

[b] (*Sup.* 1886)

Where a certificate in a benefit association provides that there shall be no liability in case of death from disease, the fact that apoplexy intervenes will not relieve the association if death is caused by bodily injury.—*National Ben. Ass'n of Indianapolis v. Grauman*, 107 Ind. 288, 7 N. E. 233.

[c] (*Sup.* 1906)

A provision in a mutual benefit certificate that it should be void in case the female holder should be attended at confinement or miscarriage by any one not a regularly licensed physician, etc., was superseded by a special contract by which insured waived all benefits in case her death resulted from pregnancy.—*Knights and Ladies of Columbia Ins. Order v. Shoaf*, 77 N. E. 738, 166 Ind. 367.

A death from puerperal septicæmia resulted from pregnancy within the meaning of a clause in a mutual benefit certificate by which the insured waived all right to benefits in case death should result from pregnancy.—*Id.*

Where insured in a mutual benefit certificate executed a waiver of all benefit in case of her death resulting from pregnancy, the action of the insurer in executing the certificate, and in requiring the beneficiary therein after death had resulted from pregnancy to make proof of loss, have a guardian appointed for a minor beneficiary, and incur expense in meeting an officer of the insurer did not estop it from relying on the waiver as a defense to an action on the certificate.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1955, 1957–1959.

**§ 788. — Suicide.**

Admissibility of evidence, see post, § 818.

Instructions, see post, § 826.

Laws relating to as impairing obligation of contracts, see CONSTITUTIONAL LAW, § 156.

Pleading, see post, § 815.

Presumptions and burden of proof, see post, § 817.

Weight and sufficiency of evidence, see post, § 819.

**[a] (App. 1899)**

By the policy of a benevolent society, a member was entitled to participate in the "benefit fund," as follows: (1) A specified amount per week, for a limited period, for total disability by reason of bodily injuries; (2) a specified sum for permanent total disability, not expressly limited as to the cause thereof; (3) a specified amount for the loss of either hand or foot, through such injuries; (4) a specified sum per week, for a limited period, for sickness or disease, causing total disability; and (5) "if death shall result, \* \* \* \$100 as a funeral fund." It was also provided in the policy that "no benefits will be paid for self-inflicted injuries. *Held*, that no funeral benefit could be recovered, in an action on such policy, where deceased had committed suicide.—*Weber v. Home Benev. Soc.*, 52 N. E. 462, 21 Ind. App. 345.

**[b] (App. 1909)**

In the absence of a statute to the contrary, a mutual benefit insurance association may provide against liability under a policy or membership certificate if insured should commit suicide, whether sane or insane.—*Kunse v. Knights of the Modern Maccabees*, 90 N. E. 89.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1956.

**§ 789. Notice and proof of loss.**

Instructions, see post, § 826.

Pleading, see post, § 815.

Verdict and findings, see post, § 827.

Weight and sufficiency of evidence, see post, § 819.

**[a] (App. 1894)**

Where the constitution and by-laws of a mutual benefit association do not require the beneficiary to make proofs of death of a member, the failure of the subordinate lodge to make a report of the cause of death of a member, as required by the constitution and by-laws, does not affect the right of the beneficiary to recover.—*Supreme Council of Catholic Benevolent Legion v. Boyle*, 10 Ind. App. 301, 37 N. E. 1105.

**[b] (App. 1909)**

Where the local order of a fraternal benefit society was as well informed of the facts concerning the death of a member as the beneficiary, and knew the member was dead, the failure of the order to give the society, as required by a by-law, notice of the death of the mem-

ber, did not deprive the beneficiary of her right to payment under the certificate.—*Supreme Tent, Knights of the Maccabees of the World, v. Ethridge*, 43 Ind. App. 475, 87 N. E. 1049.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1963–1965.

See, also, 29 Cyc. pp. 148–150.

**§ 790. Discretion of association as to allowing benefits.****[a] (Sup. 1890)**

While it is necessary for a member of a mutual benefit society to comply with the requirements of the valid by-laws of the association, it is not in the power of the officers to defeat his claim by arbitrarily rejecting his proofs as unsatisfactory, or by wrongfully declaring that he had not done what his contract or the by-laws of the association required of him.—*Supreme Council of the Order of Chosen Friends v. Forsinger*, 25 N. E. 129, 125 Ind. 52, 9 L. R. A. 501, 21 Am. St. Rep. 196.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 1960.

**§ 791. Amount of benefits.**

Amendment of constitution or by-laws changing amount of benefits, see ante, § 719.

Amount of recovery in action for benefits, see post, §§ 820, 821.

Pleading, see post, § 815.

Presumptions and burden of proof, see post, § 817.

Verdict and findings, see post, § 827.

**[a] (Sup. 1889)**

A certificate issued by a beneficial association containing an agreement to pay the beneficiary a certain sum on the death of the insured subject to the condition that, if at the time of the death there shall be less than 2,000 members in such class, there shall only be paid a sum equal to \$1 for each member in good standing in the class, confines the beneficiary to a specific sum such as is yielded by the assessments made on the class of which the insured was a member.—*Supreme Lodge, Knights of Pythias v. Knight*, 20 N. E. 479, 117 Ind. 489, 3 L. R. A. 409.

**[b] (Sup. 1889)**

An offer by plaintiff, on being informed of an alleged mistake, through which a \$2,000 certificate had been issued to her husband on payment of \$2, to allow the additional \$2 on each assessment to be deducted from the \$2,000 does not entitle her to recover the balance after making such deduction.—*Gray v. Supreme Lodge Knights of Honor*, 118 Ind. 293, 20 N. E. 833.

**[c] (App. 1895)**

Where a member of a fraternal insurance society, who was entitled to be transferred from one class of beneficiaries to another, repeatedly requested that the transfer be made, but died before his request was complied with, his bene-

ficiaries will be given that benefit which they would be entitled to had the transfer been properly made.—*Sourwine v. Supreme Lodge Knights of Pythias of the World*, 40 N. E. 646, 12 Ind. App. 447, 54 Am. St. Rep. 532.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1961, 1962.

See, also, 29 Cyc. pp. 144-148.

**§ 793. Rights of beneficiaries to proceeds.**

[a] (App. 1893)

The question whether the estate of the insured member should share in the insurance fund or not cannot depend on the mere arbitrary notions of right or wrong entertained by the officers of the society, to whom the adjustment of such claims is referred.—*People's Mut. Ben. Soc. v. Werner*, 34 N. E. 105, 6 Ind. App. 614.

[b] (App. 1904)

A law of a mutual benefit association provided that in the event of the death of one or more of the beneficiaries, if no other disposition should be made, the benefit, in case of death of the member, should be paid in full to the surviving beneficiaries, each sharing pro rata. A member designated as beneficiaries three persons, one of whom had been made beneficiary in order to secure a debt due him from the member, and such beneficiary died before the death of the member. *Held*, that the other beneficiaries took the entire fund, the heirs of the deceased beneficiary having no interest therein.—*Bunyan v. Reed*, 70 N. E. 1002, 34 Ind. App. 295.

[c] (Sup. 1909)

The rules of an association declared its object to be to establish a relief fund for payment to members when disabled, and in the event of their death to the relatives or "other beneficiaries specified in the applications," that an applicant might in his application, or subsequently, designate a beneficiary to other than relatives, on giving sufficient reason therefor, and that the death benefits should be payable only to the beneficiary designated in the application, if living at death of the member. *Held*, that a divorce secured by the member from his wife, designated as beneficiary, did not alone render her ineligible.—*Farra v. Braman*, 171 Ind. 529, 86 N. E. 843.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1967-1972, 1980.

See, also, 29 Cyc. pp. 153-155.

**§ 798. Payment of benefits.**

[a] (App. 1899)

A beneficial insurance association which has become indebted for sick benefits to a member in good standing may apply them to payment of subsequent dues of such member, though such application is not authorized by the by-

laws or by the member.—*Columbian Relief-Fund Ass'n v. Hopper*, 53 N. E. 1051, 24 Ind. App. 169.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1981, 1985.

See, also, 29 Cyc. pp. 164-167.

**§ 801. Release or discharge of association from liability.**

Pleading, see post, § 815.

[a] (App. 1907)

The measure of damages in an action against a fraternal benefit society by the beneficiary in a mutual benefit certificate for damages sustained in consequence of the fraud of the society in inducing him to discharge the society from liability on its contract is the difference between amount paid by the society and the actual value of the certificate.—*Supreme Council of Knights and Ladies of Columbia v. Apman*, 39 Ind. App. 670, 80 N. E. 640.

In a suit against a fraternal benefit society by the beneficiary in a certificate for damages for the fraud of the society in inducing him to discharge the society from liability on its paying a sum less than that called for in the certificate, evidence examined and held insufficient to establish the fraud.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 1084.

See, also, 29 Cyc. pp. 164-167.

**(F) ACTIONS FOR BENEFITS.**

**§ 803. Provisions of charter, by-laws, or certificate of membership.**

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1987, 1988.

See, also, 29 Cyc. pp. 210, 211.

**§ 804. — Right of action in general.**

[a] (Sup. 1882)

An action will lie against a benevolent society to recover the amount due and payable by reason of the death of a member.—*Supreme Lodge of Knights of Honor v. Abbott*, 82 Ind. 1.

[b] (Sup. 1890)

It is competent for a mutual benefit society to provide for the presentation of claims to officers designated by its by-laws. If it has this right, then it seems equally clear that it may prescribe a mode of procedure, providing that the mode of procedure is not such as to deprive parties of property rights.—*Supreme Council of the Order of Chosen Friends v. For-signer*, 25 N. E. 129, 125 Ind. 52, 9 L. R. A. 501, 21 Am. St. Rep. 196.

**FOR CASES FROM OTHER STATES,**

See 29 Cyc. pp. 210, 211.

**§ 805. — Resort to courts for settlement of disputes.**

[a] (Sup. 1885)

One who asserts a claim to a sum of money due under a certificate of mutual benefit insurance occupies an essentially different position from one presenting a question of discipline or policy, or of doctrine of the order or fraternity by which the certificate was issued, and is entitled to invoke the aid of the courts, notwithstanding a by-law to the contrary, though he might not be entitled to do so with reference to matters of discipline, etc., within the society.—*Bauer v. Samson Lodge, Knights of Pythias*, 1 N. E. 571, 102 Ind. 262.

[b] (Sup. 1885)

A member of a mutual relief association may sue in a court of law to enforce his right to accident benefits, even without first exhausting his remedies in the courts of the order, and this right cannot be taken away from him by any provision in the constitution or by-laws of the order.—*Supreme Council Order of Chosen Friends v. Garrigus*, 104 Ind. 133, 3 N. E. 818, 54 Am. Rep. 298.

[c] (Sup. 1889)

A member of a beneficial association is not required to exhaust his remedies in the tribunals of the society for the recovery of sick benefits, as a condition precedent to his right to sue at law, where he is prevented from so doing by the willful refusal of the proper officer to certify to his sickness, from which refusal no appeal is given by the laws of the society.—*Supreme Sitting Order of Iron Hall v. Stein*, 120 Ind. 270, 22 N. E. 136.

[d] (Sup. 1890)

A by-law of a mutual benefit society, which provides that a member claiming benefits must make proof of loss before certain subordinate officers, and, if their decision is against him, appeal to higher officers, whose decision shall be final, is valid in so far as it requires such an appeal to be taken before suit may be brought on the membership certificate.—*Supreme Council of the Order of Chosen Friends v. Forsinger*, 125 Ind. 52, 25 N. E. 129, 9 L. R. A. 501, 21 Am. St. Rep. 196.

A by-law of a mutual benefit society which provides that a member claiming benefits must make proof of loss before certain subordinate officers, and, if their decision is against him, appeal to higher officers, whose decision shall be final, is void in so far as it declares the decision of the appellate tribunal final so as to bar a resort to the courts.—Id.

[e] (App. 1897)

A rule of a railroad relief association requiring all claims or controversies to be submitted to the superintendent, whose decision shall be conclusive, subject to a right to appeal to the advisory committee, whose decision shall be absolutely final, does not oblige a claimant to appeal as a condition precedent to the bringing of action.—*Voluntary Relief Department of*

*Pennsylvania Lines West of Pittsburg v. Spencer*, 46 N. E. 477, 17 Ind. App. 123.

[f] (App. 1903)

A member of a fraternal insurance society, who is dissatisfied with a decision affecting him, is not required to exhaust his remedies by appeal within the order before resorting to a court of law for redress, unless the by-laws of the society make it obligatory on him to do so.—*Supreme Lodge K. P. v. Andrews*, 67 N. E. 1009, 31 Ind. App. 422.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, §§ 1987, 1988.

See, also, 29 Cyc. p. 211; note, 49 L. R. A. 353.

**§ 809. Defenses.**

Laws relating to suicide as impairing obligation of contracts, see CONSTITUTIONAL LAW, § 156.

[a] (App. 1894)

In an action on a mutual benefit certificate, it appearing that certain acts of the subordinate lodges, which were the agencies of the principal lodge, were necessary in order to reinstate the member after suspension, defendant could not interpose the delinquencies of its own instrumentalities to defeat the action.—*Supreme Council of Catholic Benevolent Legion v. Boyle*, 37 N. E. 1105, 10 Ind. App. 301.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 1991.

See, also, 29 Cyc. pp. 214, 215.

**§ 814. Process and appearance.**

[a] (Sup. 1902)

Process in an action on a life certificate against a foreign assessment life association which has not complied with Burns' Rev. St. 1901, § 4914s, requiring such a company to file with the state auditor a consent that process against it be served on him, could be served on the consul and clerk of the local camp to which a deceased member belonged, under section 318, authorizing service of process on the agent of a corporation if its chief officers are not in the county; and the association will not be heard to insist that service on the auditor should have been made.—*Modern Woodmen of America v. Noyes*, 64 N. E. 21, 158 Ind. 503.

**FOR CASES FROM OTHER STATES,**

SEE 28 CENT. DIG. Insurance, § 1995.

See, also, 29 Cyc. p. 220.

**§ 815. Pleading.**

Departure, see PLEADING, § 180.

Pleading matters of fact or conclusions, see PLEADING, § 8.

[a] (Sup. 1885)

In an action on a policy in a mutual benefit association providing for the payment of a certain sum, or so much thereof as might be real-

ized from one assessment, a complaint alleging that the company had refused to pay the policy, or to make any assessment, is not bad for failure to aver the number of members liable to be assessed.—*Elkhart Mutual Aid, Benevolent & Relief Ass'n v. Houghton*, 103 Ind. 286, 2 N. E. 763, 53 Am. Rep. 514.

[b] (Sup. 1886)

Where an attempt is made to aver notice and proof of death as required by a certificate in a benefit association, it may be aided by an averment that the association is in default for not paying the benefit according to the terms of the certificate.—*National Ben. Ass'n of Indianapolis v. Grauman*, 107 Ind. 288, 7 N. E. 233.

[c] (Sup. 1887)

The certificate in a benefit association is a contract, and, in a suit to recover thereon, the complaint must bring the case within its limits and conditions; but where the circumstances under which the injury was sustained are specifically set forth, followed by the averment that the plaintiff had "performed all the conditions and terms of such certificate on his part," the complaint is sufficient, under Rev. St. 1881, § 370, providing that, in pleading the performance of condition precedent in a contract, it is sufficient to allege generally that the party performed the condition on his part.—*National Ben. Ass'n of Indianapolis v. Bowman*, 110 Ind. 355, 11 N. E. 316.

[d] (Sup. 1887)

Where, in an action upon a benefit certificate, the defense is that it was issued in violation of the rules and by-laws of the association, a copy of such rules and by-laws should be set out in the answer. It is not sufficient for the pleader to give his own conclusions as to their effect.—*Gray v. National Ben. Ass'n*, 111 Ind. 531, 11 N. E. 477.

[e] (Sup. 1889)

A certificate stipulated to pay \$2,000 on the death of the member, or, if there should be less than 2,000 members of the rank to which the member belonged, then only \$1 for each member. *Held*, that a complaint, in an action on such certificate, need not aver the number of members of the rank to which deceased belonged at the time of his death, that fact being peculiarly within the knowledge of defendant.—*Supreme Lodge Knights of Pythias v. Knight*, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409.

[f] (Sup. 1889)

A paragraph in an answer to a suit on a mutual benefit certificate alleging that, on failure of a member to pay assessments within 30 days after notice, his policy was forfeited, and that decedent failed to pay such assessments within the time limited, after being duly notified, is not demurrable on the ground that it does not allege that the assessments were not in fact paid, as no person other than decedent was liable to pay the assessments.—*Gray v. Supreme Lodge Knights of Honor*, 118 Ind. 293, 20 N. E. 833.

Defendant's by-laws provided that to entitle the beneficiary of a member of decedent's age to \$2,000 he must pay \$4 on each assessment, and to entitle his beneficiary to \$1,000 he must pay \$2 on each assessment; and plaintiff's certificate stipulated that each member should comply with the laws of the order. *Held*, that the by-laws were part of the contract, and that a replication alleging that plaintiff had no knowledge of defendant's laws, and that after her husband's death, in expectation of receiving \$2,000, she contracted debts and expended money which she would not have done had she known of the alleged mistake, was demurrable.—*Id.*

[g] (Sup. 1890)

In an action against a mutual benefit insurance society, a complaint which sets out plaintiff's contract of membership, avers performance of the conditions on his part, and shows that he is totally disabled, and that he made proper proof of his disability, need not allege that his proof was such as satisfied the corporate officers.—*Supreme Council of the Order of Chosen Friends v. Forsinger*, 125 Ind. 52, 25 N. E. 129, 9 L. R. A. 501, 21 Am. St. Rep. 196.

[h] (App. 1894)

In an action on a policy issued by a benevolent society, a complaint which alleges that deceased, having been suspended for nonpayment of an assessment, in order to reinstate himself as provided by the constitution of the society, and in conformity with a notice from an officer thereof, tendered to the official designated the amount he owed for assessments, and that, by reason of the refusal of the official to receive the amount, deceased was deprived of the right to apply for a reinstatement by a vote of his lodge, sufficiently alleges that deceased performed all the conditions necessary on his part to secure his reinstatement, though the complaint alleges that the constitution of the society provided that, after payment of the assessment, deceased could not be reinstated except by vote of his lodge.—*Grand Lodge A. O. U. W. of Indiana v. King*, 10 Ind. App. 639, 38 N. E. 352.

[i] (App. 1895)

Where a policy recited that it was issued in consideration of the representations made in the application, and an answer in an action on the policy averred that it was issued on certain representations contained in answers to questions propounded when the application was made, and which were set out and alleged to be false, it will be presumed that said representations were in the application, in the absence of an averment that they were made outside thereof; and the answer as to that part will be held bad for failure to attach a copy of the application thereto, as required by Rev. St. 1881, § 362 (Rev. St. 1894, § 365).—*Supreme Lodge Knights of Pythias of the World v. Edwards*, 15 Ind. App. 524, 41 N. E. 850.

## [j] (App. 1896)

An answer that the benefit certificate was not transferable to plaintiff, for the reason that he had no insurable interest in the life of the insured, is insufficient, failing to show an offer to return the assessments paid upon the certificate by plaintiff.—*Supreme Lodge of Knights of Honor v. Metcalf*, 15 Ind. App. 135, 43 N. E. 893.

In an action on a benefit certificate, an answer alleging that the insured falsely represented his age as 49, when it was in fact 60, the constitution and by-laws of the association prohibiting the insuring of persons over 55, is insufficient, in that it fails to show an offer to return the assessments paid upon the certificate.—*Id.*

## [k] (App. 1897)

A complaint by a member to recover from an accident insurance association for an injury, which sets out the contract and rules of the association, and alleges that the injury was received without any cause or negligence on the part of plaintiff, and that he had complied with all the terms of his contract, is sufficient to negative the violation of any condition precedent to recovery under the terms of the contract.—*Voluntary Relief Department of Pennsylvania Lines West of Pittsburg v. Spencer*, 46 N. E. 477, 17 Ind. App. 123.

A paragraph of answer in an action on an accident insurance certificate alleging that plaintiff was not injured while in the performance of the duties of his employment, as required by the rules of the association to entitle him to recover, but by unnecessarily exposing himself to danger while seeking his own pleasure, is demurrable as not stating facts.—*Id.*

## [l] (App. 1900)

Where the complaint states that the officer of a local lodge to whom assessments were paid was by the by-laws of the society authorized to collect, receive, and transmit all dues to defendant parent society, and that a by-law forfeiting a policy for failure to pay assessments promptly was waived, in that after death of insured such officer demanded, received, and retained all assessments, including overdue assessments, there is no departure in a reply which states that all assessments had been paid, and that insured died on the last day that a current assessment could be paid without forfeiture, and that the following day defendant parent society demanded, received, and still retains such assessment; the authority of any particular officer to receive overdue assessments not being raised by the reply, as it is averred that defendant demanded and received the overdue assessments.—*Supreme Tribe of Ben Hur v. Hall*, 56 N. E. 780, 24 Ind. App. 316, 79 Am. St. Rep. 262.

## [m] (App. 1901)

An allegation in a complaint that a beneficiary's certificate of membership was issued

by the "supreme lodge, Knights of Pythias," is sufficiently supported by a certificate showing that it was issued by the "board of control of the endowment rank, Knights of Pythias."—*Supreme Lodge Knights of Pythias v. Foster*, 59 N. E. 877, 26 Ind. App. 333.

Where suit is brought against a mutual benefit life association on a beneficiary's certificate, where liability is conditioned on the member being in good standing at the time of his death, it is not necessary for the complaint to allege that the member was in good standing, since this is a fact peculiarly within the knowledge of the defendant, and may be made use of as matter of defense, which plaintiff is not required to anticipate.—*Id.*

## [n] (Sup. 1902)

Under Burns' Rev. St. 1901, § 373, providing that a general allegation in an action on a contract that plaintiff has performed all the conditions on his part shall be a sufficient allegation of the performance of a condition precedent, an allegation in a complaint in an action on a life policy that assured performed all conditions, rules, regulations, and requirements on his part was a sufficient allegation that he did not infringe a provision prohibiting voluntary self-destruction, even if it be regarded as a condition precedent.—*Modern Woodmen of America v. Noyes*, 64 N. E. 21, 158 Ind. 503.

The complaint in an action on a life policy which provides that voluntary self-destruction while insured is in possession of all his faculties will avoid the policy is not required to allege that insured did not reach his death in such manner, the condition in the policy being an exception which must be pleaded by defendant if it relies thereon.—*Id.*

## [o] (App. 1903)

Burns' Rev. St. 1901, § 373, provides that, in pleading a condition precedent in a contract, it shall be sufficient to allege generally that the party performed all the conditions on his part. A benefit insurance certificate recited that it was issued subject to the laws of the order, whose constitution and by-laws were made parts of the certificate by express reference thereto. *Held* that, to entitle the beneficiary to recover, she must aver full performance, by either a detailed allegation of the performance of every condition imposed by the contract of insurance and the laws of the order, or by a general allegation of the performance of all such conditions, or facts by which such conditions have been waived.—*Grand Lodge A. O. U. W. v. Hall*, 67 N. E. 272, 31 Ind. App. 107.

## [p] (App. 1904)

Where, in an action to recover the proceeds of a benefit certificate, defendant set up a claim under a certificate subsequently issued, allegations of an antenuptial contract between plaintiff and insured, in which he agreed to transfer the insurance in question to her in consideration of marriage, etc., was proper mat-

ter in reply, under Burns' Ann. St. 1901, § 300, authorizing the pleading in reply of any matter tending to avoid new matter set up in the answer.—Carter v. Carter, 72 N. E. 187, 35 Ind. App. 73.

[q] (App. 1905)

A complaint, in an action against a mutual benefit association on a benefit certificate, which alleges that deceased was received as a member of the association, and a certificate issued to him whereby the association agreed to pay a specified sum on his death, which states the date of his death, and further alleges that plaintiff is the father of deceased and had a valuable interest in his life at the time of his death and when the certificate was issued, that deceased and plaintiff have performed all the conditions of the contract required of them, that plaintiff is still the owner and holder of the certificate, that defendant has not paid the amount of the certificate and refuses to do so, and that such sum is still due, and which has attached thereto a copy of the certificate, is sufficient to withstand a demurrer for want of facts.—Grand Lodge, A. O. U. W. v. Barwe, 75 N. E. 971, 38 Ind. App. 308.

[r] (App. 1906)

In an action on a beneficiary certificate, the complaint must show the performance of every condition by the insured and the beneficiary; an allegation of performance by the beneficiary being insufficient.—Grand Lodge A. O. U. W. of Indiana v. Hall, 76 N. E. 1029, 37 Ind. App. 371.

In an action against a fraternal insurance company by the beneficiary, an allegation that insured performed the conditions upon his part to be performed will admit of proof of payment of assessments by the beneficiary.—Id.

[s] (App. 1907)

A complaint against a fraternal benefit society which alleges the issuance by it of a certificate to a member payable to plaintiff as beneficiary, and that the society by fraud induced the beneficiary to execute a release on receiving a part of the amount due under the certificate, if construed as stating an action on the certificate and for the enforcement of the contract contained therein, is fatally bad because of the averments showing the release.—Supreme Council of Knights and Ladies of Columbia v. Apman, 39 Ind. App. 670, 80 N. E. 640.

[t] (App. 1907)

In an action by the beneficiary against a fraternal insurance company, where a general denial only is filed, proofs of death are not admissible on behalf of defendant.—Craig v. Modern Woodmen of America, 40 Ind. App. 279, 80 N. E. 429.

[u] (App. 1907)

Where an answer to an action on a life insurance policy shows a breach of warranty, and that such breach may be the basis of rescission, but does not show a valid election to rescind,

and does not show that no premiums were received or that the premiums were returned, or a willingness to restore the status quo, it is insufficient.—Modern Woodmen of America v. Vincent, 40 Ind. App. 711, 80 N. E. 427, 82 N. E. 475.

[v] (Sup. 1908)

If a mutual benefit certificate holder desired to show herself within Burns' Ann. St. 1908, § 4903 (Burns' Ann. St. 1901, § 4923), invalidating any condition in the policy of a foreign insurance company not to sue for a period of less than three years, she must allege and prove facts sufficient to bring the certificate on which she sues within the statute, as, that the company was a foreign corporation, etc.—Caywood v. Supreme Lodge, Knights & Ladies of Honor, 171 Ind. 410, 86 N. E. 482, 23 L. R. A. (N. S.) 304, 131 Am. St. Rep. 253.

In an action on a mutual benefit certificate, the defense being nonpayment of an assessment, and plaintiff claiming that the company owed insured money for services which it should have applied to the assessment, the mere allegation that the company owed for the services, and that it was its duty to apply the money to payment of the assessment, was insufficient; it being necessary to allege positively the facts from which such duty arose.—Id.

[w] (App. 1909)

A complaint on a fraternal benefit certificate, which alleges that the society issued the certificate which recited that the member had been regularly admitted as a member, and that, in accordance with the provisions of the laws of the society, he was entitled to the benefits of membership, and which makes the certificate a part of the complaint, shows that the member became a member of the society.—Supreme Tent, Knights of the Maccabees of the World, v. Ethridge, 43 Ind. App. 475, 87 N. E. 1049.

A complaint on a fraternal benefit certificate, which alleges that the member "complied with" the conditions of the certificate, alleges performance of the contract, within Burns' Ann. St. 1908, § 376, providing that it shall be sufficient to allege generally that the party performed the conditions on his part.—Id.

Where the answer, in an action on a fraternal benefit certificate, admitted that the member was in good standing at his death, and stated that the beneficiary refused to make proof of death, or give any notice thereof within one year, and that, under a section of the society's laws, the certificate was void, but failed to show that the section was in force at the time of the issuance of the certificate, or at the death of the member, or when it was enacted or in force, the court did not err in sustaining a demurrer thereto.—Id.

[x] (App. 1910)

Where a complaint on a benefit certificate alleged that defendant denied liability, and re-

fused and still refuses to furnish plaintiff blanks for proof of death, and refused to accept proofs of death, and further alleged that insured had at all times performed all his duties as a member of defendant association, and had otherwise complied with the requirements thereof, and performed all the conditions on his part to be performed, and that plaintiff had performed all the conditions on her part to be performed, the complaint was not defective on the theory that plaintiff was bound to furnish proofs of death before suit was brought, regardless of defendant's refusal to furnish blanks therefor.—*Supreme Tent, Knights of the Maccabees of the World, v. Fisher*, 90 N. E. 1044.

A complaint on a benefit certificate alleging that insured offered to pay, and tendered to defendant's acting, authorized record keeper, all moneys and assessments due to defendant for November, 1905, that such record keeper refused to accept such moneys and assessments from insured, although it was his duty to do so, while subject to a motion to make more specific, was not insufficient as an allegation of tender for failure to allege the amount due at the date of the alleged tender, and that the amount tendered was in lawful money, or that it was brought into court for defendant's use.—*Id.*

[y] (App. 1910)

A pleading that a fraternal association waived the suspension of a member for nonpayment of dues for three months by accepting unconditional payment of dues for three months after the expiration of the three months and as in full compliance with the contract, and thereby waived the suspension and any loss of rights by reason of the failure to pay dues, states facts sufficient to show a waiver, especially as a statement that a party waives a right is in itself the statement of a fact.—*Brotherhood of Painters, Decorators and Paperhangers of America v. Barton*, 92 N. E. 64; *Same v. Peters*, *Id.* 183.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1990–1998.

See, also, 29 Cyc. pp. 222–230.

§ 816. Evidence.

Competency of testimony as to matters occurring during the lifetime of insured, see WITNESSES, § 167.

Declarations by officers and agents as evidence against insurer, see EVIDENCE, § 244.

Declarations of insured as evidence against beneficiary, see EVIDENCE, § 252.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1990–2007.

See, also, 29 Cyc. pp. 231–246.

§ 817. — Presumptions and burden of proof.

[a] (Sup. 1881)

In an action on an insurance certificate, stating that deceased was a "beneficiary member in good standing," and providing for payment in case "he be in good standing when he dies," such standing will be presumed to have continued, in the absence of contrary evidence, and the burden is on the insurer to show that he has lost his good standing.—*Supreme Lodge Knights of Honor of the World v. Johnson*, 78 Ind. 110.

[b] (Sup. 1886)

The burden of proving warranties in a certificate of a benefit association untrue is upon the association.—*National Ben. Ass'n of Indianapolis v. Grauman*, 107 Ind. 288, 7 N. E. 233.

[c] (App. 1894)

Where the constitution and by-laws of a mutual benefit insurance association name the classes of persons who may be beneficiaries of policies issued by it, in an action against such association, and the beneficiary named in a policy issued to plaintiff's deceased husband, to recover the amount due thereon, the burden is on plaintiff to show that such beneficiary is not within any of the classes named.—*Nye v. Grand Lodge A. O. U. W.*, 9 Ind. App. 131, 36 N. E. 429.

[d] (Sup. 1895)

Where a life insurance policy for a stated sum provides that, if the assessment levied to pay it is insufficient, the beneficiary shall receive only such proportion as may be applicable to its payment, the burden of proving that the assessment was not sufficient is on the insurer.—*People's Mut. Ben. Soc. v. McKay*, 141 Ind. 415, 39 N. E. 231, 40 N. E. 910.

[e] (App. 1895)

Under an allegation that defendant order of Knights of Pythias issued its certificate of membership in the "Endowment Rank," it will be presumed that a certificate purporting to be issued by that "Rank" was in fact issued by defendant.—*Supreme Lodge Knights of Pythias of the World v. Edwards*, 15 Ind. App. 524, 41 N. E. 850.

[f] (App. 1907)

Where, in an action on a mutual benefit certificate, defendant pleads nonpayment of an assessment as a defense, the burden is on it to prove that the assessment in question was not paid.—*Sovereign Camp, Woodmen of the World, v. Cox*, 78 N. E. 683, 80 N. E. 850, 40 Ind. App. 266.

[g] (Sup. 1908)

Even if a provision of a mutual benefit certificate, requiring it to be countersigned by an officer of the subordinate lodge, could be waived by the company, the mere possession thereof by insured without being so countersigned would not raise a presumption that the requirement

was waived.—*Caywood v. Supreme Lodge, Knights & Ladies of Honor*, 171 Ind. 410, 86 N. E. 482, 23 L. R. A. (N. S.) 304, 131 Am. St. Rep. 253.

[h] (App. 1909)

The burden is on the insurer to show that the statements by the insured in his application for life insurance were false.—*Collins v. Catholic Order of Foresters*, 43 Ind. App. 549, 88 N. E. 87.

[i] (Sup. 1910)

When the question of suicide is put in issue, it devolves upon the party affirming such fact to establish it, and this issue may be proved like any other fact in a civil action by a preponderance of the evidence on the question, and, if the evidence is equally balanced, the party having the burden must fail, not because of a presumption of law against suicide, but because he has not sustained his defense.—*Modern Woodmen of America v. Craiger*, 92 N. E. 113.

[j] (App. 1910)

In an action on a benefit certificate, as long as the evidence is consistent with the theory of accidental death, the presumption against suicide is controlling, and, the issue being suicide, the burden is on defendant to prove the fact by a fair preponderance of evidence.—*Modern Woodmen of America v. Kincheloe*, 91 N. E. 976.

[k] (App. 1910)

Where a fraternal association sought to escape liability on a certificate on the ground that the member's death was caused by his improper conduct in violation of the constitution of the association, it has the burden of showing that the improper conduct relied on was the proximate cause of the member's death.—*Brotherhood of Painters, Decorators and Paperhangers of America v. Barton*, 92 N. E. 64; *Same v. Peters*, Id. 183.

#### FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 1909–2002.

See, also, 29 Cyc. pp. 231–236.

#### § 818. — Admissibility.

Admissibility under pleading, see ante, § 815. Admissions of insured, see EVIDENCE, § 252. Parol or extrinsic evidence to contradict or vary contract of insurance, see EVIDENCE, §§ 405, 410.

Res geste, see EVIDENCE, § 121.

[a] (Sup. 1889)

In an action on a mutual benefit certificate, defended on the ground of forfeiture for non-payment of assessments, where the certificate remained uncanceled, evidence that the general manager of the association had told the assured that some of his assessments were overdue, that he had thereby lost his right to the certificate, and that he was delaying payment

at his own risk and peril, was immaterial.—*Sweetser v. Odd Fellows' Mut. Aid Ass'n*, 117 Ind. 97, 19 N. E. 722.

[b] (App. 1894)

In an action on a mutual benefit certificate, in which the death of the insured was in issue, and it appeared that he had left his home with the avowed intention of going to the lake to bathe and had never been seen afterwards, it was proper to show that the place where he went to bathe was a dangerous place, and that other persons had drowned there.—*Supreme Council of Catholic Benevolent Legion v. Boyle*, 37 N. E. 1105, 10 Ind. App. 301.

[c] (App. 1896)

Where insured, in consideration of money paid, and the payment of all assessments and dues, sold his benefit certificate to plaintiff, the insured being at the time an old man, and in poor health, the association should be allowed to prove, in an action upon the certificate, the age of the insured at the time of the transfer; such fact tending to show whether the transfer was made in good faith, or whether it was speculative, and in the nature of a wager.—*Supreme Lodge of Knights of Honor v. Metcalf*, 15 Ind. App. 135, 43 N. E. 803.

[d] (App. 1901)

In an action on a policy, where defendant claimed that deceased suicided, the wife of the deceased, who was plaintiff in the case, was allowed to state what deceased had told her, the last time she saw him alive, as to where he was going and what he intended to do. *Held* admissible as tending to throw light on the circumstances and causes of deceased's death.—*Supreme Lodge Knights of Pythias v. Foster*, 59 N. E. 877, 26 Ind. App. 333.

[e] (App. 1907)

In an action on a fraternal insurance policy in which defendant sets up a forfeiture for failure to pay the September assessment, evidence that the assured was unable to pay his August assessment and requested the lodge to pay it for him is admissible as tending to show the ability of assured and his disposition to pay his assessment.—*Marshall v. Grand Lodge, A. O. U. W.*, 40 Ind. App. 123, 81 N. E. 106.

[f] (App. 1907)

A by-law of a mutual benefit society provided that, in case a coroner's inquest was held on the death of an assured, a copy of the coroner's proceedings, all the evidence, and the verdict must accompany the proofs of death, but did not stipulate the purpose of such proofs. In an action on a benefit certificate, a beneficiary did not introduce in evidence the proofs of death, to which was attached a copy of the coroner's verdict, with the evidence, but merely proved, as pleaded in the complaint, that they had been made out on blanks furnished by the defendant, delivered to it, and accepted as satisfactory. *Held*, that the proofs of death and attached coroner's verdict and evidence before

him were inadmissible as evidence under a general denial.—*Craiger v. Modern Woodmen of America*, 40 Ind. App. 279, 80 N. E. 429.

A by-law of a mutual benefit society provided that, in case a coroner's inquest was held on the death of an assured, a copy of the coroner's proceedings, all the evidence and the verdict must accompany the proofs of death. A beneficiary attached to proofs of death a copy of the evidence taken by the coroner, together with his return, the finding of which was that the assured "came to his death by reason of drinking carbolic acid with suicidal intent, evidently while in a deranged state of mind." The beneficiary stated in the proofs furnished that she did not believe that assured came to his death by drinking carbolic acid. *Held*, that the record of the coroner's proceedings, the evidence before him, and his verdict were inadmissible as evidence to establish the affirmative defense of suicide.—*Id.*

[g] (App. 1910)

Acts 1907, c. 152, entitled "An act to collect accurate records of deaths \* \* \* contagious diseases \* \* \* prescribing the duties of the state board of health," etc., and requiring physicians to report to the health officers all deaths, and that records of deaths shall be kept by the health officers, etc., was enacted in the exercise of the police power to prevent the spread of contagious diseases and to promote the public health, and does not interfere with private rights or create a new rule of evidence, and a record of a board of health giving the cause of death of a member of a fraternal association is not admissible in evidence in an action on the certificate.—*Brotherhood of Painters, Decorators and Paperhangers of America v. Barton*, 92 N. E. 64; *Same v. Peters*, *Id.* 183.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 2003-2005; 11 CENT. DIG. Coroners, § 28.  
See, also, 29 Cyc. pp. 237-243.

§ 819. — Weight and sufficiency.

[a] (Sup. 1881)

An insurance certificate in a benevolent society, stating that, at the time of granting, the member was "in good standing," is prima facie evidence that he was so at his death.—*Supreme Lodge Knights of Honor of the World v. Johnson*, 78 Ind. 110.

[b] (App. 1894)

A member of a benevolent insurance company left his home, with soap and towel, stating that he intended to bathe in Lake Michigan, which was about a mile distant, but he never returned. His clothing and money were found on the shore, and there were footprints leading to the water's edge. No reason was shown why he should abandon his family. There was evidence that the lake was dangerous at that place. *Held* sufficient to warrant a verdict that the member was dead.—*Supreme Council of Catho-*

*lic Benevolent Legion v. Boyle*, 10 Ind. App. 301, 37 N. E. 1105.

[c] (App. 1896)

In an action on a benefit certificate, it appeared that the constitution of the society provided for the transfer of members from one class to another, without limitation as to age. The insured, who was 75 years old, applied for transfer, and his application was rejected. In answer to an inquiry as to the reason for the rejection, defendant's medical examiner stated that "the physical condition of a man 75 years of age is not such as would warrant acceptance." *Held*, that the evidence was sufficient to justify a finding that the application was illegally rejected on account of applicant's age.—*Supreme Lodge Knights of Pythias of the World v. Sourwine*, 15 Ind. App. 489, 44 N. E. 315.

[d] (App. 1900)

The domestic relations of insured and his wife were very unpleasant. He drank to excess, and, without any previous notice that his wife contemplated divorce proceedings, he was served with notice thereof, and was restrained from entering his home. He disappeared, and some days later, at the place where his hat was found on a creek bank, there were steps going into the water, but none coming out. His body was found in the stream, and there were no marks of violence on it, or any evidence of a struggle on the bank. *Held*, that the evidence excluded with reasonable certainty any hypothesis of death by any other cause than suicide, and hence would not support a verdict for plaintiff, where the policy contained a clause exempting insurer from liability for death by suicide.—*Sovereign Camp Woodmen of the World v. Haller*, 56 N. E. 255, 24 Ind. App. 108.

[e] (App. 1907)

Where the last assessment paid to the clerk of a benefit society for insured was paid on July 3, 1903, and was for the month of June, 1903, such facts sufficiently showed nonpayment of the assessment for July, for the nonpayment of which defendant claimed a forfeiture.—*Sovereign Camp, Woodmen of the World, v. Cox*, 40 Ind. App. 266, 78 N. E. 683, 80 N. E. 850.

Evidence in an action on a beneficiary certificate *held* to sustain a verdict in favor of the plaintiff.—*Id.*

[f] (App. 1908)

In an action against a mutual benefit insurance society to recover weekly benefits, evidence *held* to sustain a verdict for plaintiff on the issue whether there had been a forfeiture for nonpayment of premiums.—*United States Benev. Soc. v. Watson*, 41 Ind. App. 452, 84 N. E. 29.

[g] (App. 1910)

In an action on a mutual benefit, certificate, evidence *held* insufficient to show either payment

or tender of certain dues, for nonpayment of which the certificate was forfeited.—*Supreme Tent Knights of the Maccabees of the World v. Fisher*, 90 N. E. 1044.

[h] (App. 1910)

In an action on a beneficial association certificate, evidence held to support a finding that insured did not commit suicide.—*Modern Woodmen of America v. Kincheloe*, 91 N. E. 976.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 2006, 2007.

See, also, 29 Cyc. pp. 244-246.

### § 820. Amount of recovery.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 2013.

See, also, 29 Cyc. pp. 253-256.

### § 821. — In general.

[a] (Sup. 1885)

In an action on a policy in a mutual benefit association providing for payment of a certain sum, or so much thereof as might be realized from one assessment, plaintiff is entitled to recover the whole amount of the policy, unless some defense is pleaded and proven to reduce such amount.—*Elkhart Mutual Aid Benevolent & Relief Ass'n v. Houghton*, 103 Ind. 286, 2 N. E. 763, 53 Am. Rep. 514.

[b] (App. 1893)

The by-laws of a mutual benefit insurance company provided that losses should be paid by bimonthly assessments; that each loss should be payable pro rata out of the next assessment after proof of death, or if the claim were contested, and judgment recovered against the company thereon, the judgment should be paid pro rata out of the assessment next after its rendition. A claim having been contested and reduced to judgment in another state, suit was brought on the judgment. Held, that the facts that the pro rata share of the assessment next after the judgment would amount to less than the judgment, and that the company had disputed the claim, believing it to be unjust, constituted no reason for not paying the judgment in full, since the extent of the company's liability was determined by the judgment.—*People's Mut. Ben. Soc. v. Werner*, 6 Ind. App. 614, 34 N. E. 105.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 2013.

See, also, 29 Cyc. pp. 253-256.

### § 823. Trial.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, §§ 2008-2011.

See, also, 29 Cyc. pp. 247-252.

### § 824. — Conduct in general.

[a] (Sup. 1895)

In an action on a life insurance policy, an admission on the trial by defendant of the validity of plaintiff's demand, "except as to the amount plaintiff was entitled to recover," and a stipulation by defendant that it would confine its defense wholly to that question, concede that plaintiff had an insurable interest in the life of deceased.—*People's Mut. Ben. Soc. v. McKay*, 141 Ind. 415, 39 N. E. 231, 40 N. E. 910.

FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 2008.

See, also, 29 Cyc. p. 247.

### § 825. — Questions for jury.

[a] (Sup. 1889)

The assured, holding a certificate in a mutual benefit association, made several payments about a month after the assessments were due, and paid the last assessment about 2 months after due at the home office of the association, when he was informed by the general manager that he was delinquent in still another assessment, and that an assessment would fall due on the following day, but no forfeiture was suggested. It appeared that the notices of assessment stated that the agents were not authorized to extend the time of payment of assessments, and that any delay beyond the stipulated time would be at the risk of the member. The assured died about 20 days after his last payment, leaving two assessments unpaid, and the policy remaining uncanceled. Held, it was for the jury to say whether there had not been a waiver of any forfeiture.—*Sweetser v. Odd Fellows' Mut. Aid Ass'n*, 117 Ind. 97, 19 N. E. 722.

[b] (App. 1903)

Whether a deceased member of a benefit insurance association was entitled to all the rights and privileges of a member thereof was a question of law for the court to determine on the facts pleaded and existing.—*Grand Lodge A. O. U. W. v. Hall*, 67 N. E. 272, 31 Ind. App. 107.

[c] (App. 1903)

It cannot, as a matter of law, be said that the chief medical examiner of a fraternal order acted arbitrarily in rejecting an applicant 62 years of age on the ground that his pulse rate (76 when sitting, and 80 when standing) was excessive.—*Supreme Lodge K. P. v. Andrews*, 67 N. E. 1009, 31 Ind. App. 422.

[d] (App. 1906)

Whether a member of a fraternal insurance society acquiesced in the rejection of his application for transfer from one class of risks to another held for the jury.—*Supreme Lodge Knights of Pythias v. Andrews*, 77 N. E. 361, 78 N. E. 433, 39 Ind. App. 1.

## [c] (App. 1909)

Whether biliousness and indigestion constitute a "severe illness" within the meaning of an application for life insurance is for the jury, and not for the court.—*Collins v. Catholic Order of Foresters*, 43 Ind. App. 549, 88 N. E. 87.

Whether warranties and representations made in an application for life insurance were known to be false by the insured *held* under the evidence to be a question for the jury.—*Id.*

## FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 2009.

See, also, 29 Cyc. pp. 247-249.

## § 826. — Instructions.

## [a] (App. 1901)

In an action on a policy, where the question at issue was as to whether or not deceased habitually used intoxicants at the time he made application for insurance, the court charged the jury that: "One of the questions submitted for your determination is, was the answer, 'Not at all,' made by the deceased, on the 3d day of May, in his application for insurance, in answer to the question, 'To what extent do you use intoxicating liquors?' a true or false answer?" "The evidence before you respecting the habits of deceased in using intoxicating liquors prior to the date of application is to be considered for the purpose of enabling you to determine whether at that date defendant used intoxicating liquors." *Held* not improper, as liable to lead the jury to think that, if defendant did not use intoxicants on the particular day on which the application was made, the answer was not false.—*Supreme Lodge Knights of Pythias v. Foster*, 59 N. E. 877, 26 Ind. App. 333.

In a suit on a policy, where defendant alleges that deceased committed suicide by shooting himself with a revolver, an instruction that, as a rule laid down by medical authorities, a person generally commits suicide when he is either insane or despondent, and giving facts as to the usual visible effects of the discharge of a revolver close to the head or face, was properly refused, where the jury was in possession of all the facts and circumstances attending the death of the insured.—*Id.*

In a suit on a policy, where defendant alleges that deceased committed suicide, it was not error for the court to charge that it was proper for the jury, in determining whether suicide had been proven or not, to consider and give weight to the instinctive love of life which ordinarily exists.—*Id.*

## [b] (Sup. 1910)

In an action on a benefit insurance certificate defended on the ground of suicide, a charge that, owing to the instinctive love of life, the presumption is against suicide, and the burden is therefore on the party asserting suicide to prove it, and the evidence must be such as to exclude with reasonable certainty any other

hypothesis than that of death by suicide, was erroneous since it in the opening clause in effect declares that a presumption of law against suicide always exists, and therefore the burden was cast upon the party relying upon that fact, thus confusing matters of pleading and proof, as the defense was affirmative in character and must be specially pleaded. Under the general rules of practice defendant assumed the burden of proof without reference to any presumption of law on the question.—*Modern Woodmen of America v. Craiger*, 92 N. E. 113.

Death by suicide is unnatural and, in an action on a life insurance policy in which suicide is the defense, it is not inaccurate to charge negatively that the law will not presume an unexplained death to have been suicidal.—*Id.*

In an action on a benefit insurance certificate defended on the ground of suicide, a charge that the evidence must be of such character as to exclude with reasonable certainty every other hypothesis than that of death by suicide was erroneous as charging that the fact of suicide must be established with the degree of certainty required to justify a conviction upon circumstantial evidence in a criminal case.—*Id.*

## FOR CASES FROM OTHER STATES,

SEE 28 CENT. DIG. Insurance, § 2010.

See, also, 29 Cyc. pp. 251, 252.

## § 827. — Verdict and findings.

## [a] (Sup. 1895)

In an action on a life insurance policy, it appeared that the policy was for \$4,000, and provided that, if the assessment made for its payment was not sufficient to pay the full amount, the beneficiary should receive only such proportion of the amount as was applicable to its payment. The jury found that \$41,000 was collected on the assessment out of which the policy was payable, and that out of that amount 158 claims were payable, but did not find the amount of any of the claims other than that of plaintiff. *Held*, that the finding did not show that plaintiff was not entitled to recover the full amount of the policy.—*People's Mut. Ben. Soc. v. McKay*, 141 Ind. 415, 39 N. E. 231, 40 N. E. 910.

## [b] (App. 1898)

A finding that policies of a company, paying losses by assessments on its members, were issued to plaintiff; that they had not expired; that he had not assigned or surrendered them; and had paid all assessments,—sufficiently shows that the policies were in force when the loss sued for occurred.—*Patrons' Mutual Aid Soc. of Vermillion County v. Hall*, 49 N. E. 279, 19 Ind. App. 118.

## [c] (App. 1901)

Where, in an action on an accident policy, the court found that a notice of the injury and certificate of a physician, which complied with the requirements of the policy, were served on defendant, and that no further notices, certifi-

cates, or proofs were requested or required by defendant, a contention that there was no finding that any proofs of injury were made by plaintiff or received by defendant is without merit.—*Northwestern Benev. Soc. v. Dudley*, 61 N. E. 207, 27 Ind. App. 327.

In an action on an accident policy, a finding that the person who assaulted plaintiff was intoxicated at the time of the assault to such a degree that he did not realize that he was doing so, and did not know that he had inflicted an injury on the plaintiff, is equivalent to a finding that the injury was committed unintentionally.—*Id.*

Though payment of the membership fee was an ultimate fact which should have been found, in an action on an accident policy, where payment appeared from the record to have been treated as an admitted fact, it was unnecessary to make such finding.—*Id.*

FOR CASES FROM OTHER STATES,  
SEE 28 CENT. DIG. Insurance, § 2011.  
See, also, 29 Cyc. pp. 252, 253.

### § 833. Appeal and error.

Presumptions on appeal, see **APPEAL AND ERROR**, § 926.

[a] (App. 1900)

That an assignment of a portion of a policy to a co-beneficiary bringing suit was not introduced is not material where the motion for a new trial does not attack the recovery as excessive.—*Supreme Tribe of Ben Hur v. Hall*, 56 N. E. 780, 24 Ind. App. 316, 79 Am. St. Rep. 262.

FOR CASES FROM OTHER STATES,  
SEE 28 CENT. DIG. Insurance, § 2015.  
See, also, 29 Cyc. pp. 256, 257.

## INSURANCE COMMISSIONERS.

See—

Service of process on commissioner in action on policy issued by foreign company. **INSURANCE**, § 627.

Supervision of insurance companies. **INSURANCE**, § 10.

## INSURRECTION.

See—

Pleading in abatement of action. **PLEADING**, § 106.

WAR.

FOR CASES FROM OTHER STATES,  
SEE 29 CENT. DIG. Insurrect.  
See, also, 22 Cyc. pp. 1451-1453.

## INTEMPERANCE.

See **DRUNKARDS**.

## INTENT.

See—

Affecting award of compensatory damages. **DAMAGES**, § 57.

Element of estoppel in pais. **ESTOPPEL**, § 53.

Evidence of—

**CRIMINAL LAW**, §§ 371, 390.

**EVIDENCE**, §§ 108, 133-135, 151, 269.

Parol or extrinsic evidence to show intent of parties as to subject-matter of written instrument. **EVIDENCE**, § 461.

Presumptions as to. **EVIDENCE**, § 64.

Unintended consequences of negligent act. **NEGLIGENCE**, § 10.

Willful or malicious acts as ground for exemplary damages. **DAMAGES**, § 91.

Evidence. **DAMAGES**, § 179.

Affecting or element of particular acts or transactions.

See—

Advancement. **DESCENT AND DISTRIBUTION**, § 98.

**ADVERSE POSSESSION**, § 11.

**ALTERATION OF INSTRUMENTS**, § 11.

Annexation of chattels to real property. **FIXTURES**, §§ 1, 4.

Application for insurance. **INSURANCE**, § 180.

Appropriation of payments. **PAYMENT**, § 88.

**ASSAULT AND BATTERY**, § 3.

**ASSIGNMENTS FOR BENEFIT OF CREDITORS**, §§ 142-146.

Breach of promissory warranty or condition in insurance policy. **INSURANCE**, § 336.

Cancellation of insurance policy. **INSURANCE**, §§ 232, 240.

Change of domicile. **DOMICILE**, § 4.

Charge of indebtedness on married woman's separate estate.

**HUSBAND AND WIFE**, § 164.

**MECHANICS' LIENS**, § 71.

Construction of insurance policy. **INSURANCE**, § 155.

Of statutes. **STATUTES**, §§ 174, 180-186.

Of wills. **WILLS**, §§ 438-443.

Constructive trusts. **TRUSTS**, § 91.

**CONTRACTS**, §§ 102, 147.

Contracts within statute of frauds. **FRAUDS**, **STATUTE OF**, § 46.

Creation of partnership. **PARTNERSHIP**, § 17.

**DEDICATION**, §§ 1, 15.

**DEEDS**, § 93.

Delivery of deed. **DEEDS**, § 56.

Of insurance policy. **INSURANCE**, § 136.

Execution of power. **POWERS**, § 33.

**FALSE IMPRISONMENT**, § 4.

**FRAUD**, §§ 4, 42.

Fraud in procuring execution of deed. **DEEDS**, § 70.

**FRAUDULENT CONVEYANCES**, §§ 9, 63-66, 68, 69, 117, 155-170, 273, 289, 292, 298.

Grantee to hold for or convey to another as creating resulting trust. **TRUSTS**, § 70.

Gross negligence in operation of railroads. **RAILROADS**, § 339.

Infringement of trade-mark or trade-name. **TRADE-MARKS AND TRADE-NAMES**, § 55.  
 Injury by negligent use of street. **MUNICIPAL CORPORATIONS**, § 705.  
 From improper use of weapon. **WEAPONS**, § 18.  
 To person insured against accident. **INSURANCE**, § 464.  
**LIBEL AND SLANDER**, §§ 2, 83, 104.  
 Liquidated damages and penalties. **DAMAGES**, § 77.  
 Marriage settlements. **HUSBAND AND WIFE**, § 31.  
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**TORTS**, § 4.  
**TRESPASS**, § 2.  
**USURY**, § 12.  
 Warranty. **SALES**, § 262.  
 Willful negligence. **NEGLIGENCE**, § 11.

**Element of offenses.**

*See—*

Allegations in indictment or information. **INDICTMENT AND INFORMATION**, § 88.  
**ARSON**, § 3.  
**ASSAULT AND BATTERY**, §§ 49, 75, 84.  
 Assault with intent to kill. **HOMICIDE**, § 84.  
**BURGLARY**, § 19.  
 Carrying weapons. **WEAPONS**, § 7.  
**COUNTERFEITING**, § 3.  
**CRIMINAL LAW**, §§ 19-24, 371, 390.

**EMBEZZLEMENT**, § 5.  
**FALSE PRETENSES**, §§ 5, 27.  
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**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

[END OF VOL. 5.]

Ex.R. A  
12/28/11















